

# NOTES

## LITIGATION RISK AS A JUSTIFICATION FOR AGENCY ACTION

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*To justify its rescission of the Deferred Action on Childhood Arrivals (DACA) program, the Department of Homeland Security (DHS) employed a novel rationale: risk of litigation. DHS argued that DACA was potentially unlawful and might be disruptively enjoined by a court and that the Agency could preemptively wind down the program in light of risk that it would be forced to do so in litigation. This Note argues that agencies can and should consider litigation risk in taking regulatory action—especially given the increasing frequency of nationwide injunctions. But it proposes that an agency invoking litigation risk must examine four elements: forgone benefits prior to a predicted disruptive injunction, probability of the injunction, costs of the injunction, and contrary litigation risk. Examination of these elements here suggests that litigation risk alone did not justify the DACA rescission and that regulatory changes will rarely be justified on this sole basis. Courts must carefully scrutinize litigation risk rationales, as excessive deference to this rationale may allow agencies to evade responsibility for their policy decisions by passing blame on to hypothetical future judicial action.*

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*“[D]o you need more than that? You’ve got a court of appeals decision affirmed by an equally divided Supreme Court. Can’t [the Attorney General] just say that’s the basis on which I’m making this decision?”*

—Chief Justice John G. Roberts, Jr., 2019<sup>1</sup>

## INTRODUCTION

Until two years ago, no federal agency had ever cited litigation risk as a main justification for action.<sup>2</sup> The Trump Administration, however, has begun to employ this novel argument. Most prominently, the Department of Justice (DOJ) has argued that the Department of Homeland Security’s (DHS) rescission of Deferred Action for Childhood Arrivals (DACA) was not “arbitrary and capricious” under the Administrative Procedure Act (APA) because it was based on the Agency’s reasonable consideration of litigation risk.<sup>3</sup>

The argument originates in a September 2017 memorandum by Acting Secretary of Homeland Security Elaine Duke.<sup>4</sup> In announcing the rescission, Duke seemed to suggest that because the Fifth Circuit had enjoined Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) for violating the APA,<sup>5</sup> and because the DACA and DAPA programs were similar, it was likely that DACA would also be enjoined.<sup>6</sup> Duke announced that the

<sup>1</sup> Transcript of Oral Argument at 80, *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.* (U.S. argued Nov. 12, 2019) (Nos. 18-587, 18-588, and 18-589).

<sup>2</sup> Agencies sometimes consider whether a rule would minimize litigation risk *to regulated parties*. See, e.g., Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,790 (Feb. 14, 2013) (to be codified at 12 C.F.R. § 1024.39) (explaining that the Consumer Financial Protection Bureau’s rule aimed to “help minimize litigation risk and compliance costs arising from a private right of action”). This Note concerns litigation risk to the government itself, which has never before been a main justification.

<sup>3</sup> Appellants’ Opening Brief at 31, *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018) [hereinafter Appellants’ Ninth Circuit Opening Brief] (No. 18-15068) (“So long as the ultimate litigation judgment was reasonable, [it] was not arbitrary and capricious.”); see 5 U.S.C. § 706(2)(A) (2012) (allowing a court to set aside “arbitrary [or] capricious” agency action).

<sup>4</sup> See Memorandum from Elaine C. Duke, Acting Sec’y, U.S. Dep’t of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs., et al. (Sept. 5, 2017) [hereinafter DACA Rescission Memorandum], <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

<sup>5</sup> *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015); see also *infra* notes 28–37 and accompanying text.

<sup>6</sup> See DACA Rescission Memorandum, *supra* note 4.

Department would therefore wind the program down over six months.<sup>7</sup>

The rescission spawned litigation in four federal district courts.<sup>8</sup> All four cases were appealed, and the Ninth and Fourth Circuits released opinions.<sup>9</sup> The Supreme Court granted certiorari on June 28, 2019, consolidating the petition for certiorari in the Ninth Circuit with petitions before judgment in the Second and D.C. Circuits.<sup>10</sup> The case was argued before the Supreme Court on November 12.<sup>11</sup> In his brief, the Solicitor General again claimed that it was reasonable for DHS to institute an orderly wind-down rather than “risk[] a court-ordered shutdown, the terms and timing of which would be beyond the agency’s control.”<sup>12</sup> However, the Solicitor General also contended that the administrative record included a later memorandum produced during litigation and that this memorandum stated an alternative policy basis for the decision.<sup>13</sup> Thus, at the Supreme Court, the Solicitor General has deemphasized the litigation risk argument to some extent.

Of the courts that have considered the rescission of DACA, most have concluded, as a threshold matter, that the litigation risk argument could not sustain the action because it was not sufficiently elucidated in the Memorandum.<sup>14</sup> Of the two courts that concluded the argument *was* in the Memorandum, one court—the District of

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<sup>7</sup> *Id.*

<sup>8</sup> See *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018); *CASA de Md. v. U.S. Dep’t of Homeland Sec.*, 284 F. Supp. 3d 758 (D. Md. 2018), *aff’d in part, vacated in part, rev’d in part*, 924 F.3d 684 (4th Cir. 2019); *NAACP v. Trump*, 298 F. Supp. 3d 209, 249 (D.D.C.), *adhered to on denial of reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018).

<sup>9</sup> See *CASA de Md.*, 924 F.3d 684; *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018). The Second Circuit held argument on January 25, 2019, but did not release an opinion, and the D.C. Circuit did not hold argument prior to the Supreme Court’s granting of certiorari. See *infra* note 10 and accompanying text.

<sup>10</sup> *Docket for No. 18-587*, SUPREME COURT, <https://www.supremecourt.gov/docket/docketfiles/html/public/18-587.html> (last visited Nov. 7, 2019).

<sup>11</sup> *Id.*

<sup>12</sup> Brief for the Petitioners at 35, *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.* (U.S. argued Nov. 12, 2019) (Nos. 18-587, 18-588, and 18-589), 2019 WL 3942900 [hereinafter Brief of the Solicitor General].

<sup>13</sup> *Id.* at 37 (arguing that the Agency’s decision was “independently supported by several additional enforcement-policy concerns” set out in the later memorandum); see Memorandum from Kirstjen M. Nielsen, Sec’y, U.S. Dep’t. of Homeland Sec. (June 22, 2018) [hereinafter Supplementary DACA Rescission Memorandum], [https://www.dhs.gov/sites/default/files/publications/18\\_0622\\_S1\\_Memorandum\\_DACA.pdf](https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf) (“[R]egardless of whether these concerns about the DACA policy render it illegal or legally questionable, there are sound reasons of enforcement policy to rescind the DACA policy.”); see also *infra* notes 51–53 and accompanying text.

<sup>14</sup> See *infra* notes 73–78 and accompanying text.

Maryland—went on to conclude that the argument was reasonable.<sup>15</sup> Judge Titus held that opting for a gradual wind-down period was rational because the earlier litigation against DAPA and a prior statement by the Attorney General justified the Agency's reasonable belief that DACA would face legal challenge.<sup>16</sup>

The other court that reached the merits of the litigation risk argument was far more critical: Judge Bates of the District of the District of Columbia held that the Agency's litigation risk argument was "so implausible that it fails even under the deferential arbitrary and capricious standard."<sup>17</sup> Along similar lines, Daniel Hemel, Seth Davis, and other administrative law scholars argued in an amicus brief that the litigation risk argument here "ma[de] no sense on its own terms" because the rescission itself would lead to litigation.<sup>18</sup>

This Note argues that the litigation risk argument should not be ignored but that it can rarely justify agency action on its own. Because litigation risk affects the costs and benefits of a given regulatory decision, it should be a background factor in decisionmaking. But if an agency bases its regulatory decision *primarily* on litigation risk, it must systematically analyze that risk. This Note argues that a litigation risk analysis should consider four elements. An agency must weigh: (1) the net benefits forgone by a regulatory change to the status quo; (2) the probability that a disruptive injunction will occur; (3) the anticipated costs of that disruptive injunction; and (4) contrary litigation risk posed by the regulatory decision itself. Because DHS did not systematically analyze litigation risk along these lines, the rescission should fail arbitrary and capricious review.

The question of how courts should scrutinize litigation risk arguments implicates issues of accountability and transparency at the heart of administrative law. If agencies can justify decisions with a speculative prediction about what the courts might *make* them do in the future, agencies will avail themselves of this opportunity. They will defend unpopular policy decisions with reference to hypothetical future injunctions rather than justifying them on the merits—exactly what may have occurred here. And the litigation risk argument here is

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<sup>15</sup> *CASA de Md. v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 772 (D. Md. 2018) ("Regardless of whether DACA is, in fact, lawful or unlawful, the belief that it was unlawful and subject to serious legal challenge is completely rational."), *aff'd in part, vacated in part, rev'd in part*, 924 F.3d 684 (4th Cir. 2019).

<sup>16</sup> *Id.*

<sup>17</sup> *NAACP v. Trump*, 298 F. Supp. 3d 209, 249 (D.D.C.), *adhered to on denial of reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018).

<sup>18</sup> Brief of Twenty-Four Law Professors as Amici Curiae in Support of Plaintiffs at 12, *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018) [hereinafter Law Professor Brief] (No. 18-15068), 2018 WL 1595535.

not an isolated incident: Agencies are increasingly making arguments that sound in litigation risk.<sup>19</sup> Moreover, with the increasing incidence of nationwide injunctions against executive action,<sup>20</sup> these arguments may grow even more common. If courts do not properly scrutinize these litigation risk arguments, agencies will be able to evade accountability for their decisions by blaming imaginary future judicial behavior.

Part I lays out the facts of the DACA rescission and examines how DHS's litigation risk argument dovetails with and diverges from traditional arguments for agency policy change. Part II argues that litigation risk is a legally proper consideration that has been considered by agencies in the past, though never as the main justification. Part II goes on to analyze DHS's use of the litigation risk argument and highlights four elements missing from its analysis that must be considered for the analysis to be rational: forgone benefits, probability of a disruptive injunction, cost of a disruptive injunction, and contrary litigation risk. Part III argues that excessive judicial deference to the litigation risk argument undermines agency accountability and that courts should remand to force accountability.

## I

### THE RESCISSION OF DACA

This Part explores the litigation risk argument that was used to justify the rescission of DACA. Section I.A recounts the background of DACA and DAPA, the litigation against DAPA, and the Trump Administration's rescission of DACA. Section I.B lays out two traditional arguments that are made to justify regulatory change—first, that the agency has decided to pursue a different policy, and second, that the agency has concluded a prior policy is illegal—and then details how the litigation risk argument stakes out a novel middle ground.

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<sup>19</sup> See, e.g., Definition of “Waters of the United States,” 83 Fed. Reg. 5200, 5203 (Feb. 6, 2018) (suspending an Obama-era rule by two years in order to “avoid the nationwide inconsistencies, uncertainty, and confusion” because the rule had already been enjoined in thirteen states and there was ongoing litigation); see also Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486, 45,520 (proposed Sept. 7, 2018) (making a regulatory change to address an “uncertain environment subject to currently unknown future court interpretations”).

<sup>20</sup> See *infra* notes 106–10 and accompanying text.

### A. Background to the Decision

In June 2012, Secretary of Homeland Security Janet Napolitano issued a memorandum establishing the DACA program.<sup>21</sup> The Memorandum explained that the Department would treat undocumented immigrants who were “brought to this country as children and know only this country as home” as “low-priority cases” and would exercise “prosecutorial discretion” accordingly.<sup>22</sup> Deferred action also provided work authorization for two years, after which it could be renewed.<sup>23</sup> By June 2016, the Department had approved 741,546 so-called “Dreamers” for the DACA program.<sup>24</sup> While most scholars agreed that discretionary nonenforcement policies were legal under the Immigration and Nationality Act (INA),<sup>25</sup> they also noted that these policies could be reversed fairly easily by future administrations.<sup>26</sup>

Two years later, in November 2014, Secretary Jeh Johnson announced slight changes to DACA and instituted DAPA, which extended deferred action to undocumented immigrants with children who were citizens or lawful permanent residents.<sup>27</sup>

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<sup>21</sup> Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) [hereinafter Original DACA Memorandum], <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>22</sup> *Id.* The memo laid out five criteria to be considered on a case-by-case basis and explained that these individuals could identify themselves and receive deferred action for a two-year period subject to renewal. *Id.*

<sup>23</sup> See *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 490 (9th Cir. 2018).

<sup>24</sup> See U.S. CITIZENSHIP & IMMIGRATION SERVS., NUMBER OF I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS BY FISCAL YEAR, QUARTER, INTAKE, BIOMETRICS AND CASE STATUS: 2012-2016 (JUNE 30) (2016), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca\\_performancedata\\_fy2016\\_qtr3.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2016_qtr3.pdf).

<sup>25</sup> See, e.g., Eric Posner, *Faithfully Executed*, SLATE (Feb. 19, 2015, 3:23 PM), <https://slate.com/news-and-politics/2015/02/obamas-dapa-immigration-program-is-legal-judge-hanens-injunction-will-be-overturned-on-appeal.html> (noting that “an unusual amount of power is given to the president to set priorities” in immigration enforcement).

<sup>26</sup> See, e.g., Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 208 (2015) (“A single decision of a future administration could reverse the nonenforcement decisions with respect to millions of noncitizens.”); cf. Anil Kalhan, *Is Judge Hanen’s Smackdown of Executive Action on Immigration “Narrowly Crafted”?*, DORF ON L. (Feb. 21, 2015), <http://www.dorfonlaw.org/2015/02/is-judge-hanens-smackdown-of-executive.html> (“[D]eferred action is reversible by its very nature.”).

<sup>27</sup> See Memorandum from Jeh Charles Johnson, Sec’y of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Parents Are U.S. Citizens or Permanent

The following month, Texas and sixteen other states filed a lawsuit in the Southern District of Texas arguing that DAPA was unlawful.<sup>28</sup> In February 2015, before the program went into effect, the district court issued an opinion in *Texas v. United States* enjoining its implementation.<sup>29</sup> In November, the Fifth Circuit affirmed the preliminary injunction on two grounds.<sup>30</sup> First, the court held that the DAPA memorandum had been improperly issued without notice-and-comment procedures because it “would not genuinely leave the agency and its employees free to exercise discretion.”<sup>31</sup> Second, the Fifth Circuit went beyond the district court to hold that DAPA was “manifestly contrary” to the INA.<sup>32</sup> Plaintiffs had also argued that DAPA violated the Constitution—both the Take Care Clause<sup>33</sup> and the nondelegation doctrine<sup>34</sup>—but the court did not reach the constitutional claims.<sup>35</sup> The Supreme Court affirmed by an equally divided

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Residents (Nov. 20, 2014), <https://www.aila.org/infonet/dhs-exercising-prosecutorial-discretion>.

