9-13-2019

Section 4: Immigration Law

Institute of Bill of Rights Law, William & Mary Law School

IV. Immigration Law

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

Ruling Below: *Regents of the Uni. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018).

Overview: This is a case concerning whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable; and whether DHS's decision to wind down the DACA policy is lawful. The petitioners move to appeal the orders of the district court denying their motions to dismiss for lack of jurisdiction and for failure to state a claim.

Issue: (1) Whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable; and (2) whether DHS's decision to wind down the DACA policy is lawful.

REGENTS OF THE UNIVERSITY OF CALIFORNIA; Janet Napolitano, in her official capacity as President of the University of California, *Plaintiffs-Appellees*

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; Kristjen Nielsen, in her official capacity as Acting Secretary of the Department of Homeland Security, *Defendants- Appellants*

United States Court of Appeals, Ninth Circuit

Decided on May 15, 2018

[Excerpt; some citations and footnotes omitted]

WARDLAW, *Circuit Judge*:

It is no hyperbole to say that Dulce Garcia embodies the American dream. Born into poverty, Garcia and her parents shared a San Diego house with other families to save money on rent; she was even homeless for a time as a child. But she studied hard and excelled academically in high school. When her family could not afford to send her to the top university where she had been accepted, Garcia enrolled in a local community college and ultimately put herself through a four-year university, where she again excelled while working full-time as a legal assistant. She then was awarded a scholarship that, together with her mother's life savings, enabled her to fulfill her longstanding dream of attending and graduating from law school. Today, Garcia maintains a thriving legal practice in San Diego, where she represents members of underserved communities in civil, criminal, and immigration proceedings.

On the surface, Dulce Garcia appears no different from any other productive—indeed, inspiring—young American. But one thing sets her apart. Garcia's parents brought her to this country in violation of United States immigration laws when she was four years old. Though the United States of America is the only home she has ever known, Dulce Garcia is an undocumented immigrant.

Recognizing the cruelty and wastefulness of deporting productive young people to countries with which they have no ties, the Secretary of Homeland Security announced a policy in 2012 that would provide some relief to individuals like Garcia, while allowing our communities to continue to benefit from their contributions. Known as Deferred Action for Childhood Arrivals, or DACA, the program allows those noncitizens who unwittingly entered the United States as children, who have clean criminal records, and who meet various educational or military service requirements to apply for two-year renewable periods of deferred action—a revocable decision by the government not to deport an otherwise removable person from the country. DACA also allows recipients to apply for authorization to work in this country legally, paying taxes and operating in the aboveground economy. Garcia, along with hundreds of thousands of other young people, trusting the government to honor its promises, leapt at the opportunity.

But after a change in presidential administrations, in 2017 the government moved to end the DACA program. Why? According to the Acting Secretary of Homeland Security, upon the legal advice of the Attorney General, DACA was illegal from its inception, and therefore could no longer continue in effect. And after Dulce Garcia—along with other DACA recipients and affected states, municipalities, and organizations—challenged this conclusion in the federal courts, the government adopted the position that its fundamentally legal determination that DACA is unlawful is unreviewable by the judicial branch.

With due respect for the Executive Branch, we disagree. The government may not simultaneously both assert that its actions are legally compelled, based on its interpretation of the law, and avoid review of that assertion by the judicial branch, whose "province and duty" it is "to say what the law is." The government's decision to rescind DACA is subject to judicial review. And, upon review, we conclude that plaintiffs are likely to succeed on their claim that the rescission of DACA—at least as justified on this record—is arbitrary, capricious, or otherwise not in accordance with law. We therefore affirm the district court's grant of preliminary injunctive relief.

I.

A. History of Deferred Action

The central benefit available under the DACA program is deferred action. Because much of this dispute revolves around the legitimacy of that practice, we begin by reviewing the Executive Branch's historical use of deferred action.

The basic concept is a simple one: deferred action is a decision by Executive Branch officials not to pursue deportation

proceedings against an individual or class of individuals otherwise eligible for removal from this country.

Unlike most other forms of relief from deportation, deferred action is not expressly grounded in statute. It arises instead from the Executive's inherent authority to allocate resources and prioritize cases. As such, recipients of deferred action "enjoy no formal immigration status." But despite its non-statutory origins, Congress has historically recognized the existence of deferred action in amendments to the Immigration and Nationality Act (INA), as well as other statutory enactments. The Supreme Court has also recognized deferred action by name, describing the Executive's "regular practice (which ha[s] come to be known as 'deferred action') of exercising discretion for humanitarian reasons or simply for its own convenience." Thus, "it is well settled that the Secretary [of Homeland Security] can exercise deferred action."

Official records of administrative discretion in immigration enforcement date at least back to the turn of the twentieth century, not long after the enactment of the nation's first general immigration statute in 1882. A 1909 Department of Justice circular regarding statutorily authorized denaturalization instructed that "as a general rule, good cause is not shown for the institution of proceedings . . . unless some substantial results are to be achieved thereby in the way of betterment of the citizenship of the country."

The government's exercise of deferred action in particular first came to light in the 1970s, as a result of Freedom of Information Act litigation over the government's efforts to deport John Lennon and Yoko Ono, apparently based on Lennon's "British conviction for marijuana possession." Then known as "nonpriority status," the practice had been observed in secret within the former Immigration and Naturalization Service (INS) since at least the 1950s, but INS officials had publicly denied its existence. After the Lennon case revealed the practice, the INS issued its first public guidance on the use of deferred action, stating that "[i]n every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for nonpriority." Although the 1975 guidance was rescinded in 1997, DHS officials continue to apply the same humanitarian factors in deciding whether to grant an individual deferred action.

In addition to case-by-case adjudications, the Executive Branch has frequently applied deferred action and related forms of discretionary relief programmatically, to entire classes of otherwise removable noncitizens. Indeed, the Congressional Research Service has compiled a list of twenty-one such "administrative directives on blanket or categorical deferrals of deportation" issued between 1976 and 2011.

To take one early example, in 1956 President Eisenhower extended immigration parole to over thirty thousand Hungarian refugees who were otherwise unable to immigrate to the United States because of restrictive quotas then in existence. The power to parole—that is, to allow a noncitizen physically to enter

the country, while treating that person as "at the border" for purposes of immigration law—is established by statute, but the version of the INA in existence when President Eisenhower acted did not explicitly authorize programmatic exercises of the parole power. Subsequent presidents made use of similar categorical parole initiatives. Wadhia.