<sup>28</sup> See David Montgomery & Julia Preston, *17 States Suing on Immigration*, N.Y. TIMES (Dec. 3, 2014), <https://www.nytimes.com/2014/12/04/us/executive-action-on-immigration-prompts-texas-to-sue.html>.

<sup>29</sup> 86 F. Supp. 3d 591, 676 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015) (“Thus, between the actual parties, it is clear where the equities lie—in favor of granting the preliminary injunction.”).

<sup>30</sup> See *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

<sup>31</sup> *Id.* at 176. The court concluded that the memorandum was a rule that made enforceable law and therefore required notice-and-comment procedures. *Id.* at 177; see 5 U.S.C. § 553 (2012) (describing when notice-and-comment is required). By contrast, DHS had argued that the memorandum was a “general statement of policy” requiring no specific procedures under the APA because it merely “advise[d] the public prospectively of the manner in which the agency propose[d] to exercise a discretionary power.” *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (holding that general statements of policy regarding discretionary agency activity are exempt from notice-and-comment rulemaking requirements).

<sup>32</sup> *Texas*, 809 F.3d at 182. The INA vests discretion in the Secretary to “[e]stablish[] national immigration enforcement policies and priorities,” 6 U.S.C. § 202(5) (2012), and DHS has instituted deferred action and work authorization programs for decades. But the Fifth Circuit held that deference did not apply to such a significant decision, and that, even if it did apply, the INA disallowed deferred action and work authorization except on an ad hoc basis or for narrower classes of people. See *Texas*, 809 F.3d at 181–84.

<sup>33</sup> See Brief for the Cato Institute et al. as Amici Curiae Supporting Respondents at 20, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674), 2016 WL 1377723 (arguing that DAPA was a “blatant effort to undermine a law that [President Obama] tried and failed to repeal”).

<sup>34</sup> See *id.* at 24–25 (arguing that provisions of the INA “constitute an invalid delegation of legislative power to the executive,” if it is true, as some immigration law scholars have claimed, that the Act provides “no discernible congressional enforcement priorities” (quoting Cox & Rodríguez, *supra* note 26, at 155)).

<sup>35</sup> *Texas*, 809 F.3d at 154.

vote the following year,<sup>36</sup> a disposition that lacks any precedential effect.<sup>37</sup>

While a presidential candidate, Donald Trump repeatedly promised to end the DACA program.<sup>38</sup> However, after his election, President Trump indicated that he was sympathetic to the plight of the Dreamers, calling them “incredible kids”<sup>39</sup> and insisting that he would deal with the problem “with heart.”<sup>40</sup> In June 2017, DHS released a memorandum announcing that the program would remain in effect.<sup>41</sup> Many conservatives were frustrated.<sup>42</sup>

In response to the memo, Texas Attorney General Ken Paxton and the attorneys general of nine other states sent a letter to Attorney General Sessions threatening to amend a pending case in the Southern District of Texas to sue over the legality of DACA.<sup>43</sup> The letter insisted that “just like DAPA, DACA unilaterally confers . . . lawful presence without any statutory authorization from Congress” and announced that these states would sue the Administration if it did not stop issuing new DACA permits by September 5.<sup>44</sup> Paxton’s letter prompted a letter by another set of states. On behalf of nineteen

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<sup>36</sup> *United States v. Texas*, 136 S. Ct. 2271 (2016).

<sup>37</sup> See *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987) (“[A]n affirmance by an equally divided Court is not entitled to precedential weight.”).

<sup>38</sup> See, e.g., Amber Phillips, ‘They’re Rapists.’ *President Trump’s Campaign Launch Speech Two Years Later, Annotated*, WASH. POST (June 16, 2017, 1:43 PM), <https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/> (“I will immediately terminate President Obama’s illegal executive order on immigration, immediately.”); *Full Text: Donald Trump Immigration Speech in Arizona*, POLITICO (Aug. 31, 2016, 10:54 PM), <https://www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614> (“We will immediately terminate President Obama’s two illegal executive amnesties.”).

<sup>39</sup> See Julie Hirschfeld Davis & Jennifer Steinhauer, *Trump’s Soft Spot for Dreamers Alienates Immigration Hard-Liners*, N.Y. TIMES (Feb. 26, 2017), <https://www.nytimes.com/2017/02/26/us/politics/daca-dreamers-immigration-trump.html>.

<sup>40</sup> See Nolan D. McCaskill, *Trump Says He Will Treat Dreamers ‘with Heart,’* POLITICO (Feb. 16, 2017, 2:37 PM), <https://www.politico.com/story/2017/02/trump-press-conference-dreamers-heart-235103>.

<sup>41</sup> See Michael D. Shear & Vivian Yee, ‘Dreamers’ to Stay in U.S. for Now, but Long-Term Fate Is Unclear, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/politics/trump-will-allow-dreamers-to-stay-in-us-reversing-campaign-promise.html>.

<sup>42</sup> See Davis & Steinhauer, *supra* note 39 (quoting Roy Beck, president of NumbersUSA, as saying “I’ve got people really angry and talking about ‘He’s double crossed us, he’s deceived us.’ You could say that the troops are restless”); see also Mark Hensch, *Steve King ‘Very Disappointed’ by Trump’s Inaction on DACA*, THE HILL (Apr. 14, 2017, 3:25 PM), <http://thehill.com/homenews/administration/328890-steve-king-very-disappointed-by-trump-on-amnesty>.

<sup>43</sup> Letter from Ken Paxton, Att’y Gen. of Tex., et al., to Jeff Sessions, Att’y Gen. of U.S. (June 29, 2017), <https://www.aila.org/infonet/ten-states-sent-letter-to-doj-requesting-end-daca>.

<sup>44</sup> *Id.*



states, California Attorney General Xavier Becerra wrote Sessions a letter vowing to defend DACA “by all appropriate means.”<sup>45</sup>

On the September 5 “deadline,” Acting Secretary of Homeland Security Elaine Duke announced that DACA would be rescinded and gradually wound down over a six-month period.<sup>46</sup> In her memorandum, Duke quoted a letter that had been issued the previous day by then-Attorney General Jeff Sessions arguing that because DACA had the “same legal and constitutional defects” as did DAPA, it was likely that “potentially imminent litigation would yield similar results with respect to DACA.”<sup>47</sup> Therefore, DACA would be “[wound] down in an efficient and orderly fashion.”<sup>48</sup> This gradual wind-down allowed DACA recipients whose work authorizations would expire in the following six months to renew for an additional two years, but only if they applied immediately.<sup>49</sup> All other recipients would be unable to work legally or attend university when their current authorizations expired. Furthermore, at that point, they would be subject to immediate deportation.<sup>50</sup>

During litigation in the D.C. district court, Judge Bates of the D.C. district court gave the Agency ninety days to give further detail as to the statutory and constitutional arguments in the original memorandum.<sup>51</sup> On June 22, 2018, then-Secretary Kirstjen Nielsen produced a three-page memorandum purporting to provide this detail.<sup>52</sup> The new memorandum put forth a policy justification arguably not present in the original memorandum.<sup>53</sup> At the Supreme Court, the parties dis-

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<sup>45</sup> Letter from Xavier Becerra, Cal. Att’y Gen., et al., to Donald J. Trump, President of the U.S. (July 21, 2017), [https://oag.ca.gov/system/files/attachments/press\\_releases/7-21-17%20Letter%20from%20State%20AGs%20to%20President%20Trump%20re%20DACA.final\\_.pdf](https://oag.ca.gov/system/files/attachments/press_releases/7-21-17%20Letter%20from%20State%20AGs%20to%20President%20Trump%20re%20DACA.final_.pdf).

<sup>46</sup> See DACA Rescission Memorandum, *supra* note 4.

<sup>47</sup> *Id.* (quoting Letter from Jefferson B. Sessions, Att’y Gen. of U.S., Dep’t of Justice, to Elaine Duke, Acting Sec’y, U.S. Dep’t of Homeland Security (Sept. 4, 2017), <https://www.justice.gov/opa/speech/file/994651/download>).

<sup>48</sup> DACA Rescission Memorandum, *supra* note 4.

<sup>49</sup> See Dara Lind, *The Government Is Already Winding Down DACA—No Matter What Trump Tweets*, Vox (Sept. 6, 2017, 9:40 AM), <https://www.vox.com/2017/9/6/16259076/trump-daca-congress> (explaining that the application deadline was only a month after the announcement).

<sup>50</sup> See *id.*

<sup>51</sup> NAACP v. Trump, 298 F. Supp. 3d 209, 249 (D.D.C. 2018).

<sup>52</sup> See Supplementary DACA Rescission Memorandum, *supra* note 13.

<sup>53</sup> *Id.* (“[I]t is critically important for DHS to project a message that leaves no doubt regarding the clear, consistent, and transparent enforcement of the immigration laws against all classes and categories of aliens.”).

pute whether this later memorandum is part of the administrative record.<sup>54</sup>

### *B. An Unusual Argument for Regulatory Change*

One interpretation of the Duke Memorandum is that DHS had concluded that DACA was unlawful and, having reached this conclusion, the Agency was obligated to end the program. Such an argument would not be unusual: The Trump Administration has repeatedly reversed Obama-era policies by arguing that a prior policy exceeded the Agency's statutory authority.<sup>55</sup> For example, in repealing net neutrality regulation, the FCC argued that the Agency had erroneously classified broadband internet services as "common carriers,"<sup>56</sup> and in repealing the Clean Power Plan, the EPA argued that the Obama-era EPA had interpreted the Clean Air Act incorrectly.<sup>57</sup> Of course, an agency must consider its statutory and constitutional authority when taking action to ensure that its decision is not set aside under the APA for being "contrary to constitutional right" or "in excess of statutory jurisdiction."<sup>58</sup> Scholars use the term "administrative constitutionalism" to describe "agencies' interpretation and implementation of constitutional law."<sup>59</sup> Gillian Metzger has argued that unless Congress has suggested otherwise, it should be assumed that Congress intends agencies to consider "relevant constitutional values" in making deci-

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<sup>54</sup> Compare Brief of the Solicitor General, *supra* note 12, at 29 (arguing that the later memorandum explained then-Secretary Nielsen's contemporaneous decision to stand by the rescission and thus is new agency action), with Brief of Respondents the States of California, Maine, Maryland, and Minnesota at 50, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.* (U.S. argued Nov. 12, 2019) (Nos. 18-587, 18-588, and 18-589), 2019 WL 4795675 [hereinafter Brief of the State Respondents] (arguing that the DOJ submitted the Nielsen memorandum to the district court as "further explanation" of the initial decision and *not* as a new action).

<sup>55</sup> See William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1378–79 & 1379 nn.102–03 (2018) (noting that this strategy has grown increasingly common in the last two decades).

<sup>56</sup> Restoring Internet Freedom, 83 Fed. Reg. 7852, 7853 (Feb. 22, 2018) (explaining that the "best reading of the relevant definitional provisions of the Act support[ed] classifying broadband internet . . . as an information service" that can only be regulated under Title I of the Communications Act of 1934).

<sup>57</sup> Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,526–27 (July 8, 2019) (concluding that the Clean Power Plan depended on an erroneous interpretation of "system of emission reduction" in section 111 of the Clean Air Act).

<sup>58</sup> See 5 U.S.C. § 706(2)(B), (C) (2012).

<sup>59</sup> Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801 (2010); see also Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1929 (2013) (arguing that it is a "feature and not a bug of our constitutional practice").

sions.<sup>60</sup> Thus, even if recent applications of the practice have attracted criticism,<sup>61</sup> as a theoretical matter, it is not troubling for DHS to conclude that DACA is unlawful based on a reinterpretation of the applicable statutes and constitutional provisions.

Courts examining the DACA rescission have rejected the unlawfulness argument on the merits—at least on the cursory record presented by the Agency.<sup>62</sup> After all, there was little evidence in the record that DHS seriously considered DACA’s legality. Sessions’s letter, which Acting Secretary Duke quoted, was short and not entirely accurate. For example, though the Fifth Circuit explicitly avoided ruling on any constitutional challenge,<sup>63</sup> Sessions asserted in his letter that courts had found “constitutional defects” with DAPA.<sup>64</sup> Moreover, the Fifth Circuit’s two holdings on the statutory claims were not necessarily applicable to DACA. The Fifth Circuit had held that (1) DAPA violated the procedural requirements of the APA and (2) DAPA violated the INA, which the court held provided contrary directions vis-à-vis some who received deferred action under DAPA.<sup>65</sup> This second holding was unlikely to apply to DACA, as the class of DACA recipients was one-sixth the size of that of DAPA recipients, and the INA did not clearly speak to this smaller group.<sup>66</sup> Additionally, at the time of DACA’s rescission, the DOJ’s Office of Legal Counsel still had not rescinded a 2014 opinion declaring the legality of

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<sup>60</sup> See Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 523 (2010); see also Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1226 (2006) (arguing that the executive branch has “an independent responsibility to interpret and implement the Constitution”); cf. Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485 (2018) (arguing that federal agencies dealing with immigration currently do not, but should, enforce constitutional norms, particularly in adjudications). But see Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 508 (2005) (arguing that agencies should not consider constitutional issues because “[c]onstitutionally timid administration both compromises faithful agency and potentially usurps the role of the judiciary”).

<sup>61</sup> See, e.g., Buzbee, *supra* note 55, at 1434 (criticizing some of the Trump Administration’s claims of unlawfulness because “if an agency claims new limits on its own power through a new statutory interpretation, then it can avoid engagement with the empirical and scientific data earlier gathered and relied upon”).

<sup>62</sup> See, e.g., *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 510 (9th Cir. 2018) (holding that the Acting Secretary was “incorrect in her belief that DACA was illegal and had to be rescinded”).

<sup>63</sup> *Texas v. United States*, 809 F.3d 134, 154 (5th Cir. 2015) (“We decide this appeal, however, without resolving the constitutional claim.”).

<sup>64</sup> See Letter from Jefferson B. Sessions to Elaine Duke, *supra* note 47.

<sup>65</sup> See *supra* notes 31–32 and accompanying text.

<sup>66</sup> See *Regents*, 908 F.3d at 509 (noting the discrepancies in size between the groups and rejecting the contention that the difference was “legally immaterial”).

these deferred action programs.<sup>67</sup> Furthermore, the DOJ had not argued that *Chevron* deference applied.<sup>68</sup> Thus, the legal arguments in the record were fairly weak, and courts concluded that Acting Secretary Duke erred in her conclusion that DACA was unlawful.<sup>69</sup>

The litigation risk argument allowed the government to distance itself somewhat from these difficult legal questions.<sup>70</sup> By arguing the rescission of DACA was a discretionary one made in light of litigation risk, the Agency sidestepped the question of whether the legal conclusion was correct in favor of the question of whether the analysis of prospective judicial behavior was *reasonable*. According to the DOJ, the Acting Secretary had concluded that there was “serious doubt concerning DACA’s lawfulness and a real risk that the policy would meet the same fate.”<sup>71</sup> The Acting Secretary thus faced a choice: defend DACA “with the risk that a court would order it shut down

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<sup>67</sup> See The Dep’t of Homeland Sec.’s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others, 38 Op. O.L.C. 2 (2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> (explaining that DACA and DAPA are “permissible exercises of DHS’s discretion to enforce the immigration laws”).

<sup>68</sup> See *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1045 n.17 (N.D. Cal. 2018) (“[T]he government does not argue that *Chevron* deference should be afforded to the Attorney General’s legal conclusion.”). The government may have made this choice in order to argue that the decision was discretionary and therefore unreviewable. See *infra* note 70. But cf. James Durling & E. Garrett West, *May Chevron Be Waived?*, 71 STAN. L. REV. ONLINE 183 (2019) (arguing that courts should not permit *Chevron* to be waived as it would allow an agency to manipulate standards of review vis-à-vis its current and past actions).

<sup>69</sup> E.g., *CASA de Md. v. U.S. Dep’t of Homeland Sec.*, 924 F.3d 684, 704 (4th Cir. 2019) (noting that DACA did not conflict with any statutory provisions); *Regents*, 908 F.3d at 510 (“DACA was a permissible exercise of executive discretion.”); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 426 (E.D.N.Y. 2018) (same). However, some commentators have argued that the agency’s legal conclusions were sufficient. See, e.g., Keith E. Whittington, *Departmentalism, Judicial Supremacy and DACA*, LAWFARE BLOG (Feb. 26, 2018, 7:00 AM), <https://www.lawfareblog.com/departamentalism-judicial-supremacy-and-daca> (“If the court were to recognize the administration’s constitutional concerns . . . as reflecting the judgment of an equal branch of government . . . then it would be hard pressed to dismiss those concerns as arbitrary.”).

<sup>70</sup> See David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 260 n.201 (2001) (“Agency counsel . . . routinely massage agency decisions to strengthen their prospects in litigation.”). The government also likely framed the decision as a discretionary one in order to make the argument that the decision was unreviewable. As the government noted, enforcement decisions—including those in immigration enforcement—are unreviewable when Congress has not “provided meaningful standards for defining the limits of that discretion.” *Heckler v. Chaney*, 470 U.S. 821, 834 (1985). But if an enforcement decision is made based on a conclusion of law, then by definition Congress *has* provided meaningful standards and the decision is reviewable. See, e.g., *Citizens for Responsibility & Ethics in Wash. v. FEC*, 892 F.3d 434, 441 n.11 (D.C. Cir. 2018) (“[I]f [an agency] declines to bring an enforcement action on the basis of its interpretation of [a statute], the [agency’s] decision is subject to judicial review.”).

<sup>71</sup> Brief of the Solicitor General, *supra* note 12, at 37.

either immediately or pursuant to a court-drafted plan beyond DHS's control, or rescind DACA in an orderly fashion.”<sup>72</sup> In arguing that the prior policy *might* be illegal such that a court would likely order an injunction, the Acting Secretary did not necessarily assert that the Agency *preferred* the policy not to be in effect. The argument expressed a generalized view of potential illegality while equivocating on the Agency's view of the legal and policy merits—and invoking the strong deference of arbitrary and capricious review.

Four courts—the Northern District of California, the Eastern District of New York, the Fourth Circuit, and the Ninth Circuit—did not even reach the merits of the litigation risk argument, holding that it was not in the Memorandum.<sup>73</sup> Under the longstanding principle of administrative law first set out in *SEC v. Chenery Corp. (Chenery I)*, courts may sustain agency action only on the basis of rationales offered at the time of the decision to ensure that courts do not intrude upon the agency's domain.<sup>74</sup> Rationales offered later are impermissible post hoc justifications put forth for the purposes of litigation.<sup>75</sup> Because the Memorandum did not specifically cite litigation risk—and referred only vaguely to DACA's legal defects and potential litigation—the Ninth Circuit found that the argument was a post hoc rationalization.<sup>76</sup> Similarly, Judge Garaufis of the Eastern District of New York wrote that the Memorandum's quote from Sessions's earlier letter that “it is likely that potentially imminent litigation would yield similar results” was “too thin a reed to bear the weight” of the litigation risk argument.<sup>77</sup> The Fourth Circuit noted the “absence of any reference to litigation risk” and that explanation of why an injunction was likely was “[e]ntirely absent.”<sup>78</sup>

Two courts held that the *Chenery* rule was satisfied and went on to scrutinize the litigation risk argument under the arbitrary and capricious review standard.<sup>79</sup> Despite its “hard look” moniker,<sup>80</sup> the arbi-

<sup>72</sup> *Id.*

<sup>73</sup> See, e.g., *Regents*, 908 F.3d at 500 (“[T]he Acting Secretary did not mention ‘litigation risks’ as a ‘consideration.’”).

<sup>74</sup> See *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 88 (1943).

<sup>75</sup> See *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (“[C]ourts may not accept appellate counsel’s *post hoc* rationalizations for agency action.”).

<sup>76</sup> *Regents*, 908 F.3d at 500.

<sup>77</sup> *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 429 (E.D.N.Y. 2018).

<sup>78</sup> *CASA de Md. v. U.S. Dep’t of Homeland Sec.*, 924 F.3d 684, 700 n.12, 704 (4th Cir. 2019).

<sup>79</sup> See *NAACP v. Trump*, 298 F. Supp. 3d 209, 241 (D.D.C.), *adhered to on denial of reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018) (“Together, these statements were sufficient to express the Department’s concern that a nationwide injunction in the *Texas* litigation would abruptly shut down the DACA program.”); *CASA de Md. v. U.S. Dep’t of*

trary and capricious standard is quite deferential, allowing agencies flexibility to achieve their goals.<sup>81</sup> Judicial deference helps to prevent ossification and allows agencies to be flexible in pursuing policy change as the political winds and overall circumstances shift.<sup>82</sup> In *FCC v. Fox Television Stations*, the Supreme Court explained that an agency generally “need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better*.”<sup>83</sup> Rather, it suffices that the agency acknowledges the new policy represents a change, “that there are good reasons for it, and that the agency *believes* it to be better.”<sup>84</sup>

Significantly, the litigation risk justification was not rooted in discretionary policy preferences, as are many regulatory changes subjected to arbitrary and capricious review. DHS could have—but did not—justify its decision on the basis of a change in enforcement priorities.<sup>85</sup> Agencies commonly change regulations in part on the basis of their policy preferences, and courts are accustomed to reviewing these changes.<sup>86</sup> But it is one thing to review with deference an

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Homeland Sec., 284 F. Supp. 3d 758, 773 (D. Md. 2018), *aff’d in part, vacated in part, rev’d in part*, 924 F.3d 684 (4th Cir. 2019) (“All of this is in the Administrative Record.”); *see also In re United States*, 875 F.3d 1200, 1211 (9th Cir. 2017) (Watford, J., dissenting) (“[T]he Acting Secretary explicitly states her asserted reason for rescinding DACA: concern that the program would be invalidated in threatened litigation.”), *cert. granted, judgment vacated*, 138 S. Ct. 443 (2017).

<sup>80</sup> See Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 727–28 (2014) (noting the origins of “hard look” review in D.C. Circuit decisions in the late 1960s and 1970s and its subsequent adoption by the Supreme Court).

<sup>81</sup> See generally Jacob Gersen & Adrian Vermuele, *Thin Rationality Review*, 114 MICH. L. REV. 1355 (2016) (arguing that courts already apply a fairly “thin” kind of arbitrary and capricious review).

<sup>82</sup> See William S. Jordan III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 440 (2000) (noting that, among a sample of sixty-one rules remanded by the D.C. Circuit, eighty percent were eventually implemented).

<sup>83</sup> 556 U.S. 502, 515 (2009).

<sup>84</sup> *Id.* Of course, an agency may not “rel[y] on factors which Congress has not intended it to consider, entirely fail[] to consider an important aspect of the problem, [or] offer[] an explanation for its decision that runs counter to the evidence before the agency.” *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>85</sup> See *NAACP v. Trump*, 298 F. Supp. 3d 209, 237 (D.D.C.), *adhered to on denial of reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018) (“Here, the Department never stated, and the government does not now contend, that DACA’s rescission reflected a change in the agency’s immigration enforcement priorities.”). *But see supra* note 54 and accompanying text (noting that the Solicitor General contends that the supplementary memorandum produced by Secretary Nielsen during litigation presents an independent policy justification that should be considered part of the administrative record).

<sup>86</sup> For example, the Trump Administration has repealed Obama-era rules on fracking and oil and gas leasing. *See, e.g.*, Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule, 82 Fed. Reg. 61,924 (Dec. 29, 2017) (rescinding a prior rule because the agency believed “it imposes administrative burdens and compliance costs

agency's choice of peer-reviewed scientific studies or its policy judgment on how to balance the needs of different stakeholders. It is another thing altogether to defer to a *view about litigation risk*.

For the most part, the litigation risk argument was unavailing. The D.C. district court—and many commentators—concluded that it failed arbitrary and capricious review. Judge Bates explained that the Agency's litigation risk prediction was “so implausible that it fails even under the deferential arbitrary and capricious standard.”<sup>87</sup> An amicus brief by twenty-four administrative law scholars explained that the litigation risk argument “makes no sense on its own terms” because the Agency knew it would face litigation whether it rescinded DACA or not.<sup>88</sup> Cristian Farias of *New York Magazine* argued the Administration had chosen to “simply throw up its arms and offer as pretext that the litigation risk was too big a price to pay.”<sup>89</sup>

Additionally, two courts held that the rescission might be arbitrary and capricious for the independent reason that DHS failed to consider reliance by DACA recipients.<sup>90</sup> An agency may have to provide a “more detailed justification” if “its prior policy has engendered serious reliance interests.”<sup>91</sup> However, other courts put less emphasis on reliance interests, perhaps because it was unnecessary to their

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that are not justified”); Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 36,934 (Aug. 7, 2017) (rescinding the prior rule on the grounds that it “would unnecessarily burden the development of Federal oil and gas and Federal and Indian coal beyond the degree necessary to protect the public interest”). Many of these repeals, however, have been reversed. See *Roundup: Trump-Era Agency Policy in the Courts*, INST. FOR POLICY INTEGRITY, <https://policyintegrity.org/deregulation-roundup> (last visited Oct. 14, 2019) (reporting that the Trump Administration had won a mere five of the fifty-eight cases in court over its attempts to deregulate, as of August 30, 2019).

<sup>87</sup> *NAACP*, 298 F. Supp. 3d at 233, 243.

<sup>88</sup> Law Professor Brief, *supra* note 18, at 12–13.

<sup>89</sup> Cristian Farias, *Trump Ending DACA Was Never About the Law. A Federal Judge Noticed*, N.Y. MAG. (Jan. 10, 2018), <http://nymag.com/intelligencer/2018/01/judge-reverses-trump-daca-decision.html>.

<sup>90</sup> *CASA de Md. v. U.S. Dep't of Homeland Sec.*, 924 F.3d 684, 704 (4th Cir. 2019); *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1044 (N.D. Cal. 2018). Officials in both the Obama and Trump Administrations encouraged reliance. See *Transcript of AP Interview with Trump*, ASSOCIATED PRESS (Apr. 23, 2017), <https://www.apnews.com/c810d7de280a47e88848b0ac74690c83> (quoting President Trump as stating that “[t]he dreamers should rest easy. OK? I'll give you that. The dreamers should rest easy”).

<sup>91</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); see also *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (“[L]ongstanding policies may have engendered serious reliance interests that must be taken into account.”). Some argue that these statements on reliance should be construed narrowly. See, e.g., Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937, 983 (2017) (arguing that *Fox* stands for the proposition that due process requires fair warning of major shifts in agency interpretation but not about general policies of enforcement).

holdings or because of disagreement over the extent to which a guidance document that explicitly “confer[s] no substantive right” can confer reliance interests.<sup>92</sup> This Note does not take a position either way on the sufficiency of the Agency’s analysis of reliance interests here. While further analysis of reliance may well have been necessary, it is not a part of the litigation risk analysis laid out in this Note but rather an additional analysis required on top of it.

On the other side, one district court—and some scholars—concluded that the litigation risk rationale should pass arbitrary and capricious review. Judge Titus of the District of Maryland held that the Agency had a “reasonable belief” that DACA was unlawful and that “opt[ing] for a six-month wind-down period instead of the chaotic possibility of an immediate termination” at an unknown time was “rational.”<sup>93</sup> The Agency had “[taken] control of a pell-mell situation and provided Congress . . . an opportunity to remedy it.”<sup>94</sup> Zachary Price opined that the government’s legal misgivings and concerns about litigation risk seemed “more than adequate.”<sup>95</sup> Similarly, Josh Blackman has written that “[m]inimizing the risk of litigation where the government is likely to lose, provides more than a rational basis to wind down the policy.”<sup>96</sup> Because these are the sort of decisions that the Justice Department makes frequently, “[i]t is preposterous for courts to dismiss this justification out of hand.”<sup>97</sup>

## II

### ASSESSING THE LITIGATION RISK ARGUMENT

While many commentators and courts have argued that litigation risk was not cognizable here, it is important to note that litigation risk in general is a relevant factor in agency decisionmaking. Section II.A examines why litigation risk is a proper motivating factor in agency action. Section II.B turns to the litigation risk argument made to jus-

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<sup>92</sup> Original DACA Memorandum, *supra* note 21, at 3. Not only did the Memorandum not confer a right, but it also was only a guidance document. The scope of reliance interests that might warrant further explanation in arbitrary and capricious review remains contested. See *supra* note 91.