Another salient example is the Family Fairness program, established by the Reagan Administration and expanded under President George H.W. Bush. The Immigration Reform and Control Act of 1986 (IRCA) had provided a pathway to legal status for hundreds of thousands of undocumented noncitizens, but did not make any provision for their close relatives unless those individuals separately qualified under the Act's criteria. President Reagan's INS Commissioner interpreted IRCA not to authorize immigration benefits for anyone outside the statutory criteria, but nevertheless exercised executive discretion to defer the deportation of the minor children of noncitizens legalized under the statute. And in 1990, the INS instituted "significant liberalizations" of the policy by granting one-year periods of extended voluntary departure to children and spouses of individuals legalized under IRCA who could establish admissibility, continuous residency, and a clean criminal record. Contemporary estimates by INS officials of the number of people potentially eligible ranged as high as 1.5 million. Extended voluntary departure, the mechanism through which these individuals were allowed to remain in the United States is, like deferred action, a creature of executive discretion not specifically authorized by statute.

Since then, the immigration agency has instituted categorical deferred action programs for self-petitioners under the Violence Against Women Act; applicants for T and U visas (which are issued to victims of human trafficking and of certain crimes, respectively); foreign students unable to fulfill their visa requirements after Hurricane Katrina; and widowed spouses of United States citizens who had been married less than two years. None of these deferred action programs was expressly authorized by statute at the time they were initiated.

B. The DACA Program

DACA was announced in a June 15, 2012, memorandum from Secretary of Homeland Security Janet Napolitano, entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children." Secretary Napolitano explained that the nation's immigration laws "are not designed . . . to remove productive young people to countries where they may not have lived or even speak the language," especially where "many of these young people have already contributed to our country in significant ways," and, because they were brought here as children, "lacked the intent to violate the law." She therefore determined that "[p]rosecutorial discretion, which is used in so many other areas, is especially justified here."

The Napolitano memorandum thus laid out the basic criteria of the DACA program, under which a noncitizen will be considered for a grant of deferred action if he or she:

• came to the United States under the age of sixteen;

• has continuously resided in the United States for at least five years preceding [June 15, 2012] and is present in the United States on [June 15, 2012];

• is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;

• has not been convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses, nor otherwise poses a threat to national security or public safety; and

• is not above the age of thirty [on June 15, 2012].

DACA applicants must submit extensive personal information to DHS, along with fees totaling nearly $500. Applicants also submit to biometric screening in which they are photographed and fingerprinted, enabling extensive biographical and biometric background checks. If those checks come back clean, each application is then evaluated for approval by DHS personnel on a case-by-case basis.

If approved into the DACA program, an applicant is granted a renewable two-year term of deferred action—again, "a form of prosecutorial discretion whereby the Department of Homeland Security declines to pursue the removal of a person unlawfully present in the United States." In addition to the deferral of removal itself, pre-existing DHS regulations allow all deferred-action recipients to apply for employment authorization, enabling them to work legally and pay taxes. Indeed, "DACA recipients are *required* to apply for employment authorization, in keeping with the Executive's intention that DACA recipients remain 'productive' members of society." Finally, DHS does not consider deferred-action recipients, including those benefitting from DACA, to accrue "unlawful presence" for purposes of the INA's reentry bars.

In an attempt to build on the success of the DACA program, in 2014 Secretary of Homeland Security Jeh Johnson issued a separate memorandum that both announced the related Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA), which allowed deferred action for certain noncitizen parents of American citizens and lawful permanent residents, and expanded DACA by (1) removing the age cap, (2) extending the term of deferred-action and related work-authorization grants from two to three years, and (3) moving up the cutoff date by which an applicant must have been in the United States to January 1, 2010. Twenty-six states challenged this extension in federal court, arguing that DAPA is unconstitutional. All of the policies outlined in the Johnson memorandum were enjoined nationwide in a district court order upheld by the Fifth Circuit and affirmed by an equally divided Supreme Court. The original DACA program remained in effect.

In 2017, a new presidential administration took office, bringing with it a change in immigration policy. On February 20, 2017,

then-Secretary of Homeland Security John Kelly issued a memorandum that set out the administration's new enforcement priorities, stating that "the Department no longer will exempt classes or categories of removable aliens from potential enforcement." However, the memorandum explicitly left DACA and DAPA in place. In a second memorandum issued June 15, 2017, after "consider[ing] a number of factors, including the preliminary injunction in the [*Texas*] matter, the ongoing litigation, the fact that DAPA never took effect, and our new immigration enforcement priorities," Secretary Kelly rescinded DAPA as an "exercise of [his] discretion."

Then, on June 28, 2017, Texas Attorney General Ken Paxton wrote to United States Attorney General Jefferson B. Sessions III threatening that if the federal government did not rescind DACA by September 5, 2017, Paxton would amend the complaint in the *Texas* litigation to challenge DACA as well as DAPA.

On September 4, 2017, the day before Paxton's deadline, Attorney General Sessions sent his own letter to Acting Secretary of Homeland Security Elaine Duke. The Attorney General's letter "advise[d] that the Department of Homeland Security . . . should rescind" the DACA memorandum based on his legal opinion that the Department lacked statutory authority to have created DACA in the first place. He wrote:

DACA was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress'[s] repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch.

The Attorney General further opined that "[b]ecause the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA."

The very next day, following the Attorney General's directive, Acting Secretary Duke issued a memorandum rescinding DACA. The memorandum begins with a "Background" section that covers DACA, DAPA, the *Texas* litigation, Secretary Kelly's previous memoranda, Texas Attorney General Paxton's threat, and the Attorney General's letter. Then, in the section titled "Rescission of the June 15, 2012 DACA Memorandum," the Duke memorandum states:

Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated. In the exercise of my authority in establishing national immigration policies and priorities, except for the purposes explicitly identified below, I hereby rescind the June 15, 2012 memorandum.

The Duke memorandum further states that although DHS would stop accepting initial

DACA requests effective immediately, the agency would provide a one-month window in which renewal applications could be filed for current DACA beneficiaries whose benefits were set to expire before March 5, 2018. It also states that DHS would not terminate existing grants of deferred action under DACA "solely based on the directives in this memorandum." Thus, beginning on March 5, 2018, each DACA recipient's grant of deferred action would be allowed to expire at the end of its two-year term. As of September 4, 2017—the day before the rescission—approximately 689,800 individuals were enrolled in DACA.