<sup>93</sup> *CASA de Md. v. U.S. Dep’t of Homeland Sec.*, 284 F. Supp. 3d 758, 773 (D. Md. 2018), *aff’d in part, vacated in part, rev’d in part*, 924 F.3d 684 (4th Cir. 2019).

<sup>94</sup> *Id.*

<sup>95</sup> Zachary Price, *Why Enjoining DACA’s Cancellation Is Wrong*, TAKE CARE BLOG (Jan. 12, 2018), <https://takecareblog.com/blog/why-enjoining-daca-s-cancellation-is-wrong>.

<sup>96</sup> Josh Blackman, *Understanding Sessions’s Justification to Rescind DACA*, LAWFARE BLOG (Jan. 16, 2018, 8:00 AM), <https://www.lawfareblog.com/understanding-sessions-justification-rescind-daca>.

<sup>97</sup> Josh Blackman, *The Judiciary Learns to Equilibrate Between the President and the Legal Resistance*, LAWFARE BLOG (Feb. 15, 2018, 1:00 PM), <https://www.lawfareblog.com/judiciary-learns-equilibrate-between-president-and-legal-resistance>.



tify the DACA rescission. The Section then isolates four elements of litigation risk that must be analyzed to show why litigation risk alone could not rationally justify the rescission.

### A. *Litigation Risk Is a Valid Consideration*

The Section first argues that consideration of litigation risk in regulatory policymaking is appropriate because it significantly affects whether an agency will be successful at its job. Then it claims that agencies already consider litigation risk.

#### 1. *Litigation Risk as a Relevant Factor*

If agencies must consider all “important aspect[s] of the problem,”<sup>98</sup> the litigation risk posed by agency action must be one of these aspects. To begin, Congress clearly wants agency implementations of its statutes to have legal effect. Since those implementations will not have legal effect if they are set aside by a court, this would seem to require agency analysis of whether decisions will withstand judicial scrutiny.<sup>99</sup> Scholars have long noted that agencies consider litigation risk.<sup>100</sup> Judicial behavior is notoriously unpredictable,<sup>101</sup> and the stakes of many agency actions are significant. Just as firms gauge legal risks of corporate decisions, it seems logical that agencies must

<sup>98</sup> *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>99</sup> See *supra* notes 58–61 and accompanying text (discussing “administrative constitutionalism” and agency consideration of its own statutory and constitutional authority).

<sup>100</sup> See, e.g., JAMES Q. WILSON, *BUREAUCRACY* 282–90 (1989) (recounting various agencies’ adoption of risk-averse rulemaking procedures in the face of the prospect of costly legal challenge); Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 361–62 (2019) (noting how judicial review affects ex ante agency actions); R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 247 (1992) (noting that agencies must divert resources from policymaking to address litigation risk); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1398–99 (2010) (same).

<sup>101</sup> Conventional wisdom can quickly be proven wrong, as it was with the question of whether the individual mandate in the Affordable Care Act was a valid exercise of Congress’s Commerce Power. See Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 45 (2010) (arguing that it was within the Commerce Power); Dahlia Lithwick, *It’s Not About the Law, Stupid*, SLATE (Mar. 22, 2012, 7:58 PM), <https://slate.com/news-and-politics/2012/03/the-supreme-court-is-more-concerned-with-the-politics-of-the-health-care-debate-than-the-law.html> (noting that in 2009 Nancy Pelosi dismissed the idea that the mandate was unconstitutional with “Are you serious?”). But see Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 561 (2012) (holding that the mandate was not within the Commerce Power); Alexander Bolton, *Lawmakers Press Supreme Court for Verdict on Healthcare Law*, THE HILL (Feb. 2, 2011, 11:00 AM), <https://thehill.com/homenews/administration/141631-lawmakers-press-court-for-verdict> (noting that constitutional law scholars’ initial confidence had rapidly waned).

gauge the legal risks of their policy decisions. And courts have generally held that agencies can consider any relevant factor, provided there is no “express congressional direction” not to do so.<sup>102</sup> Few (if any) laws expressly forbid an agency from considering litigation risk, which suggests that consideration is at least permissible, if not required.

The Supreme Court has acknowledged and implicitly authorized consideration of litigation risk. In *Heckler v. Chaney*, the Supreme Court held that there was a presumption that agency inaction was unreviewable because agencies must be able to make judgments as to their priorities.<sup>103</sup> The Court seemed to touch upon the consideration of litigation risk when it explained that an agency must assess “whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.”<sup>104</sup> The Court understood the obvious: Agencies often choose to expend their resources on actions that they believe are “likely to succeed.”

At least one president has specifically instructed agencies to consider litigation exposure. An executive order promulgated under President Clinton states that an “agency’s proposed legislation and regulations shall be written to minimize litigation.”<sup>105</sup> While not necessarily mandating a full litigation risk analysis, the order suggests that anticipating judicial challenges is part of the decisionmaking process.

Furthermore, due to the recent rise of the nationwide injunction, litigation poses an even graver threat to agency action than it did in the past. In the final year of the Obama Administration, district courts in Texas issued five separate nationwide injunctions against executive

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<sup>102</sup> *Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000); see also *Catawba County v. EPA*, 571 F.3d 20, 37 (D.C. Cir. 2009) (per curiam) (allowing consideration of a logically relevant factor not in the statute); *George E. Warren Corp. v. EPA*, 159 F.3d 616, 624 (D.C. Cir. 1998), amended by 164 F.3d 676 (D.C. Cir. 1999) (emphasizing the court’s “usual reluctance to infer from congressional silence an intention to preclude the agency from considering factors other than those listed in a statute”). See generally Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67, 73–74 nn.18–22 (collecting cases). Note that this prong of arbitrariness review arguably overlaps with *Chevron* deference. Though the question of whether agency action relied on impermissible factors involves scrutiny of reasoned decisionmaking, the embedded question of which factors are permissible involves scrutiny of the agency’s statutory interpretation.

<sup>103</sup> 470 U.S. 821, 831 (1985).

<sup>104</sup> *Id.* (emphasis added).

<sup>105</sup> Civil Justice Reform, Exec. Order No. 12,988 § 3(a)(2), 61 Fed. Reg. 4729 (Feb. 5, 1996).

policies.<sup>106</sup> Even more nationwide injunctions have occurred in the first three years of the Trump Administration<sup>107</sup>—and sometimes two in one day.<sup>108</sup> In cases against the Obama and Trump Administrations, the promise of a potential nationwide injunction has increased the incentive for plaintiffs to forum shop.<sup>109</sup> State public-law litigation against the federal government has grown rapidly since the 1980s and is increasingly partisan.<sup>110</sup> Competing injunctions put this new legal uncertainty into especially stark relief.<sup>111</sup> Particularly in the context of these changes, a relevant consideration in promulgating a regulation must be whether it will likely be permitted to go into effect.

Litigation risk also dovetails well with cost-benefit analysis, a decisionmaking methodology that agencies have long embraced. Since 1981, the Office of Information and Regulatory Affairs (OIRA) has required agencies to use cost-benefit analysis.<sup>112</sup> Executive Order 12,866, issued in 1993 and still in effect, requires quantifying the effects of regulations with an annual effect on the economy of more than \$100 million.<sup>113</sup> Executive orders under President Obama<sup>114</sup> and

<sup>106</sup> See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 457 nn.230–32 (2017) (citing cases).

<sup>107</sup> See, e.g., *City of Chicago v. Sessions*, 888 F.3d 272, 288 (7th Cir. 2018) (affirming a nationwide injunction against the withholding of federal funding from “sanctuary cities”); *Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017) (affirming a nationwide injunction of the third travel ban), *rev’d*, 138 S. Ct. 2392 (2018).

<sup>108</sup> Miriam Jordan, *Judges Strike Several Blows to Trump Immigration Policies*, N.Y. TIMES (Oct. 11, 2019), <https://www.nytimes.com/2019/10/11/us/immigration-public-charge-injunction.html>. In addition to the two nationwide injunctions, that day also brought a *third* injunction, but its geographical extent was limited to the Ninth Circuit. *Id.*

<sup>109</sup> See Bray, *supra* note 106, at 460 (noting the asymmetric benefits for plaintiffs, whose victory might lead to a nationwide injunction, compared to the government defendant, whose victory has no effect on other potential plaintiffs); see also *infra* note 170 and accompanying text (outlining strategic forum-shopping considerations for challenges to DACA and DAPA). See generally Thomas O. McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. PA. L. REV. 302, 312–18 (1980) (describing and evaluating the races by attorneys to file appeals in their preferred circuit court).

<sup>110</sup> See Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 73, 89–90 (2018) (describing the rise in “coordinated AG litigation” by increasingly partisan state attorneys general).

<sup>111</sup> See Bagley, *supra* note 100, at 387–89 (detailing the saga of competing injunctions in different segments of the country over the Obama-era 2015 Clean Water Rule).

<sup>112</sup> See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1263–68 (2006) (describing the history of OIRA and cost-benefit analysis).

<sup>113</sup> Exec. Order No. 12,866 § 6(a)(3)(C), 3 C.F.R. § 638 (1993), *reprinted in* 5 U.S.C. § 601 app. at 557–61 (1994).

<sup>114</sup> Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); see Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575, 582 (2015) (outlining the Obama Administration’s executive orders pertaining to agency budgeting and cost-benefit practices).

President Trump<sup>115</sup> have made only slight modifications to this framework.

Executive branch guidance on cost-benefit analysis also provides apt guidance on analyzing the uncertainty inherent in litigation risk analysis. Circular A-4, issued by the Office of Management and Budget (OMB) in 2003 and still in effect, sets out guidelines for agency cost-benefit analysis.<sup>116</sup> The Circular requires agencies to analyze and present “[t]he important uncertainties connected with [agencies’] regulatory decisions.”<sup>117</sup> Such analyses must consider the “statistical variability of key elements underlying the estimates of benefits and costs . . . and the incomplete knowledge about the relevant relationships.”<sup>118</sup> In this analysis, agencies must identify the data and models they use and the inferences and assumptions they make.<sup>119</sup> Agencies must also consider how different assumptions may affect the baseline and, where necessary, measure a proposed change against alternative baselines.<sup>120</sup>

Circular A-4 includes specific requirements for analyzing uncertainty when agency actions have a particularly significant effect on the economy. That is, if there is a range of likely values of an input or a range of likely outcomes, the agency should note and analyze them to present a more complete picture of the expected results. Circular A-4 requires a formal quantitative analysis for rules with annual effects above \$1 billion and recommends it for rules with effects above \$100 million, also providing the alternative of a “numerical sensitivity analysis” to demonstrate how results differ with plausible changes in assumptions or input data.<sup>121</sup> Where there is considerable uncertainty, cost-benefit analyses may require estimates of probability distributions of different values and outcomes.<sup>122</sup> Agencies are instructed to

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<sup>115</sup> See Caroline Cecot & Michael A. Livermore, *The One-In, Two-Out Executive Order Is a Zero*, 166 U. PA. L. REV. ONLINE 1, 1–2 (2017), <http://www.pennlawreview.com/online/166-U-Pa-L-Rev-Online-1.pdf> (characterizing President Trump’s “one-in, two-out” rule for new regulations as a modification within the existing framework).

<sup>116</sup> OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, at 1 (2003); see Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1371 (2013) (describing Circular A-4 as “a touchstone for agency cost-benefit analysis on a range of methodological questions”).

<sup>117</sup> OFFICE OF MGMT. AND BUDGET, CIRCULAR A-4, at 38 (2003).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 39.

<sup>120</sup> *Id.* at 15.

<sup>121</sup> *Id.* at 41.

<sup>122</sup> *Id.* at 42.

be risk-neutral, as conservative or “worst-case” analyses do not permit accurate calculation of the expected value.<sup>123</sup>

While courts defer to agency cost-benefit analyses,<sup>124</sup> they have insisted that the analyses incorporate all important aspects of the issue, even if there are significant uncertainties.<sup>125</sup> In *Center for Biological Diversity v. National Highway Traffic Safety Administration*, the Ninth Circuit reviewed the National Highway Traffic Safety Administration’s (NHTSA) corporate average fuel economy standards for light trucks.<sup>126</sup> After noting significant uncertainty as to the correct cost of carbon, the Agency had declined to consider it. The Ninth Circuit held that this decision was arbitrary and capricious because, “while the record shows that there is a range of values [for the cost of carbon], the value . . . is certainly not zero.”<sup>127</sup> Similarly, the D.C. Circuit has explained that “[t]he mere fact that the magnitude of . . . effects is *uncertain* is no justification for *disregarding* the effect entirely.”<sup>128</sup> In other words, in the face of uncertainty, agencies must make a reasonable effort to estimate within the appropriate range of values.

Litigation risk is thus well-suited to a cost-benefit analysis framework. Indeed, private parties facing litigation risk routinely use cost-benefit analyses.<sup>129</sup> It should be noted, however, that litigation risk in administrative law would differ in at least two key ways from litigation risk for private parties: (1) the relevant benefits and costs are those on the economy rather than on a litigant, and (2) the costs of the litiga-

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<sup>123</sup> *Id.* at 40. Some have argued for a so-called “precautionary principle” under which, in situations of high uncertainty, regulators pursue the more risk-averse policy. But as Cass Sunstein has shown, such a principle is “paralyzing” because “risks are on all sides of social situations.” Cass R. Sunstein, *The Paralyzing Principle*, REGULATION, Winter 2002–2003, at 32.