C. Procedural History

The rescission of DACA instantly sparked litigation across the country, including the cases on appeal here. Suits were filed in the Northern District of California by the Regents of the University of California, a group of states led by California, the City of San Jose, the County of Santa Clara and Service Employees International Union Local 521, and a group of individual DACA recipients led by Dulce Garcia. The complaints included claims that the rescission was arbitrary and capricious under the Administrative Procedure Act (APA); that it was a substantive rule requiring notice-and-comment rulemaking under the APA; that it violated the due process and equal protection rights protected by the U.S. Constitution; and that DHS was equitably estopped from using the information provided on DACA applications for enforcement purposes. The cases were consolidated before Judge William Alsup in the District Court for the Northern District of California and proceeded to litigation.

On October 17, 2017, the district court ordered the government to complete the administrative record, holding that the record proffered by the government was incomplete in several respects. Seeking to avoid providing additional documents, the government filed a petition for mandamus. In arguing its mandamus petition, the government took the position that the legality of the rescission should stand, or fall based solely on the reasons and the record already provided by the government. We denied the mandamus petition, stating that "the notion that the head of a United States agency would decide to terminate a program giving legal protections to roughly 800,000 people based solely on 256 pages of publicly available documents is not credible, as the district court concluded."

The government next petitioned the Supreme Court for the same mandamus relief; the Court did not reach the merits of the administrative record dispute, but instead instructed the district court to rule on the government's threshold arguments challenging reviewability of its rescission decision before requiring the government to provide additional documents. Thus, the administrative record in this case still consists of a scant 256 publicly available pages, roughly three-quarters of which are taken up by the three published judicial opinions from the *Texas* litigation.

Returning to the district court, the government moved to dismiss the consolidated cases on jurisdictional grounds

and for failure to state a claim, while the plaintiffs moved for a preliminary injunction. The district court granted the request for a nationwide preliminary injunction, holding that most of the plaintiffs had standing; that neither the APA nor the INA barred judicial review; and that plaintiffs were likely to succeed on their claim that the decision to rescind DACA was arbitrary and capricious. The district court therefore entered a preliminary injunction requiring DHS to adjudicate renewal applications for existing DACA recipients.

In a separate order, the court partially granted and partially denied the government's motion to dismiss. The court dismissed plaintiffs' notice-and-comment and Regulatory Flexibility Act claims; a due process claim premised on an entitlement to deferred action; and the equitable estoppel claim. The court denied the motion as to plaintiffs' equal protection claim and a due process claim premised on an alleged change in DHS's information-sharing policy.

The district court certified the issues addressed in both its orders for interlocutory review under 28 U.S.C. § 1292(b). We granted the government's petition for permission to appeal the orders. Plaintiffs cross-appealed, asserting that the district court erroneously dismissed their notice-and-comment and due process claims.

II.

"We review the district court's decision to grant or deny a preliminary injunction for abuse of discretion." Within this inquiry, "[w]e review the district court's legal conclusions *de novo*, the factual findings underlying its decision for clear error." A district court's decision on a motion to dismiss for lack of subject matter jurisdiction or for failure to state a claim is also reviewed de novo.

III.

The threshold question in this case is in many ways also the most pivotal: is Acting Secretary Duke's decision to rescind the DACA program reviewable by the courts at all? The government contends that both the APA and the INA bar judicial review; we address each statute in turn.

A. Reviewability under the APA

The APA provides for broad judicial review of agency action: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. Thus, as a general matter, the Supreme Court has consistently articulated "a 'strong presumption' favoring judicial review of administrative action."

However, the APA also forecloses judicial review under its procedures to the extent that "agency action is committed to agency discretion by law." "This is a very narrow exception" that comes into play only "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply."

In *Heckler v. Chaney*, the Supreme Court analyzed this exception in considering "the extent to which a decision of an

administrative agency to exercise its 'discretion' not to undertake certain enforcement actions is subject to judicial review under the [APA]." In *Chaney*, the Commissioner of the Food and Drug Administration (FDA) declined to take investigatory and enforcement action against state prison officials' use of drugs, which had been FDA-approved for medical use, in human executions. A group of prisoners on death row had petitioned the FDA, arguing that using the drugs to execute humans was unlawful because they were only approved for medical use, and not for executions. Responding to the petition, the Commissioner questioned whether the FDA had jurisdiction to prohibit the use of drugs in executions, but went on to conclude that even if the agency did have jurisdiction, it would "decline to exercise it under [the agency's] inherent discretion to" do so. The inmates then sued the FDA, attempting to invoke the APA's framework for judicial review.

The Supreme Court held that the FDA Commissioner's discretionary decision not to enforce the Food, Drug, and Cosmetic Act against state prison officials was unreviewable under the APA. The Court identified a pre-APA "tradition" under which "an agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion," and concluded that "the Congress enacting the APA did not intend to alter that tradition." As the Court summed up its holding, "[t]he general exception to reviewability provided by § 701(a)(2) for action 'committed to agency discretion' remains a narrow one, but within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise." That is, the normal presumption in favor of judicial review is reversed when the agency action in question is a refusal to enforce the substantive law.

Importantly for present purposes, the Court explicitly left open the question whether "a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction" might be reviewable notwithstanding this general rule. This reservation makes perfect sense. It is one thing to read the APA's exception for "agency action [] committed to agency discretion by law" as including the Executive's discretionary decisions to decline enforcement, given a pre-existing legal tradition that had treated those decisions as unreviewable. It would be quite another to say that an agency's *non*-discretionary belief that it lacked the *power* to enforce the law was similarly "committed to agency discretion."

Several years after *Chaney*, our court directly addressed the question that the Supreme Court had left open. In *Montana Air Chapter No. 29 v. Federal Labor Relations Authority*, a union representing civilian Air National Guard employees filed an unfair labor practice charge against the National Guard Bureau, but the Federal Labor Relations Authority (FLRA) refused to issue a complaint. . The opinion letters issued by FLRA's general counsel indicated that he had "determined, according to his interpretation of the statutes and regulations, that he lacked jurisdiction to issue an unfair labor practice complaint" under the circumstances.