<sup>124</sup> See *Charter Commc’ns, Inc. v. FCC*, 460 F.3d 31, 42 (D.C. Cir. 2006) (“[C]ost-benefit analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency . . . .” (quoting *Consumer Elec. Ass’n v. FCC*, 347 F.3d 291, 304 (D.C. Cir. 2003))); *Nat’l Wildlife Fed’n v. EPA*, 286 F.3d 554, 563 (D.C. Cir. 2002) (“[I]n view of the complex nature of economic analysis typical in the regulation promulgation process, [the petitioners’] burden to show error is high.”).

<sup>125</sup> See, e.g., *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) (“[W]e will [not] tolerate rules based on arbitrary and capricious cost-benefit analyses.”).

<sup>126</sup> 538 F.3d 1172, 1200 (9th Cir. 2008).

<sup>127</sup> *Id.*

<sup>128</sup> *Pub. Citizens v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004).

<sup>129</sup> See Editor’s Note, *The Corporate Counsel Section of the New York State Bar Association, Report on Cost-Effective Management of Corporate Litigation*, 19 AM. J. TRIAL ADVOC. 11, 22 (1995) (“In conjunction with the development of a litigation plan and budget, the litigation team should conduct a more detailed cost-benefit analysis of the case.”).

tion itself are likely de minimis to the Agency in comparison to those larger benefits and costs.<sup>130</sup>

Because litigation risk is a factor relevant to whether an agency will be successful, agencies can and should consider it, and cost-benefit analysis provides a useful basic framework for how to think about the key uncertainties. Even the court that most clearly reached and rejected the litigation risk argument did not suggest a categorical unwillingness to consider this *type* of argument. On the contrary, Judge Bates explicitly noted that the Agency could have decided on rescission after weighing the costs and benefits of litigation.<sup>131</sup> He suggested, for example, that the Agency could have concluded that the costs of defending the policy would outweigh its benefits to the public or that the negative publicity around the litigation would undermine the policy.<sup>132</sup>

## 2. *Examples of Consideration of Litigation Risk*

Agencies and other decisionmakers only occasionally refer to litigation risk. For example, in a February 2019 proposed rule, the Department of Energy stated that negotiated rulemaking for certain cases would provide “[t]horough consideration of the underlying issues” and produce consensus that “may also reduce litigation risk.”<sup>133</sup> Cass Sunstein, who served as OIRA Administrator under President Obama, recalls reminding agencies that guidance documents would be struck down in court if they were too firm, and agencies responded by making these documents “more fuzzy.”<sup>134</sup> The role of litigation risk in agency decisions can also be inferred by comparing agency behavior undertaken under statutes that permit different levels

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<sup>130</sup> Theoretically, an agency could consider costs to the agency or the Department of Justice of litigating the various challenges to agency action, though they would likely be small.

<sup>131</sup> *NAACP v. Trump*, 298 F. Supp. 3d 209, 233 (D.D.C.), *adhered to on denial of reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018).

<sup>132</sup> *Id.*

<sup>133</sup> Energy Conservation Program for Appliance Standards: Proposed Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 84 Fed. Reg. 3910, 3932 (proposed Feb. 13, 2019). A few other brief mentions can be found in the Federal Register. *See, e.g.*, Notice of Availability of Programmatic Assessment of Greenhouse Gas Emissions from Transit Projects, 82 Fed. Reg. 5636, 5638 (Jan. 18, 2017) (“The use of the Programmatic Assessment is entirely optional, but FTA believes it would reduce litigation risk by taking a ‘hard look’ at GHG [greenhouse gas] emissions due to transit projects.”).

<sup>134</sup> Cass R. Sunstein, “*Practically Binding*”: *General Policy Statements and Notice-and-Comment Rulemaking*, 68 ADMIN. L. REV. 491, 503 (2016).

of legal exposure in court.<sup>135</sup> Finally, consideration of litigation risk can be inferred by analyzing the changes that agencies make during informal rulemaking.

The Obama Administration's promulgation of the Clean Power Plan provides a useful example.<sup>136</sup> When the Environmental Protection Agency (EPA) proposed the Clean Power Plan in June 2014, it intended to calculate a key emissions standard called the "best system of emission reduction" (BSER) using four building blocks, the fourth of which was "expanded use of demand-side energy efficiency."<sup>137</sup> Yet commenters made strong arguments that the Clean Air Act's provisions did not authorize the EPA to consider energy efficiency in calculating these standards.<sup>138</sup> In light of these comments, this fourth building block was excluded from the final rule.<sup>139</sup> The EPA explained:

Although the BSER provisions are sufficiently broad to include . . . the measures in building blocks 2 and 3, they also incorporate significant constraints on the types of measures that may be included in the BSER. We discuss those constraints in this section. These constraints [sic] explain why we are not including building block 4 in the BSER.<sup>140</sup>

Yet the EPA did not abandon its focus on energy efficiency. In the final rule, it noted that "most commenters also supported the use of demand-side [energy efficiency] for compliance whether or not it is used in determining the BSER, and we are allowing demand-side [energy efficiency] to be used for that purpose."<sup>141</sup> Faced with legal arguments that its preferred regulatory strategy posed risk in court,

<sup>135</sup> Cf. Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 107 (2015) (noting that agencies more frequently follow required procedures when implementing statutes that pose higher litigation risk).

<sup>136</sup> This Section discusses litigation risk of one small part of the Clean Power Plan only and is not intended to be a comprehensive discussion of the rule's substantive provisions, its statutory basis, or its litigation risk.

<sup>137</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830, 34,856 (proposed June 18, 2014).

<sup>138</sup> See, e.g., Attorneys General of the States of Oklahoma et al., Comment on Proposed EPA Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, at 20 (Nov. 24, 2014), [https://www.regulations.gov/document?D\\_EPA-HQ-OAR-2013-0602-25433](https://www.regulations.gov/document?D_EPA-HQ-OAR-2013-0602-25433) ("By going beyond source-level, inside-the-fenceline measures, EPA's proposal would expand 111(d) . . . [and] regulate[] not only pollutant emission by sources, but a state's entire resource and energy sectors.").

<sup>139</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,776 (Oct. 23, 2015).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 64,730; see also William S. Scherman & Jason J. Fleischer, *The Environmental Protection Agency and the Clean Power Plan: A Paradigm Shift in Energy Regulation Away from Energy Regulators*, 36 ENERGY L.J. 355, 365 n.47 (2015) ("Yet the EPA has not dropped its effort to impose demand-side reductions from the Clean Power Plan

the EPA changed that strategy, removing energy efficiency from the calculation of the BSER standard and placing it in compliance plans instead.<sup>142</sup> Moreover, the plan's supporters touted this change.<sup>143</sup> Litigation risk thus played a key role in the Agency's choices, as it does in so many.

Why are overt references to litigation risk so rare? One explanation might be that, while litigation risk as a background factor guides regulatory decisions, it only rarely justifies a decision on its own.<sup>144</sup> Another explanation might be that agencies are loath to discuss litigation risk because it might be seen as an admission that its action is on shaky legal ground. After all, an agency may still take an action that poses high litigation risk if it believes that it is worth the risk or is plausibly defensible.<sup>145</sup> But litigation risk clearly plays a key role.

### B. *The Four Key Elements of Litigation Risk*

If an agency states on the record that litigation risk justifies a significant change from the status quo—as it did in the DACA rescission—arbitrary and capricious review requires that agencies actually analyze litigation risk.<sup>146</sup> The D.C. Circuit has in fact suggested that mere reference to litigation risk is insufficient. In *International Union, United Mine Workers v. Department of Labor*, the Mine Safety and Health Administration (MSHA) had claimed that it had withdrawn an

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altogether. . . . [T]he EPA has built a 1% per year increase in energy efficiency into its base case.”).

<sup>142</sup> See Hannah J. Wiseman & Hari M. Osofsky, *Regional Energy Governance and U.S. Carbon Emissions*, 43 *ECOLOGY L.Q.* 143, 209–10 (2016) (noting that the fact that the energy efficiency building block was not in the final plan would help the EPA defend legal challenges); John H. Cushman Jr., *Did the EPA Bulletproof the Clean Power Plan?*, *INSIDECLIMATE NEWS* (Aug. 3, 2015), <https://insideclimatenews.org/carbon-copy/03082015/did-epa-bulletproof-clean-power-plan-obama-climate-carbon-regulations> (arguing that the change was “safer . . . legally”).

<sup>143</sup> See, e.g., Press Release, Am. Council for an Energy-Efficient Econ., *Energy Efficiency a Key Compliance Strategy for States in EPA Final Clean Power Plan Rule* (Aug. 3, 2015), <https://aceee.org/press/2015/08/energy-efficiency-key-compliance> (quoting the American Council for an Energy-Efficient Economy executive director's statement that the “inclusion of energy efficiency in compliance plans is much more important” than its inclusion as a building block).

<sup>144</sup> See, e.g., *infra* notes 154–56 and accompanying text (noting that litigation risk will rarely be dispositive if an action is cost-benefit justified otherwise); see also *infra* note 205 and accompanying text (noting that a strong litigation risk argument may require the unconventional assertion that the Supreme Court will affirm a disruptive judicial remedy).

<sup>145</sup> See Barron & Kagan, *supra* note 70, at 260 (“[A]n agency can justify a decision to defend a final action less as a firm commitment to the merits than as a reasonable means of giving the courts the final say on a disputed question.”).

<sup>146</sup> See *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (“[R]easonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.”).



air quality rule in part because of legal doubt stemming from a court decision: namely, it claimed that an appellate court decision had implied that comprehensive rulemaking was not the best way to address its statutory goal.<sup>147</sup> The D.C. Circuit dismissed this argument, noting that “the MSHA did not explain *why* it came to deem the Eleventh Circuit decision fatal to [its] effort.”<sup>148</sup>

Reasoned analysis of the litigation risk argument is even more important when—as in the DACA case—the agency suggests that the argument could be sufficient justification on its own. As discussed *supra*, cost-benefit analysis provides a useful framework for analyzing litigation risk, and agencies have expertise with these analyses.<sup>149</sup> Even when statutes do not require cost-benefit analysis, arbitrary and capricious review requires decisions justified in economic or cost-benefit terms to be economically reasonable.<sup>150</sup> This Section proposes four elements essential to an economically reasonable analysis of litigation risk.

First, it is important to note that litigation risk would be largely irrelevant if the agency’s decision would lead to net benefits vis-à-vis the current policy. For example, if DHS believed rescission of DACA would be beneficial, it could simply have said so, stated the underlying facts, and rescinded the program. Litigation risk would be unlikely to change this calculus<sup>151</sup>—bracketing out contrary litigation risk.<sup>152</sup> Litigation risk will rarely be dispositive unless the *current* regulatory policy is providing net benefits. Thus, in a rational litigation risk analysis, the first factor an agency should consider is the net benefits of the status quo—benefits that would be forgone by the change. As one amicus brief framed the inquiry, a homeowner who reasonably believes his house has some chance of falling victim to arson cannot

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<sup>147</sup> 358 F.3d 40, 44 (D.C. Cir. 2004).

<sup>148</sup> *Id.* (emphasis added).

<sup>149</sup> See *supra* notes 112–29 and accompanying text.

<sup>150</sup> See *supra* note 125 and accompanying text; cf. *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996) (noting that environmental impact statements do not require cost-benefit analysis but nonetheless may “not be based on misleading economic assumptions”); *Johnston v. Davis*, 698 F.2d 1088, 1094–95 (10th Cir. 1983) (same).

<sup>151</sup> An agency’s action could obviously be justified even if it also poses litigation risk, but in that case, it would be wrong to say that the action was justified *because of* litigation risk. Rather, such action would be justified *in spite of* litigation risk. Of course, as discussed *supra* in Section II.A, the agency might still consider whether another rule or action might be a preferable option because it is also beneficial while posing less litigation risk.

<sup>152</sup> See *infra* Section II.B.4 (explaining the need to consider litigation risk stemming from rescission).

“reasonably address that risk by burning down the house himself.”<sup>153</sup> He must first consider the value of the house.

These forgone benefits must then be weighed against the second and third elements of litigation risk: the probability of a disruptive injunction and the additional costs of that injunction. Connor Raso has written that litigation risk for an agency consists of the probability a lawsuit is filed, multiplied by the probability that it loses, multiplied by the expected cost of losing.<sup>154</sup> But because agencies are sued over almost all major actions they take,<sup>155</sup> this Note presumes a lawsuit will be filed. This Note proposes that Raso’s latter two factors, the probability of a disruptive injunction and the additional costs of that injunction, are the second and third key elements that an agency must consider in a litigation risk analysis.<sup>156</sup> Finally, after the agency weighs the first three factors, the agency must consider a fourth: the contrary litigation risk—that is, the risk that the agency’s rescission *itself* will be halted by courts. After all, if the voluntary rescission itself is likely to be enjoined in a disruptive way, it may not be rational to pursue rescission.

In all, these four elements are “aspect[s] of the problem” that the agency should consider and address.<sup>157</sup> Additionally, in a specific factual situation, an agency might plausibly argue that other considerations are relevant—for example, the prospect of very embarrassing litigation that will harm the effectiveness of the policy<sup>158</sup>—but these are not raised by the DACA rescission and are unlikely to be relevant

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<sup>153</sup> Brief of the Institute for Policy Integrity at New York University School of Law as Amicus Curiae Supporting Plaintiffs-Appellees’ Principal and Response Briefs at 4, *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018) [hereinafter *Institute for Policy Integrity Brief*] (No. 88), 2018 WL 1595534. If this analogy contains an implicit comparison of federal judges to arsonists, it is no doubt unintended.

<sup>154</sup> Raso, *supra* note 135, at 80 n.62. Note that various variables go into each of these components; for example, the expected cost to the agency of losing necessarily incorporates the probabilistic costs of different potential remedies, including remand with or without vacatur. *Id.* at 81.

<sup>155</sup> Cf. Caleb Nelson, “*Standing*” and Remedial Rights in Administrative Law, 105 VA. L. REV. 703, 708 (2019) (noting that courts assume “everyone who is suffering ‘injury in fact’ and whose interests are even ‘arguably’ within a relevant ‘zone’ can obtain relief under the APA”).