Acknowledging *Chaney*'s rule that "[a]n agency's decision not to take enforcement action . . . is presumed to be immune from judicial review," we noted that the Supreme Court had nevertheless "suggested that discretionary nonenforcement decisions may be reviewable when" the refusal to enforce is based on a supposed lack of jurisdiction. We took the next logical step, holding that *Chaney*'s presumption of nonreviewability "may be overcome if the refusal is based solely on the erroneous belief that the agency lacks jurisdiction." Because "the General Counsel's decision not to issue an unfair labor practice complaint was based on his belief that he lacked jurisdiction to issue such a complaint," we proceeded to "examine the General Counsel's statutory and regulatory interpretations to determine if his belief that he lacked jurisdiction was correct."

The final piece of the APA reviewability puzzle is the Supreme Court's decision in *City of Arlington v. FCC*. There, the Court was faced with the question whether an agency's determination of its own jurisdiction is entitled to the same deference as any other agency interpretation under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, Writing for the Court, Justice Scalia explained in no uncertain terms that in the context of administrative agencies, "the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage." With respect to courts, the jurisdictional/nonjurisdictional divide is a real and consequential one, because "[a] court's power to decide a case is independent of whether its decision is correct . . . . Put differently, a jurisdictionally proper but substantively incorrect judicial decision is not ultra vires." But the same is not true with respect to agencies: "Both their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires." . Thus, the Court concluded, "[t]he reality, laid bare, is that there is *no difference*, insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority (its 'jurisdiction') and its exceeding authorized application of authority that it unquestionably has."

To summarize, *Chaney* holds that an agency's refusal to enforce the substantive law is presumptively unreviewable because that discretionary nonenforcement function is "committed to agency discretion" within the meaning of the APA. *Montana Air* builds upon the question left open by *Chaney*'s footnote four, explaining that a nonenforcement decision is reviewable notwithstanding *Chaney* if the decision was based solely on the agency's belief that it lacked jurisdiction to act. And *City of Arlington* teaches that there is no difference between an agency that lacks jurisdiction to take a certain action, and one that is barred by the substantive law from doing the same; the question "is always, simply, whether the agency has stayed within the bounds of its statutory authority." The rule that emerges is this: an agency's nonenforcement decision is outside the scope of the *Chaney* presumption—and is therefore presumptively reviewable—if it is based solely on a belief that the agency lacked the lawful authority to do otherwise. That is,

where the agency's decision is based not on an exercise of discretion, but instead on a belief that any alternative choice was foreclosed by law, the APA's "committed to agency discretion" bar to reviewability, 5 U.S.C. § 701(a)(2), does not apply.

This rule is fully consistent with the Supreme Court's decision in *ICC v. Brotherhood of Locomotive Engineers* (*BLE*), which rejected the notion that "if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." We have no quarrel with that statement in the abstract, but as applied it simply begs the question: is the agency action in question "otherwise unreviewable"?

The *BLE* case concerned the reviewability of the Interstate Commerce Commission's denial of a motion to reopen proceedings on grounds of material error. The Supreme Court held that category of agency action presumptively unreviewable because it "perceive[d] . . . a similar tradition of nonreviewability" to the one it had found in *Chaney* for nonenforcement decisions. In reaching its holding, the Court rejected an argument that there was nevertheless "law to apply"—and that therefore the action was not committed to agency discretion—as the agency's order had discussed the legal merits at length. What mattered was that the agency's "formal action" was one for which a tradition of nonreviewability was discernable, regardless of how the agency explained its action.

BLE thus stands for the proposition that if a particular type of agency action is presumptively unreviewable, the fact that the agency explains itself in terms that are judicially cognizable does not change the categorical rule. Fair enough. But the categorical rule announced in *Chaney* does not encompass nonenforcement decisions based solely on the agency's belief that it lacked power to take a particular course; instead, the Court explicitly declined to extend its rule to that situation. And in *Montana Air*, we held that such decisions *are* reviewable. *BLE*'s statement about "otherwise unreviewable" agency decisions, therefore, has no application to the category of agency action at issue here.

We believe the analysis laid out above follows necessarily from existing doctrine. And, just as importantly, this approach also promotes values fundamental to the administrative process.

First, the *Montana Air* rule does not impermissibly encroach on executive discretion; to the contrary, it empowers the Executive. If an agency head is mistaken in her assessment that the law precludes one course of action, allowing the courts to disabuse her of that incorrect view of the law does not constrain discretion, but rather opens new vistas within which discretion can operate. That is, if an administrator chooses option *A* for the sole reason that she believes option *B* to be beyond her legal authority, a decision from the courts putting option *B* back on the table allows a reasoned, discretionary policy choice between the two courses of action. And if the agency's view of the law is instead confirmed by the courts, no injury to discretion results because the status quo is preserved.

Moreover, allowing judicial review under these circumstances serves the critical function of promoting accountability within the Executive Branch—not accountability to the courts, but democratic accountability to the people. Accountability in this sense is fundamental to the legitimacy of the administrative system: although they are "unelected . . . bureaucrats," the heads of cabinet-level departments like DHS "are subject to the exercise of political oversight and share the President's accountability to the people." Indeed, the Constitution's Appointments Clause was designed to ensure public accountability for . . . the making of a bad appointment . . . ."

This democratic responsiveness is especially critical for agencies exercising prosecutorial functions because, as Justice Scalia explained in his oft-cited dissent in *Morrison v. Olson*, "[u]nder our system of government, the primary check against prosecutorial abuse is a political one." This check works because "when crimes are not investigated and prosecuted fairly, nonselectively, with a reasonable sense of proportion, the President pays the cost in political damage to his administration." In other words, when prosecutorial functions are exercised in a manner that is within the law but is nevertheless repugnant to the sensibilities of the people, "the unfairness will come home to roost in the Oval Office."

But public accountability for agency action can only be achieved if the electorate knows how to apportion the praise for good measures and the blame for bad ones. Without knowing the true source of an objectionable agency action, "the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" In then-Professor Kagan's words, "the degree to which the public can understand the sources and levers of bureaucratic action" is "a fundamental precondition of accountability in administration."

The *Montana Air* rule promotes accountability by ensuring that the public knows where to place blame for an unpopular measure. When an agency justifies an action solely with an assertion that the law prohibits any other course, it shifts responsibility for the outcome from the Executive Branch to Congress (for making the law in question) or the courts (for construing it). If the Executive is correct in its interpretation of the law, then the public is correct to blame the other two branches for any resulting problems. But if the Executive is wrong, then it avoids democratic accountability for a choice that was the agency's to make all along. Allowing the judiciary—the branch ultimately responsible for interpreting the law—to review such decisions prevents this anti-democratic and untoward outcome. As Judge Bates of the District Court for the District of Columbia aptly put the point in confronting the very issue we face here, "an official cannot claim that the law ties her hands while at the same time denying the courts' power to unbind her. She may escape political accountability or judicial review, but not both."

We therefore must determine whether the Acting Secretary's decision to end DACA was based solely on a belief that the program

was unlawful, such that the *Chaney* presumption does not apply.

We take Attorney General Sessions literally at his word when he wrote to Acting Secretary Duke that "DACA was effectuated . . . without proper statutory authority," and that DACA "was an unconstitutional exercise of authority by the Executive Branch." These are the reasons he gave for advising Acting Secretary Duke to rescind DACA. We therefore agree with the district court that the basis for the rescission was a belief that DACA was unlawful, and that the discretionary "litigation risk" rationale pressed by the government now is a mere post-hoc rationalization put forward for purposes of this litigation. Acting Secretary Duke's September 5, 2017, rescission memorandum contains exactly one sentence of analysis:

Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated.

In the next sentence, the Acting Secretary went on to announce the rescission itself:

In the exercise of my authority in establishing national immigration policies and priorities, except for the purposes explicitly identified below, I hereby rescind the June 15, 2012 memorandum.

The easy rejoinder to the government's insistence that the Acting Secretary rescinded DACA due to "litigation risks" is that the Acting Secretary did not mention "litigation risks" as a "consideration." And both "consideration[s]" actually enumerated by the Acting Secretary are most naturally read as supporting a rationale based on DACA's illegality. The "ongoing litigation" referenced is of course *Texas v. United States*, in which the Fifth Circuit upheld a preliminary injunction against the related DAPA policy, and the Supreme Court affirmed by an equally divided vote. The "rulings" in that case are propositions of law—taken alone, they are more readily understood as supporting a legal conclusion (DACA is illegal) than a pragmatic one (DACA might be enjoined). The pragmatic interpretation requires extra analytical steps (someone might sue to enjoin DACA, and they might win) that are entirely absent from the list of factors that the Acting Secretary stated she was "taking into consideration" in making her decision. Acting Secretary Duke easily could have included "the prospect of litigation challenging DACA" in her list of considerations; had she done so, then perhaps the reference to the *Texas* litigation could be read as supporting a practical worry about an injunction. Absent that, however, the mention of the courts' "rulings" is best read as referencing the courts' legal conclusions.

Attorney General Sessions's September 4, 2017, letter likewise focuses on the supposed illegality of DACA, rather than any alleged "litigation risk." Its substantive paragraph states

DACA was effectuated . . . *without proper statutory authority* and with no established end-date, after Congress'[s] repeated rejection of proposed legislation that would

have accomplished a similar result. Such an open-ended circumvention of immigration laws was *an unconstitutional exercise of authority* by the Executive Branch.

These sentences unmistakably reflect the Attorney General's belief that DACA was illegal and therefore beyond the power of DHS to institute or maintain. The letter goes on to opine that "[b]ecause the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA [in the *Texas* litigation], it is likely that potentially imminent litigation would yield similar results with respect to DACA." But in the context of the full paragraph, the reference to "similar results" is best read not as an independent reason for rescinding DACA, but as a natural consequence of DACA's supposed illegality—which is the topic of the paragraph as a whole. In the words of Judge Garaufis of the District Court for the Eastern District of New York, that reference "is too thin a reed to bear the weight of Defendants' 'litigation risk' argument."

In any event, the Attorney General's letter is relevant only to the extent it illuminates whether Acting Secretary Duke—the official who actually rescinded the DACA program—did so as an exercise of her discretion or because she understood her hand to be forced by the law. In this connection, it is helpful to compare the operative language used by Acting Secretary Duke to rescind DACA with that used by her predecessor, Secretary John Kelly, to rescind DAPA just months before. In his June 15, 2017, memorandum, Secretary Kelly wrote:

> After consulting with the Attorney General, and *in the exercise of my discretion* in establishing national immigration enforcement policies and priorities, I hereby rescind the November 20, 2014 memorandum [that established DAPA].

Placed alongside Acting Secretary Duke's language, the parallels—and the differences—are stark. Acting Secretary Duke's memorandum reads:

> *In the exercise of my authority* in establishing national immigration policies and priorities, except for the purposes explicitly identified below, I hereby rescind the June 15, 2012 memorandum [that established DACA].

The obvious similarities between the two passages strongly suggest that Acting Secretary Duke modeled her language after that of Secretary Kelly's memo. And indeed, we *know* that the Acting Secretary considered the Kelly memorandum in reaching her decision, because the government has told us so.

Given that Acting Secretary Duke hewed so closely to Secretary Kelly's language in general, it is appropriate to draw meaning from the one major difference between the two sentences: Secretary Kelly exercised his "*discretion*" in ending DAPA; Acting Secretary Duke merely exercised her "*authority*." The point is that with the example set by the Kelly memorandum in front of her, Acting Secretary Duke clearly would have known how to express that the rescission was a discretionary act case. Furthermore, the near-verbatim language of the two rescission memoranda suggests that

the Acting Secretary adopted the majority of Kelly's wording, but actively rejected describing the DACA rescission as an act of discretion. This difference in language cuts strongly against any suggestion that the rescission was discretionary.

The government counters that the memorandum "focused from beginning to end principally on litigation concerns, not the legality of DACA *per se*." But as the State plaintiffs point out, the memorandum's references to these supposed "litigation concerns" were limited to a simple summary of the *Texas* litigation's procedural history; appeared only in the "Background" section of the memorandum; and were not referenced in the Acting Secretary's statement of what she was "[t]aking into consideration."

The government also asserts that because the Acting Secretary wrote that DACA "should" rather than *must* be ended, she did not view herself as bound to act. But even on its face, "should" is fully capable of expressing obligation or necessity. The Acting Secretary's use of "should" instead of "must" cannot overcome the absence of any discussion of potential litigation or the "risks" attendant to it from the rescission memorandum's statement of reasons, and the discrepancy between the rescission of DAPA as an act of "discretion" and the rescission of DACA as an act of "authority."