<sup>156</sup> Cf. DEP’T OF HOMELAND SECURITY, RISK STEERING COMMITTEE, DHS RISK LEXICON 27 (2010), <https://www.dhs.gov/xlibrary/assets/dhs-risk-lexicon-2010.pdf> (explaining that risk is defined as the “potential for an unwanted outcome resulting from an incident, event, or occurrence, as determined by its likelihood and the associated consequences”).

<sup>157</sup> *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>158</sup> See text accompanying note 132. As stated *supra* note 130, in the vast majority of situations, the government’s litigation costs are likely to be de minimis compared to the considerations discussed in this Part.

in most cases. Sections II.B.1 through II.B.4 will examine each of the four key elements on the facts of the DACA rescission.

### 1. *Forgone Benefits*

First, litigation risk requires considering forgone benefits prior to an anticipated injunction. Rescission of DACA would result in significant forgone benefits.<sup>159</sup> The government cited no studies suggesting that rescinding DACA would benefit the economy, and indeed, the studies run to the contrary.<sup>160</sup> A study by the Cato Institute notes that, among the 700,000 DACA recipients, the average recipient is 22 years old, employed, and earns \$17 an hour.<sup>161</sup> More than half are currently students, and 17% are pursuing an advanced degree.<sup>162</sup> About 70% help to support their families.<sup>163</sup> Rescission would have adverse effects not only on DACA recipients and their families but also on their employers, their landlords, the economy, and the government. As Justice Breyer noted at oral argument, the Supreme Court briefs noted at least 66 health care organizations, 210 educational organizations, and 145 businesses with strong interests in the continuation of DACA.<sup>164</sup> The Cato Institute estimated that a roll-back of DACA would result in a loss of \$351 billion in GDP and \$92.9 billion in federal tax revenue over ten years.<sup>165</sup> The damage would be particularly acute in certain areas. Almost 90,000 recipients live in Los Angeles, for example, and New York City, Dallas/Fort Worth, Houston, and Chicago each have over 30,000.<sup>166</sup> For whatever probability that the disruptive injunction does not materialize, a preemptive regulatory

<sup>159</sup> Cf. *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017) (holding that an agency's failure to consider forgone benefits was arbitrary and capricious).

<sup>160</sup> See Phillip E. Wolgin, *The High Cost of Ending Deferred Action for Childhood Arrivals*, CTR. FOR AMER. PROG. (Nov. 18, 2016, 9:00 AM), <https://www.americanprogress.org/issues/immigration/news/2016/11/18/292550/the-high-cost-of-ending-deferred-action-for-childhood-arrivals> (estimating the cost to the GDP at \$433 billion over 10 years); Brief of the Solicitor General, *supra* note 12.

<sup>161</sup> See Ike Brannon & Logan Albright, *The Economic and Fiscal Impact of Repealing DACA*, CATO INST. (Jan. 18, 2017, 3:00 PM), <https://www.cato.org/blog/economic-fiscal-impact-repealing-daca>.

<sup>162</sup> *Id.*

<sup>163</sup> Principal and Response Brief of Appellees the Regents of the University of California et al. at 16, *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018) (No. 18-15068), 2018 WL 1414352.

<sup>164</sup> Transcript of Oral Argument, *supra* note 1, at 23–24.

<sup>165</sup> Logan Albright et al., *A New Estimate of the Cost of Reversing DACA* 8–9 (Cato Inst., Working Paper No. 49, 2018), <http://www.cato.org/sites/cato.org/files/pubs/pdf/working-paper-49.pdf>.

<sup>166</sup> Gustavo López & Jens Manuel Krogstad, *Key Facts About Unauthorized Immigrants Enrolled in DACA*, PEW RES. CTR. (Sept. 25, 2017), <http://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca>.

change would force the country to forgo *all* of these benefits for no reason.

Of course, for the probability that a disruptive court injunction does occur, most of the benefits discussed above would be forgone either way. Even then, a preemptive rescission of DACA would still cause forgone benefits compared to a disruptive injunction because of the time lag. Researchers have estimated that DACA recipients contributed \$41.7 billion to the domestic GDP in 2016.<sup>167</sup> For every year that elapses before a disruptive and costly injunction, about \$40 billion in benefits accrues to the economy.<sup>168</sup> If DHS had believed a court would likely issue a disruptive injunction the following week, then relatively few benefits would have been forgone and the decision would be easier to justify. But such an imminent injunction was highly unlikely. The Texas complaint had not yet been amended to include claims against DACA, delays are inevitable in litigation, and stays and appeals were almost certain,<sup>169</sup> so the benefits were likely to flow for a significant period.

## 2. *The Probability of a Disruptive Injunction*

After recognizing that voluntary rescission of DACA would result in significant forgone benefits, DHS should then have weighed them against the second and third factors: the probability of a disruptive injunction along with the higher costs of that injunction.

At first glance, the probability of a disruptive injunction in the case of DACA might appear high. After all, the Texas Attorney General was planning to amend the complaint to contest the legality of DACA in a forum unlikely to be sympathetic to the federal government. The pending case had been filed in the Brownsville Division in the Southern District of Texas, where it would be heard by Judge Hanen, who had ruled against DAPA in 2015 and had struck down multiple other policies promulgated by the Obama Administration.<sup>170</sup>

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<sup>167</sup> Jacqueline Varas & Usama Zafar, *Estimating the Economic Contributions of DACA Recipients*, AM. ACTION F. (Dec. 21, 2017), <https://www.americanactionforum.org/research/estimating-economic-contributions-daca-recipients>.

<sup>168</sup> Of course, a gradual wind-down would likely provide some of these benefits for the first six months. The benefits would then decline to zero over the next two years as DACA recipients would be unable to renew their status.

<sup>169</sup> See *infra* Section II.B.2 for an extensive discussion as to why this was highly unlikely.

<sup>170</sup> See *Texas v. United States*, 86 F. Supp. 3d 591, 676 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016); see also Molly Hennessy-Fiske, *U.S. Judge Andrew Hanen Has History of Opposing Obama Immigration Policies*, L.A. TIMES (Feb. 17, 2015, 6:10 PM), <https://www.latimes.com/nation/nationnow/la-na-immigration-lawsuit-hanen-20150217-story.html>. Actions challenging Obama Administration policies have often been filed in certain sparsely populated judicial divisions in Texas where few judges are on the bench, including the Brownsville Division of

But legal differences between DACA and DAPA and divergent factual circumstances made an adverse outcome less likely. The administrative record included no consideration of similarities and differences between the two programs, potential defenses to the possible litigation, or contrary rulings by other courts, among other basic considerations necessary to analyze the likelihood of a loss in court.<sup>171</sup> For example, because DACA concerned a smaller group of people than DAPA, even the Fifth Circuit's reasoning might have led to the conclusion that it did not violate the INA.<sup>172</sup> Indeed, courts examining the DACA rescission concluded that DACA was indeed lawful.<sup>173</sup> On the other hand, in the litigation that was eventually filed, Judge Hanen would hold that DACA violated both the procedural and substantive requirements of the APA,<sup>174</sup> so there was a real possibility that a court would come to this conclusion.

However, even if a court ruled DACA unlawful, the doctrine of laches might preclude it from ordering an injunction. This equitable doctrine holds that relief will be denied to "a plaintiff whose unexcused delay . . . would be prejudicial to the defendant."<sup>175</sup> As Judge Alsup of the Northern District of California noted in his opinion, the Agency had failed to consider this doctrine.<sup>176</sup> Indeed, even though Judge Hanen concluded that DACA violated the APA, he held that an

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the Southern District of Texas, where Judge Hanen sat until recently. See Alex Botoman, Note, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297, 302–05 (2018) (noting that Texas's challenges to DAPA/DACA II and to Title IX (on the issue of bathroom use by gender students) were filed (respectively) in the Brownsville Division of the Southern District of Texas, where there were two active judges, and the Wichita Falls Division of the Northern District of Texas, where there was one active judge); Mark Reagan, *Judge Moving to Spot in Houston*, BROWNSVILLE HERALD (Mar. 24, 2018), [https://www.brownsvilleherald.com/news/local/judge-moving-to-spot-in-houston/article\\_6ef9cb14-2fda-11e8-87e4-fbf71be240e9.html](https://www.brownsvilleherald.com/news/local/judge-moving-to-spot-in-houston/article_6ef9cb14-2fda-11e8-87e4-fbf71be240e9.html). Many others were filed in the Wichita Falls or Fort Worth Divisions of the Northern District of Texas, where Judge Reed O'Connor is either the only district judge who hears cases or the only judge who is not semiretired. See Manny Fernandez, *In Weaponized Courts, Judge Who Halted Affordable Care Act Is a Conservative Favorite*, N.Y. TIMES (Dec. 15, 2018), <https://www.nytimes.com/2018/12/15/us/judge-obamacare-reed-oconnor.html>.

<sup>171</sup> See *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 429–30 (E.D.N.Y. 2018).

<sup>172</sup> See *Texas v. United States*, 809 F.3d 134, 181–82 (5th Cir. 2015) (stating that because of DAPA's size and importance, Congress would not implicitly delegate policy decisions regarding it to an administrative agency).

<sup>173</sup> See *supra* notes 62–69 and accompanying text.

<sup>174</sup> See *Texas v. United States*, 328 F. Supp. 3d 662, 735 (S.D. Tex. 2018). After DHS's attempt to rescind DACA was halted by the courts, the Texas Attorney General filed suit in the Southern District of Texas as threatened. Eventually, Judge Hanen ruled that DACA violated substantive and procedural provisions of the APA, but did not issue an injunction because of the doctrine of laches. See *infra* notes 175–77 and accompanying text.

<sup>175</sup> *Russell v. Todd*, 309 U.S. 280, 287 (1940).

<sup>176</sup> *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1044 (N.D. Cal. 2018).

injunction was time-barred for this reason.<sup>177</sup> Because of the doctrine of laches, it was fairly likely that no disruptive injunction would materialize—and that is exactly what occurred.

Even if a court ordered an injunction, it would be unlikely to order an immediate and disruptive one. Courts have broad discretion to fashion equitable relief.<sup>178</sup> Ronald Levin has noted that courts embrace “a broad understanding of the remedial powers of federal courts in administrative law cases—even in the face of arguably contrary statutory directives.”<sup>179</sup> A judge could hardly fail to notice that, when the Fifth Circuit affirmed the injunction against DAPA, it had not yet gone into effect and there were no reliance interests.<sup>180</sup> In contrast, a disruptive end to DACA would cause concrete and profound harms.<sup>181</sup> In his opinion, Judge Bates of the District of the District of Columbia wrote that “[i]t seems doubtful that the [*Texas*] court would have preliminarily enjoined DACA instead of remanding it to the Department, perhaps without vacatur.”<sup>182</sup> Courts sometimes remand without vacating agency action if the deficiencies of the agency action are not serious and “the consequences of vacating may be quite disruptive.”<sup>183</sup> Remands without vacatur have been issued in the D.C. Circuit about three times per year since 2000,<sup>184</sup> and have been issued in the Fifth Circuit at least twice.<sup>185</sup>

<sup>177</sup> *Texas v. United States*, 328 F. Supp. 3d 662, 738 (“A delay in seeking an injunction has been viewed as a concession or an indication that the alleged harm does not rise to a level that merits an injunction.”).

<sup>178</sup> See, e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (holding that a court’s equitable discretion was not limited to “order of immediate cessation”); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (explaining that the essence of the equitable remedy is the power “to mould each decree to the necessities of the particular case”); *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939) (“[W]hile the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case.”).

<sup>179</sup> Ronald M. Levin, “*Vacation*” at *Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 *DUKE L.J.* 291, 323 (2003).

<sup>180</sup> See *Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015) (describing the harms of an injunction as “vague”), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016).

<sup>181</sup> See *supra* Section II.B.1.

<sup>182</sup> *NAACP v. Trump*, 298 F. Supp. 3d 209, 242 (D.D.C.), *adhered to on denial of reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018).

<sup>183</sup> *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 151 (D.C. Cir. 1993); see also STEPHANIE J. TATHAM, ADMIN. CONFERENCE OF THE U.S., *THE UNUSUAL REMEDY OF REMAND WITHOUT VACATUR* 5–13 (2014), <https://www.acus.gov/sites/default/files/documents/Remand%20Without%20Vacatur%20Final%20Report.pdf> (describing the evolution and application of the doctrine of remand without vacatur).

<sup>184</sup> Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 *COLUM. L. REV.* 253, 307 (2017).

<sup>185</sup> See *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (remanding without vacatur); *Chem. Mfrs. Ass’n v. EPA*, 870 F.2d 177, 236 (5th Cir. 1989) (same); see also TATHAM, *supra* note 183, at 27 n.166 & 167 (collecting cases); Richard J. Pierce, Jr.,

Alternatively, a court could strike down the program but delay its own order to allow the agency to remedy the legal error or to allow a period of transition. In ruling the Federal Election Commission (FEC) unconstitutional in *Buckley v. Valeo*, the Supreme Court delayed its order by thirty days to allow Congress to remedy the mistake.<sup>186</sup> In the agency context, then-Judge Scalia writing for a D.C. Circuit panel struck down an Interstate Commerce Commission rule for inadequate procedures but allowed it to remain in effect for ninety days “subject to whatever action the Commission may take within that time.”<sup>187</sup> Indeed, Judge Bates opted for a ninety-day delay of vacatur in this case to offer the Agency a chance to further explain its arguments in the administrative record.<sup>188</sup> In view of this precedent, even if it ruled DACA unlawful, the court might order something very much like the gradual wind-down the Agency itself favored.

When considering an injunction against a governmental agency, a reviewing court would keep in mind “the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs.”<sup>189</sup> Grounded in separation-of-powers concerns, this rule establishes that the court should defer to the government as to the scope of an injunction.<sup>190</sup> If the government believed that a voluntary rescission would be the least harmful way to end the program—as Acting Secretary Duke’s memorandum argued—the government would vigorously make this argument in court. To neglect to do so would be arbitrary, as it would dramatically increase the costs of the injunction for no discernible benefit.<sup>191</sup> Courts have held that an agency cannot artificially inflate the costs of an alternative option, thus “put[ting] a thumb on the scale by under-

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*Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 75–78 (1995) (discussing early remand-without-vacatur cases).