Finally, the government takes a quote from the Supreme Court to the effect that courts should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned,", and contorts it into an argument that the district court's "narrow reading of the Acting Secretary's rationale is *hardly the only one* that 'may reasonably be discerned' from the Acting Secretary's memorandum." But *Bowman* is about finding a reviewable rationale in an agency's action versus finding *no* articulation of that rationale. *Bowman* does not say—and it certainly does not logically follow—that a court must ignore the most natural reading of an agency's statement of reasons just because it may also be "reasonably susceptible" to a (less compelling) reading that the government would prefer. The government is in effect asking the court to defer to agency counsel's post-hoc rationalization, as long as there is some reading of the rescission memorandum—never mind how strained—that would support it. *Bowman* does not require this incongruous result.

We agree with the district court that the Acting Secretary based the rescission of DACA solely on a belief that DACA was beyond the authority of DHS. Under *Montana Air* and *Chaney*'s footnote four, this conclusion brings the rescission within the realm of agency actions reviewable under the APA. Unless the INA itself deprives the courts of jurisdiction over this case, we must proceed to evaluate the merits of plaintiffs' arbitrary-and-capricious claim.

B. Jurisdiction under the INA

The government contends that the INA stripped the district court of its jurisdiction in a provision that states:

Except as provided in this section [which sets out avenues of review not applicable here] . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary of Homeland Security] to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

The Supreme Court has explicitly held that this section "applies only to three discrete actions that the [Secretary] may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" As the Court put it, "[i]t is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings. Not because Congress is too unpoetic to use synecdoche, but because that literary device is incompatible with the need for precision in legislative drafting."

The government attempts to expand Section 1252(g) to encompass this case in two ways. First, it points out that the *AADC* Court read that provision as Congress's effort to shield executive decisions not to grant deferred action from review outside the procedures prescribed by the INA. The Court quoted a treatise describing the practice of deferred action and the litigation that would result when the government declined to grant deferred action: "Efforts to challenge the refusal to exercise such discretion on behalf of specific aliens sometimes have been favorably considered by the courts . . .." Having reviewed these developments, the Court concluded: "Section 1252(g) seems clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations. . . ."

The government argues that *AADC*'s reasoning—and therefore Section 1252(g)—applies to the rescission of DACA, which is itself in some sense a "no deferred action" decision. It seems quite clear, however, that *AADC* reads Section 1252(g) as responding to litigation over *individual* "no deferred action" decisions, rather than a programmatic shift like the DACA rescission. For example, the treatise passage *AADC* quotes to set the scene for Congress's action refers explicitly to "[e]fforts to challenge the refusal to exercise [deferred action] *on behalf of specific aliens*. . . ." And in any case, the holding of *AADC* was explicit: "The provision applies only to [the] three discrete actions" mentioned in the statute.

The government's fallback argument is thus to cast the rescission of DACA as an initial "action" in the agency's "commence[ment] [of] proceedings." But *AADC* specifically rejected a broad reading of the three discrete actions listed in Section 1252(g). "[D]ecisions to open an investigation, [or] to surveil the suspected violator" are *not* included in Section 1252(g)'s jurisdictional bar, even though these actions are also "part of the deportation process," and could similarly be construed as incremental steps toward an eventual "commence[ment] [of] proceedings,"

Indeed, in a case closely on point, our court rejected the application of Section

1252(g) and allowed to proceed a challenge to INS guidance narrowly interpreting the terms of a "one-time legalization program" for undocumented immigrants. We noted that "[a]s interpreted by the Supreme Court in [*AADC*], [Section 1252(g)] applies only to the three specific discretionary actions mentioned in its text, not to all claims relating in any way to deportation proceedings," and held that the challenge was not barred. The panel did not appear concerned by the fact that it was possible to conceptualize that policy choice by INS as an ingredient in a subsequent decision to commence proceedings against particular individuals.

The government cites no cases applying the Section 1252(g) bar to a programmatic policy decision about deferred action; the two cases it does cite were challenges to individual "no deferred action" decisions—that is, they fall exactly within Section 1252(g) as interpreted by the Court in *AADC*. Especially in light of the "'strong presumption in favor of judicial review of administrative action' governing the construction of jurisdiction-stripping provisions of IIRIRA[.]"

IV.

Having concluded that neither the APA nor the INA precludes judicial review, we turn to the merits of the preliminary injunction. The district court held that plaintiffs satisfied the familiar four-factor preliminary injunction standard with respect to their claim under the APA that the rescission of DACA was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The government takes issue with the district court's conclusion on only one of the preliminary injunction factors: the likelihood of success on the merits.

In an arbitrary-and-capricious challenge, "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."

Similarly, it is black letter law that where an agency purports to act solely on the basis that a certain result is legally required, and that legal premise turns out to be incorrect, the action must be set aside, regardless of whether the action *could* have been justified as an exercise of discretion. That principle goes back at least as far as the Supreme Court's seminal decision in *Chenery I*, in which the Court stated:

If [agency] action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, *an order may not stand if the agency has misconceived the law*.

This holding of *Chenery I* remains good law. As the D.C. Circuit flatly put it, "An agency action, however permissible as an exercise of discretion, cannot be sustained where it is based not on the agency's own judgment but on an erroneous view of the law."

Thus, if the DACA rescission was based solely on an erroneous legal premise, it must be set aside under 5 U.S.C. § 706(2)(A). We have already concluded, in our discussion of reviewability, that the rescission was indeed premised on the belief that the DACA program was unlawful. We next must decide whether that legal conclusion was correct.

Attorney General Sessions's September 4, 2017, letter expresses several possible bases for the agency's ultimate conclusion that DACA was unlawful. First, the Attorney General states that "DACA was effectuated by the previous administration through executive action . . . after Congress'[s] repeated rejection of proposed legislation that would have accomplished a similar result." But our court has already explained that "Congress's failure to pass the [DREAM] Act does not signal the illegitimacy of the DACA program," partly because "the DREAM Act and the DACA program are not interchangeable policies because they provide different forms of relief": the DREAM Act would have provided a path to lawful permanent resident status, while DACA simply defers removal. Moreover, there is nothing inherently problematic about an agency addressing a problem for which Congress has been unable to pass a legislative fix, so long as the particular action taken is properly within the agency's power. This argument therefore provides no independent reason to think that DACA is unlawful.