<sup>186</sup> 424 U.S. 1, 142–43 (1976). In other contexts, the Supreme Court has delayed an order by three months or more. *See, e.g.,* N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982) (staying for three months its invalidation of the jurisdictional provision as to bankruptcy courts to afford Congress an opportunity to remedy it).

<sup>187</sup> *Simmons v. ICC*, 757 F.2d 296, 300 (D.C. Cir. 1985).

<sup>188</sup> *See NAACP v. Trump*, 298 F. Supp. 3d 209, 245 (D.D.C.), *adhered to on denial of reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018) (explaining that remand without vacatur was a plausible remedy but could lead to “troubling humanitarian consequences” and opting instead to vacate the rescission and stay the order for ninety days).

<sup>189</sup> *Rizzo v. Goode*, 423 U.S. 362, 378–79 (1976) (quoting *Sampson v. Murray*, 415 U.S. 61, 83 (1974)).

<sup>190</sup> *See* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1683 (2004).

<sup>191</sup> *Cf.* Adam Cox et al., *A Primer on the DACA Rescission*, BALKINIZATION (Oct. 5, 2017), <https://balkin.blogspot.com/2017/10/a-primer-on-daca-rescission.html> (arguing that the rescission may be arbitrary because the Attorney General’s change of position itself caused the “risk” being used to justify the rescission).

valuing the benefits and overvaluing the costs.”<sup>192</sup> A court would likely defer to the government’s argument as to the appropriate scope of the injunction, particularly given deference to the executive on issues related to immigration.<sup>193</sup>

If the district court ordered a disruptive injunction—in spite of the government’s arguments to the contrary—the government would likely ask for a stay and appeal.<sup>194</sup> Appellate courts may stay district court decisions and modify equitable relief.<sup>195</sup> Of course, success on the merits and on the appropriate remedy might depend on the composition of the panel of circuit judges. Thomas Miles and Cass Sunstein have shown that agency action promulgated under the administration of a given president is more likely to be invalidated by panels composed of judges appointed by a president of the other political party.<sup>196</sup> Since DACA was enacted by President Obama, litigation risk might depend on how many judges in the Fifth Circuit were nominated by a Republican, as this might have some bearing on the likelihood that DACA would be upheld. Theoretically, an agency could refuse to comply—or “nonacquiesce”—to a lower court decision.<sup>197</sup> But agencies in the past have usually embraced the doctrine of nonacquiescence when subject to conflicting decisions by different circuits,<sup>198</sup> and an agency would be unlikely to ignore a decision on such a high-profile issue.

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<sup>192</sup> *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008) (holding that NHTSA must produce a balanced analysis of costs and benefits in the face of uncertainty); see *supra* notes 125–28 and accompanying text (providing further citations supporting the proposition that cost-benefit analysis must be fair).

<sup>193</sup> See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018) (noting the “deference traditionally accorded the President” on immigration and national security issues).

<sup>194</sup> See 5 U.S.C. § 705 (2012) (stating that reviewing courts can grant a stay “to the extent necessary to prevent irreparable injury”). Again, the agency must assume it will litigate as thoroughly as it can. It cannot base its decisionmaking on the assumption that it will make poor tactical choices or errors in litigation that will cause the DACA rescission to be more damaging than it otherwise would be. See *supra* note 192 and accompanying text.

<sup>195</sup> See, e.g., *McKinney ex rel. NLRB v. Creative Vision Res., L.L.C.*, 783 F.3d 293, 298 (5th Cir. 2015) (overturning a preliminary injunction issued several years after the allegedly wrongful conduct).

<sup>196</sup> See Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 767 (2008) (finding that judges appointed by a president of a given political party vote to invalidate agency action promulgated by an agency under a president of the *other* party approximately twenty percent more often).

<sup>197</sup> See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 683 (1989) (describing nonacquiescence and arguing that it should be allowed “as an interim measure . . . while federal law on the subject remains in flux”).

<sup>198</sup> See, e.g., *id.* at 694 (describing the Social Security Administration’s nonacquiescence policy).



Ultimately, in a case concerning an injunction against DACA, litigation risk would turn on Supreme Court review. While the Supreme Court only rarely grants certiorari, it does so much more frequently when it is requested by the government.<sup>199</sup> On a particularly important agency policy, the Supreme Court would be highly likely to hear the case.<sup>200</sup> In fact, the Supreme Court might hear the case even sooner, as the government could pursue fast-track review through mandamus or certiorari before judgment.<sup>201</sup> Particularly if the remedy were disruptive, the Supreme Court would review so as not to let a circuit panel settle a matter of nationwide importance. The injunction against DAPA elicited exactly this sort of review in 2016,<sup>202</sup> and there is every reason to think an injunction against DACA would merit the same treatment.

The Supreme Court would be unlikely to sanction a disruptive end to DACA even if it agreed with the lower courts on the merits. Separate from its concerns about the law and proper administration of remedies, the Court is also concerned with its own legitimacy,<sup>203</sup> and the Court would be disinclined to affirm a chaotic ruling by a lower court. Therefore, on the almost inevitable appeal, the Supreme Court would be unlikely to uphold a disruptive injunction.<sup>204</sup> Thus, to argue that there is a high probability that a disruptive injunction will go into effect, an agency would have to argue it believes the Supreme Court will affirm a disruptive remedy—an odd contention that would strain credulity in most cases.<sup>205</sup>

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<sup>199</sup> See Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 408 (2004) (noting that the Court grants over fifty percent of the Solicitor General's petitions for certiorari but only three percent of petitions by other parties).

<sup>200</sup> See *id.* at 408, 401 n.62.

<sup>201</sup> Such procedural mechanisms have been attempted with greater frequency during the Trump Administration. See Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 124 (2019) (detailing this trend); Joshua Matz, *The Justice Department's New Tactic: Leapfrog Judicial Process and Go Straight to the Supreme Court*, WASH. POST (Nov. 12, 2018, 1:52 PM), [https://www.washingtonpost.com/opinions/the-justice-departments-new-tactic-leapfrog-judicial-process-and-go-straight-to-the-supreme-court/2018/11/12/e7a61004-e38a-11e8-b759-3d88a5ce9e19\\_story.html](https://www.washingtonpost.com/opinions/the-justice-departments-new-tactic-leapfrog-judicial-process-and-go-straight-to-the-supreme-court/2018/11/12/e7a61004-e38a-11e8-b759-3d88a5ce9e19_story.html).

<sup>202</sup> See *United States v. Texas*, 136 S. Ct. 2271 (2016).

<sup>203</sup> See, e.g., Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html> (noting Chief Justice Roberts's unprecedented public statement that the "independent judiciary is something we should all be thankful for").

<sup>204</sup> And even if somehow the Court upheld an end to DACA, such a decision would not have occurred for at least a year and perhaps more—leaving plenty of time for benefits of the DACA program to accrue in the meantime.

<sup>205</sup> In accepting the litigation risk argument, ironically, a judge must defer to an agency belief that judges will be flagrantly *unreasonable* in their administration of remedies. One

### 3. *The Costs of a Disruptive Injunction*

The probability of a disruptive injunction must be viewed in light of the anticipated cost of that injunction. A disruptive injunction, if somehow affirmed, would cause additional harms and “the potential for chaos.”<sup>206</sup> 700,000 DACA recipients’ work authorizations would lapse immediately. This could cause the economic dislocation to occur more suddenly than would occur in a gradual wind-down. Having lost work authorization and deferred action so suddenly, many would turn to unreported employment, or would struggle to pay rent or buy essentials. The disruptiveness of this event would likely have much more severe ripple effects than if it were spaced out over a longer period. Businesses that employed DACA recipients would encounter significant economic disruptions as they would lack the time and forewarning to prepare and train new employees. Evictions and homelessness might increase more precipitously due to the disruptive injunction. It would also break apart families.<sup>207</sup> Additionally, a sudden injunction would have dramatic negative effects on the well-being of DACA participants and their communities.<sup>208</sup>

By contrast, a gradual wind-down would allow some DACA recipients to renew for an additional two years, and others would be able to work legally until their two-year permit ran out.<sup>209</sup> But these DACA recipients, knowing when their deferred status would expire, might nonetheless be able to prepare for this eventuality. Similarly, the family members and employers of DACA recipients would have the benefit of foresight: Knowing when deferred action would lapse would allow them to make whatever arrangements they could. In addition to having reduced monetary costs, a gradual wind-down

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might therefore hypothesize that the judges most likely to accept the litigation risk argument are those with low self-esteem.

<sup>206</sup> *CASA de Md. v. U.S. Dep’t of Homeland Sec.*, 284 F. Supp. 3d 758, 766 (D. Md. 2018), *aff’d in part, vacated in part, rev’d in part*, 924 F.3d 684 (4th Cir. 2019).

<sup>207</sup> See Anna Maria Barry-Jester, *The End of DACA Will Ripple Through Families and Communities*, FIVETHIRTYEIGHT (Sept. 6, 2017, 6:06 PM), <https://fivethirtyeight.com/features/the-end-of-daca-will-ripple-through-families-and-communities> (noting that a 2015 survey indicates that a quarter of DACA participants have a child who is a U.S. citizen and sixty percent have a sibling who is a U.S. citizen).

<sup>208</sup> See Tiziana Rinaldi, *DACA Recipients Saw Their Mental Health Improve. Now, Advocates Fear Its End Will Have the Opposite Effect*, PUB. RADIO INT’L (Nov. 22, 2017, 7:00 AM), <https://www.pri.org/stories/2017-11-22/study-found-daca-improved-mental-health-its-recipients-which-why-researchers>; Dinah Wiley, *New Study Findings on Mixed-Status Immigrant Families: Threat of Family Separation Affects Health of the Children*, GEO. HEALTH POL’Y INST. (June 13, 2013), <https://ccf.georgetown.edu/2013/06/13/new-study-findings-on-mixed-status-immigrant-families-threat-of-family-separation-affects-health-of-the-children>.

<sup>209</sup> Lind, *supra* note 49.

would be more “humane” than the alternative of a disruptive injunction.<sup>210</sup> Rational agency decisionmaking includes considerations of nonquantifiable benefits and costs,<sup>211</sup> and the forewarning to DACA recipients that their deferred status would end could offer benefits in the form of temporary peace of mind and somewhat reduced fear.

While the costs of a disruptive injunction are likely to be at least somewhat higher than that of a gradual rescission, they are unlikely to be that high when multiplied by the probability that a such disruptive injunction would be upheld by the Supreme Court. Furthermore, a gradual wind-down of DACA would not forestall many of the costs that would come with an injunction. For example, even in the event of a wind-down, some employers might fire DACA recipients prior to the lapse of their work permits, and the threat of these firings could introduce uncertainty and doubt and might cause additional costs to productivity. Regardless, the costs of a disruptive injunction multiplied by the probability of that injunction are certainly dwarfed when compared against the \$40 billion in annual forgone benefits prior to the disruptive injunction.

#### 4. *Contrary Litigation Risk*

Finally, an agency analyzing whether litigation risk might justify action logically must consider contrary litigation risk. As Judge Wardlaw of the Ninth Circuit asked the Deputy Assistant Attorney General in oral argument: “Well isn’t that just trading one set of litigation for another?”<sup>212</sup> As Judge Wardlaw implied, *contrary* litigation risk must be considered. If there is a significant chance that the agency’s preemptive rescission will itself be enjoined, that would further discount the rationality of the agency’s preferred solution. First, and most obviously, it could decrease the benefits of the action, as the preemptive action would be less likely to solve the problem it is trying to solve. Second, it could increase the costs by creating additional problems. That is, the agency might be introducing *more* regulatory and economic uncertainty.

<sup>210</sup> Appellants’ Ninth Circuit Opening Brief, *supra* note 3, at 36.

<sup>211</sup> See Exec. Order No. 12,866 § 6(a)(3)(B)(ii), 58 Fed. Reg. 51,735 (Sept. 30, 1993), reprinted in 5 U.S.C. § 601 app. at 557–61 (1994) (requiring an analysis of costs “together with, to the extent feasible, a quantification of those costs” (emphasis added)); OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, at 3 (2003), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf> (“When there are important non-monetary values at stake, [the agency] should also identify them in [its] analysis.”).

<sup>212</sup> Oral Argument at 17:55, *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018) (No. 18-15068), [https://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000013676](https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000013676).

On at least one occasion, a court has held that citing litigation risk while failing to consider contrary litigation risk is arbitrary and capricious. In *Organized Village of Kake v. Department of Agriculture*,<sup>213</sup> the Department of Agriculture claimed—as a subsidiary rationale—that “litigation over the last two years” against a rule could help justify modifying it.<sup>214</sup> The Ninth Circuit sitting en banc dismissed this argument, noting that the modification “predictably led to [another] lawsuit.”<sup>215</sup> In concluding that the decision was arbitrary and capricious, the court explained that “[a]t most, the Department deliberately traded one lawsuit for another.”<sup>216</sup>

New agency action will typically pose *more* litigation risk than the status quo because changes are more likely to be litigated. Incumbents who stand to lose out from a regulatory change will always have incentive to litigate, whereas those who would be favored by the new policy may not be as involved and may not even have standing.<sup>217</sup> Of course, in select cases, the status quo may be unstable and subject to more litigation risk than the change. Here, however, contrary litigation was a virtual certainty, as California Attorney General Xavier Becerra and attorneys general of nineteen other states had vowed “to defend DACA by all appropriate means.”<sup>218</sup> Thus, DHS needed to consider and analyze that contrary litigation risk.

The four elements discussed above are essential to rational consideration of litigation risk. The forgone benefits should be weighed against the probability of an injunction and the costs of an injunction—along with contrary litigation risk. In rescinding DACA, the Agency did not properly inquire into these elements; had it done so, it would likely have concluded that the argument was irrational here.

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<sup>213</sup> 795 F.3d 956, 967 (9th Cir. 2015) (en banc) (quoting Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136, 75,137 (Dec. 30, 2003)).

<sup>214</sup> Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136, 75,137 (Dec. 30, 2003).

<sup>215</sup> *Kake*, 795 F.3d at 970.