The Attorney General's primary bases for concluding that DACA was illegal were that the program was "effectuated . . . without proper statutory authority" and that it amounted to "an unconstitutional exercise of authority." More specifically, the Attorney General asserted that "the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA" in the *Texas* litigation.

The claim of "constitutional defects" is a puzzling one because as all the parties recognize, no court has ever held that DAPA is unconstitutional. The Fifth Circuit and district court in *Texas* explicitly declined to address the constitutional issue. Indeed, the government makes no attempt in this appeal to defend the Attorney General's assertion that the DACA program is unconstitutional. We therefore do not address it further.

With respect to DACA's alleged "legal . . . defects," the district court explained in great detail the long history of deferred action in immigration enforcement, including in the form of broad programs; the fact that the Supreme Court and Congress have both acknowledged deferred action as a feature of the immigration system; and the specific statutory responsibility of the Secretary of Homeland Security for "[e]stablishing national immigration enforcement policies and priorities,". The government does not contest any of these propositions, which themselves go a long way toward establishing DACA's legality. Instead, the government argues that the Fifth Circuit's reasons for striking down the related DAPA policy would also apply to DACA.

The Fifth Circuit concluded that DAPA was unlawful on two grounds: first, that DAPA was in fact a legislative rule and therefore should have been promulgated through

notice-and-comment rulemaking; and second, that DAPA was substantively inconsistent with the INA.

With respect to the first holding, notice-and-comment procedures are not required where the agency pronouncement in question is a "general statement[] of policy." "The critical factor to determine whether a directive announcing a new policy constitutes a rule or a general statement of policy is the extent to which the challenged [directive] leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the [announced] policy in an individual case."

On its face, DACA obviously allows (and indeed requires) DHS officials to exercise discretion in making deferred action decisions as to individual cases: Secretary Napolitano's memorandum announcing DACA specifically states that "requests for relief pursuant to this memorandum are to be decided on a case by case basis." The Fifth Circuit in *Texas* held that DAPA was a substantive rule notwithstanding similar discretionary language, based primarily on statistics regarding the approval rates of DACA applications. The court read those statistics as revealing that DACA was discretionary in name only—that is, that DHS personnel had no discretion to deny deferred action if the DACA criteria were met.

But as the dissenting judge in *Texas* pointed out, DACA's (then) 5% denial rate—which did not include applications rejected for administrative deficiencies—is consistent with a discretionary program given that applicants self-select: "It should be expected that only those highly likely to receive deferred action will apply; otherwise, applicants would risk revealing their immigration status and other identifying information to authorities, thereby risking removal (and the loss of a sizeable fee)."

Moreover, the denial rate has risen as the DACA program has matured. DHS statistics included in the record reveal that in fiscal year 2016, for example, the agency approved 52,882 initial DACA applications and denied 11,445; that is, 17.8% of the applications acted upon were denied. As Judge King concluded, "Neither of these numbers suggests an agency on autopilot." In light of these differences, we do not agree that DACA is a legislative rule that would require notice-and-comment rulemaking.

As to the substantive holding in *Texas*, the Fifth Circuit concluded that DAPA conflicted with the INA largely for a reason that is inapplicable to DACA. Specifically, the Fifth Circuit reasoned that the INA provides "an intricate process for illegal aliens to derive a lawful immigration classification from their children's immigration status" but that "DAPA would allow illegal aliens to receive the benefits of lawful presence solely on account of their children's immigration status without complying with any of the requirements. . . that Congress has deliberately imposed." As the district court in this case noted, there is no analogous provision in the INA defining how immigration status may be derived by undocumented persons who arrived in the United States as children. One of the major problems the Fifth Circuit identified with DAPA is therefore not present here.

In resisting this conclusion, the government flips the Fifth Circuit's reasoning on its head, arguing that "[i]nsofar as the creation of pathways to lawful presence was relevant, the fact that Congress had legislated only for certain individuals similarly situated to DAPA beneficiaries—and not DACA recipients—would make DACA *more* inconsistent with the INA than DAPA." To the extent the government meant to draw on the *Texas* court's analysis, it gets it exactly backwards: the whole thrust of the Fifth Circuit's reasoning on this point was that DHS was without authority because "Congress has 'directly addressed the precise question at issue.'" There is no argument that Congress has similarly occupied the field with respect to DACA; as the Attorney General himself noted, Congress has repeatedly rejected Dreamer legislation.

The second major element of the Fifth Circuit's analysis on the substantive issues was that the INA itself "prescribes . . . which classes of aliens can achieve deferred action and eligibility for work authorization." The court drew the implication that the statute must therefore preclude the Executive Branch from granting these benefits to other classes.

But "[t]he force of any negative implication . . . depends on context." Indeed, "[w]e do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." Here, the express grants of deferred action cited by the Fifth Circuit were not passed together as part of the original INA; rather, they were added to the statute books piecemeal over time by Congress.

Given this context, we find it improbable that Congress "considered the . . . possibility" of all other potential uses for deferred action "and meant to say no" to any other application of that tool by the immigration agency. We think the much more reasonable conclusion is that in passing its seriatim pieces of legislation, instructing that this and that "narrow class[]" of noncitizens should be eligible for deferred action, Congress meant to say nothing at all about the underlying power of the Executive Branch to grant the same remedy to others. We do not read an "and no one else" clause into each of Congress's individual express grants of deferred action.

Another element in the Fifth Circuit's analysis was that "DAPA would make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits, and 'we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.'" DACA, on the other hand, had 689,800 enrollees as of September 2017. The government asserts that this difference in size is "legally immaterial," but that response is unconvincing. If the point is that the "economic and political magnitude" of allowing 4.3 million people to remain in the country and obtain work authorization is such that Congress would have spoken to it directly, then surely it makes a difference that one policy has less than one-sixth the "magnitude" of the other. As the district court

laconically put it, "there is a difference between 4.3 million and 689,800."

Finally, the government finds "an insurmountable obstacle to plaintiffs' position" in that "the district court's injunction affirmed by the Fifth Circuit covered both DAPA and *expanded DACA*." It is true that the *Texas* court also enjoined the expansions of DACA that were announced in the same memorandum as the DAPA program. But no analysis was devoted to those provisions by either the Fifth Circuit or the *Texas* district court, and one of the keys to the Fifth Circuit's reasoning—that Congress had supposedly occupied the field with respect to obtaining immigration benefits through one's children—does *not* apply to either the original DACA program or its expansions. Under these circumstances, we do not find the *Texas* courts' treatment of the DACA expansions to be strong persuasive authority, much less an "insurmountable obstacle."