<sup>216</sup> *Id.*

<sup>217</sup> See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 (1992) (holding that the plaintiffs lacked standing in part because they had only a “generally available grievance about government”); Bagley, *supra* note 100, at 365 (noting that those who will certainly be harmed by a change will always have standing but that those who merely might be harmed may not); Amanda Leiter, *Substance or Illusion? The Dangers of Imposing a Standing Threshold*, 97 GEO. L.J. 391, 392–93 (2009) (same); see also RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 159–61 (2008) (noting the distinct hurdles pro- and anti-regulatory plaintiffs face in challenging agency action).

<sup>218</sup> Letter from Xavier Becerra, Cal. Att’y Gen., et al., to Donald J. Trump, President of the U.S., *supra* note 45, at 3–4.

### III

#### LITIGATION RISK AND AGENCY ACCOUNTABILITY

This Part argues that important principles of administrative law support the idea that courts should be skeptical of litigation risk arguments. Section III.A argues that careful scrutiny of the litigation risk argument is necessary to ensure agency accountability. Section III.B argues that remand can force an agency to produce a policy justification.

##### A. *The Argument May Undermine Accountability*

In addition to being arbitrary in many cases, the litigation risk argument may undermine agency accountability. Careful arbitrariness review of agency reasons can make manifest the trade-offs inherent in agency action and enhance transparency and political accountability.<sup>219</sup> Even though arbitrary and capricious review does not involve inquiry into an agency's "true" motives, the DACA case shows how arbitrary and capricious review can force transparency.

The government has rejected the claim that it needs to consider elements of litigation risk along the lines of those discussed *supra*. In its Ninth Circuit brief, for example, the government argued that neither the APA nor any past court has required an agency to "provide the equivalent of a bench memo setting out the subsidiary legal arguments to be made by each side in the course of protracted litigation, with an accompanying evaluation of the likelihood of success in various district courts, the courts of appeals, and the Supreme Court."<sup>220</sup> But the APA and prior case law did not specifically require these considerations only because agencies have never tried to justify regulatory change entirely on this basis. If the argument is to be taken seriously, these considerations are indispensable. Otherwise, judicial review would be *pro forma*, and the court would barely be reviewing anything, thus flouting the APA.<sup>221</sup>

By deferring too much to the litigation risk argument, judges would not only rubber stamp potentially irrational policies, but they would also permit the evasion of political accountability. If the litigation risk argument is insufficiently scrutinized, agencies would have a

<sup>219</sup> Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 149 (2012); *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001) (arguing that presidential leadership of the administrative state enhances transparency and establishes an electoral link between the public and the bureaucracy).

<sup>220</sup> Appellants' Ninth Circuit Opening Brief, *supra* note 3, at 31.

<sup>221</sup> *See* 5 U.S.C. § 706(2)(A) (2012) (providing that a court "shall . . . set aside" arbitrary and capricious agency action).

loophole through which they could implement regulatory change without adequately explaining themselves. As discussed earlier, an agency typically justifies a change vis-à-vis a prior administration's regulatory policy either as a discretionary policy choice or as a legal conclusion that the prior policy was not permitted by law or as a discretionary policy choice.<sup>222</sup> Both types of argument have established standards of review—legal conclusions under the *Chevron* framework of statutory analysis and discretionary policy choices under arbitrary and capricious review.<sup>223</sup> Litigation risk cannot be allowed as a way for agencies to circumvent these standards and evade responsibility.

In the two-and-a-half years since it announced rescission, the Agency has neither provided sufficient detail supporting its original reasoning nor accepted a formal remand and issued a new decision.<sup>224</sup> As discussed *supra*, Judge Bates of the D.C. district court gave the Agency ninety days to give detail as to why it had believed that DACA violated the statute or to issue a new decision on the basis of policy reasons.<sup>225</sup> But Secretary Nielsen's supplementary memorandum provided relatively little new detail on the original arguments.<sup>226</sup> Further, though it did not purport to issue a new agency action, it arguably introduced a new policy argument.<sup>227</sup> The Nielsen Memorandum thus elicited a rather strident second opinion from Judge Bates.<sup>228</sup>

It might seem odd that the Agency neither provided substantial further explanation nor issued an official new decision. As discussed before, essentially no one argues that the Department cannot change its legal interpretation on whether the statutory provisions in the INA permit the DACA program.<sup>229</sup> Similarly, the Agency could have offered discretionary policy reasons. Such policy change is much of what agencies do in the first years of a new presidential administration, and even DACA's defenders are in universal agreement that

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<sup>222</sup> See *supra* Section I.B.

<sup>223</sup> See *supra* Section I.B.

<sup>224</sup> Brief of the State Respondents, *supra* note 54, at 49.

<sup>225</sup> *NAACP v. Trump*, 298 F. Supp. 3d 209, 249 (D.D.C. 2018).

<sup>226</sup> See Supplementary DACA Rescission Memorandum, *supra* note 13 (arguing that the rescission was justified "by threat of burdensome litigation that distracts from the agency's work").

<sup>227</sup> See *id.* (arguing that the decision is justified by the need "to project a message that leaves no doubt regarding the clear, consistent, and transparent enforcement of the immigration laws against all classes and categories of aliens").

<sup>228</sup> See *NAACP*, 315 F. Supp. 3d at 473 ("The Court has already once given DHS the opportunity to remedy these deficiencies—either by providing a coherent explanation of its legal opinion or by reissuing its decision for bona fide policy reasons . . . so it will not do so again.").

<sup>229</sup> See *supra* notes 55–61 and accompanying text.

DHS has the ability to set its own discretionary immigration enforcement priorities.<sup>230</sup> Few courts would hold that the law requires that a program established by guidance document by one president must be maintained through all future changes of administration.

Some have argued that the Agency's decisions can be explained by the desire to avoid "institutional blame" for rescinding DACA.<sup>231</sup> On this view, the Agency did not want to go on the record saying "we believe DACA is illegal and are ending it" or "we do not want to do DACA" because they did not want to own the issue politically.<sup>232</sup> To rebut this suggestion, the Solicitor General insisted during oral argument that "[w]e own this."<sup>233</sup> But the Agency has *not* taken the public position that it wants to pursue this deeply unpopular policy. The Solicitor General's statement to an audience of nine Justices during oral argument does not substitute for a statement to the public. A remand would force the agency to "stand[] up and tell[] the country that we have decided to terminate this important and popular program because we don't like it, and even if that weren't reviewable in a court of law, it would be reviewable in a court of public opinion."<sup>234</sup>

Not only could litigation risk allow agencies to evade blame for unpopular or politically controversial policies, but it specifically allows them to pass the blame onto *courts*. In rescinding DACA, the Department invoked hypothetical future court behavior as a rationale to preemptively undertake a policy that the Agency implies courts are likely to *make* them do in the future. In this way, judges have a vested interest in careful scrutiny of the litigation risk argument: If they

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<sup>230</sup> See, e.g., Cox et al., *supra* note 191 ("[DACA] has been a discretionary policy based on judgments about how to allocate scarce enforcement resources and how to exercise the Secretary's work-authorization power. Therefore DHS thus could, for example, rescind DACA based upon the Secretary's view that it is an unwise or counterproductive policy."). Daniel Hemel stands largely alone in arguing that the Administration could not rescind the guidance document without going through informal rulemaking. See Daniel Hemel, *Trump Can't Revoke DACA Without Going Through Notice and Comment*, TAKE CARE BLOG (Sept. 5, 2017), <https://takecareblog.com/blog/trump-can-t-revoke-daca-without-going-through-notice-and-comment>.

<sup>231</sup> See David S. Rubenstein, *Immigration Blame*, 87 FORDHAM L. REV. 125, 177–78 (2018) ("The very anticipation of being blamed, it seems, had some effect on the politics and policies surrounding DACA's suspension.").

<sup>232</sup> See Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 574 (2018) (suggesting that the Administration wished to avoid the political liability caused by "brutal scenes of children, teenagers, and young adults being deported to countries they may not even remember").

<sup>233</sup> Transcript of Oral Argument, *supra* note 1, at 89.

<sup>234</sup> Oral Argument at 34:25, *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018), [https://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000013676](https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000013676) (statement of Michael Mongan, Deputy Solicitor General of California).

rubber stamp this argument, they themselves could be blamed for causing a whole host of policy decisions that they did not in fact cause. Lax review of the litigation risk argument could therefore rope the courts further into the political fray.

### *B. Courts Should Remand to Force Transparency*

As suggested above, the fact that the litigation risk argument fails to justify the rescission of DACA does not mean that the Trump Administration lacks the power to rescind it. It cannot be that simply because an executive program has been in place for a long time—or that hundreds of thousands people rely on it—that the program cannot be ended legally. In 2015, Adam Cox and Cristina Rodríguez noted that “[a] single decision of a future administration could reverse” the DACA program.<sup>235</sup>

To rescind DACA legally, the Trump Administration could issue a new decision, building on the couple of conclusory sentences in the Nielsen Memorandum purporting to be a policy argument.<sup>236</sup> DHS could state that it is discretionarily rescinding DACA because, in providing undocumented immigrants with deferred removal and work authorization, the program incentivized them to remain in the country unlawfully. After acknowledging that DACA has economic benefits, DHS could plausibly argue that, in sanctioning the unlawful residence of some 700,000 people, DACA made it more difficult for the Agency to enforce immigration law. Further, DHS could argue that rescinding DACA would help to deter future illegal immigration, a key goal of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.<sup>237</sup> To be sure, this argument may not be appealing and can (and probably should) be criticized on normative grounds. But it would be reasonable on its own terms.

If DHS could get its way merely by writing a different memorandum, what is gained from courts holding the line on the rationality of the litigation risk argument? One answer might simply be that this is the law: Arbitrary and capricious review should be understood to require scrutiny of agency arguments on their own terms. Another answer is that remand forces the Agency to be more transparent with

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<sup>235</sup> Cox & Rodríguez, *supra* note 26, at 208.

<sup>236</sup> See Supplementary DACA Rescission Memorandum, *supra* note 13.

<sup>237</sup> See H.R. REP. NO. 104-469, pt. 1, at 1 (1996) (stating that the Illegal Immigration Reform and Immigrant Responsibility Act was designed to “improve deterrence of illegal immigration to the United States by increasing border patrol and investigative personnel, by increasing penalties for alien smuggling and for document fraud, by reforming exclusion and deportation law and procedures, by improving the verification system for eligibility for employment”).



the public. And it is at least possible that the Agency might, upon looking at the record again and considering the issues more closely, come out a different way.

But many criticize the argument that agency remand forces transparency or expertise. Justice Breyer channeled one objection during oral argument when he recalled Justice Fortas's remark that judicial review of agency action should not turn into "a ping-pong game" between courts and agencies.<sup>238</sup> Along these lines, Rick Hills has argued that remanding the DACA rescission to DHS would not result in real gains in transparency or political accountability.<sup>239</sup> He wrote that "[t]he 'distance' between the 'legal' theory announced in Sessions's letter and the 'policy' position that might be elicited after remand is just too trivial to be worth the effort."<sup>240</sup> In fact, some remands may actually *undermine* transparency, providing an agency with instructions on how to fashion a more plausible alternative rationale.<sup>241</sup> As David Barron has noted, an agency can simply "recast its position in language that sounds sufficiently administrative and apolitical to survive the next round of judicial scrutiny."<sup>242</sup>

Forcing an agency to explain its "real" reasons may have diminishing marginal returns, and courts face the perennial question of how much explanation is enough.<sup>243</sup> During oral argument, Justice Kavanaugh pointed to the Agency's supplementary memorandum and suggested that, "there's already been, in effect, a remand."<sup>244</sup> Cox notes that whether one embraces remand for the sake of accountability depends on thorny empirical questions as to "how often agencies will be inclined to try to avoid political responsibility . . . by hiding behind arguments that the law has tied the agency's hands [and] about

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<sup>238</sup> *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969); see Transcript of Oral Argument, *supra* note 1, at 82 (paraphrasing this remark).

<sup>239</sup> Rick Hills, Comment to *The Legality of Rescinding DACA with Minimal Reason-Giving: When Are Incomplete Legal Arguments "Arbitrary and Capricious"?*, PRAWFSBLAWG (Jan. 11, 2018, 8:33 PM), <https://prawfsblawg.blogs.com/prawfsblawg/2018/01/the-legality-of-rescinding-daca-with-minimal-reason-giving-when-are-incomplete-legal-arguments-arbitrary-and-caprici.html>.

<sup>240</sup> *Id.*

<sup>241</sup> See Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 725 (2016) (stating that expertise forcing can reduce transparency by incentivizing agencies to justify what are actually political decisions with a technical rationale).

<sup>242</sup> David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1140 (2008).

<sup>243</sup> See generally Bagley, *supra* note 184, for an argument that courts should remand far less often even when they find that agencies inadequately explained their actions. See also *id.* at 292–96 (critiquing overly absolutist readings of the *Chenery* rule).

<sup>244</sup> Transcript of Oral Argument, *supra* note 1, at 83.

how effective this strategy is likely to be at actually insulating the relevant political actors.”<sup>245</sup>

Though criticisms of remand have merit, the litigation risk argument—like any other argument—must be reviewed *somehow*. Ultimately, if it is not analyzed with reference to something akin to the four elements in Section II.B, it is not really being reviewed at all.

#### CONCLUSION

Litigation risk has long had an implicit role in agency decision-making, and it is appropriate for an agency to anticipate and consider judicial behavior in making regulatory decisions. Furthermore, as federal courts issue more nationwide injunctions to halt executive action, consideration of litigation risk is of increasing importance. But, at least if litigation risk is a *main* justification for action, the agency must take a “hard look” at it. Reasonable consideration of litigation risk requires examining four key elements: the benefits that would be forgone by the proposed regulatory action, the probability of a disruptive injunction, the cost of that disruptive injunction, and contrary litigation risk. These elements must be considered for the argument to be rational. Because DHS failed to consider any of these elements, its rescission of DACA was arbitrary and capricious.

Overly deferential review of the litigation risk argument may allow agencies to evade responsibility for their policy decisions—and to do so by passing the blame onto courts. It thus risks roping the judiciary even further into the political fray. Courts must be wary when agencies use cursory predictions of litigation risk to justify their decisions.

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<sup>245</sup> Hills, *supra* note 239.