In sum, the reality is (and always has been) that the executive agencies charged with immigration enforcement do not have the resources required to deport every single person present in this country without authorization. Recognizing this state of affairs, Congress has explicitly charged the Secretary of Homeland Security with "[e]stablishing national immigration enforcement policies and priorities."

It is therefore no surprise that deferred action has been a feature of our immigration system—albeit one of executive invention—for decades; has been employed categorically on numerous occasions; and has been recognized as a practical reality by both Congress and the courts. In a world where the government can remove only a small percentage of the undocumented noncitizens present in this country in any year, deferred action programs like DACA enable DHS to devote much-needed resources to enforcement priorities such as threats to national security, rather than blameless and economically productive young people with clean criminal records.

We therefore conclude that DACA was a permissible exercise of executive discretion, notwithstanding the Fifth Circuit's conclusion that the related DAPA program exceeded DHS's statutory authority. DACA is being implemented in a manner that reflects discretionary, case-by-case review, and at least one of the Fifth Circuit's key rationales in striking down DAPA is inapplicable with respect to DACA. With respect for our sister circuit, we find the analysis that seemingly compelled the result in *Texas* entirely inapposite. And because the Acting Secretary was therefore incorrect in her belief that DACA was illegal and had to be rescinded, plaintiffs are likely to succeed in demonstrating that the rescission must be set aside.

To be clear: we do not hold that DACA *could not* be rescinded as an exercise of Executive Branch discretion. We hold only that here, where the Executive *did not* make a discretionary choice to end DACA—but rather acted based on an erroneous view of what the law required—the rescission was arbitrary and capricious under settled law. The government is, as always, free to reexamine its policy choices, so long as doing

so does not violate an injunction or any freestanding statutory or constitutional protection.

V.

Having concluded that the district court was correct in its APA merits holding, we now turn to the question of the appropriate remedy. The district court preliminarily enjoined the rescission of DACA with respect to existing beneficiaries on a nationwide basis. The government asserts that this was error, and that a proper injunction would be narrower.

The general rule regarding the scope of preliminary injunctive relief is that it "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs before the court."

It is also important to note that the claim underlying the injunction here is an arbitrary-and-capricious challenge under the APA. In this context, "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." As Justice Blackmun explained while "writing in dissent but apparently expressing the view of all nine Justices on this question,"

The Administrative Procedure Act permits suit to be brought by any person "adversely affected or aggrieved by agency action." In some cases the "agency action" will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain "programmatic" relief that affects the rights of parties not before the court.

A final principle is also relevant: the need for uniformity in immigration policy. As the Fifth Circuit stated when it affirmed the nationwide injunction against DAPA, "the Constitution requires an *uniform* Rule of Naturalization; Congress has instructed that the immigration laws of the United States should be enforced vigorously and *uniformly*; and the Supreme Court has described immigration policy as a comprehensive and *unified* system." Allowing uneven application of nationwide immigration policy flies in the face of these requirements.

In its briefing, the government fails to explain how the district court could have crafted a narrower injunction that would provide complete relief to the plaintiffs, including the entity plaintiffs. Nor does it provide compelling reasons to deviate from the normal rule in APA cases, or to disregard the need for uniformity in national immigration policy. The one argument it does offer on this latter point—that "[d]eferred action is itself a departure from vigorous and uniform enforcement of the immigration laws," and that "enjoining the rescission of DACA on a nationwide basis . . . increases rather than lessens that departure"—is a red herring. DACA *is* national immigration policy, and an injunction that applies that policy to some individuals while rescinding it as to others is inimical to the principle of uniformity.

We therefore conclude that the district court did not abuse its discretion in issuing a nationwide injunction. Such relief is commonplace in APA cases, promotes uniformity in immigration enforcement, and is necessary to provide the plaintiffs here with complete redress.

VI.

We turn next to the district court's treatment of the government's motion to dismiss for failure to state a claim. The government moved to dismiss all of plaintiffs' claims; the district court dismissed some claims and denied the government's motion as to others. We take each claim in turn.

A. APA: Arbitrary-and-Capricious

For the reasons stated above in discussing plaintiffs' likelihood of success on the merits, the district court was correct to deny the government's motion to dismiss plaintiffs' claim that the DACA rescission was arbitrary and capricious under the APA.

B. APA: Notice-and-Comment

Plaintiffs also assert that the rescission of DACA is in fact a substantive rule under the APA, and that it therefore could not be validly accomplished without notice-and-comment procedures.

As touched on above with respect to DACA itself, an agency pronouncement is excluded from the APA's requirement of notice-and-comment procedures if it constitutes a "general statement[] of policy." General statements of policy are those that "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." "To qualify as a general statement of policy . . . a directive must not establish a binding norm and must leave agency officials free to consider the individual facts in the various cases that arise and to exercise discretion."

The district court held that because DACA itself was a general statement of policy that did not require notice and comment, it could also be rescinded without those procedures. This proposition finds support in *Mada-Luna*, in which "we conclude[d] that [a deferred-action Operating Instruction] constituted a general statement of policy, and thus could be validly repealed and superseded without notice-and-comment proceedings." Plaintiffs contest this conclusion, arguing that the DACA *rescission* was a binding rule, even though DACA's *adoption* was a general statement of policy. They provide two bases for this assertion.

First, plaintiffs argue that the rescission is binding because it requires DHS officials to reject new DACA applications and (after a certain date) renewal applications. It is true that Acting Secretary Duke's rescission memorandum makes rejections of DACA applications mandatory. But the relevant question under the rescission memorandum is not whether DHS officials retained discretion to accept applications for a program that no longer existed; instead, the question is whether DHS officials retained discretion *to grant deferred action* and collateral benefits outside of the (now-cancelled) DACA program.

For its part, the government asserts that the rescission memorandum made clear that, despite the rescission, "future deferred action requests will be 'adjudicat[ed] . . . on an individual, case-by-case basis.'" Mildly put, this assertion mischaracterizes the memorandum. The quoted language refers to the treatment of only (a) initial applications pending on the date of the rescission, and (b) renewal applications filed within the one-month wind-down period. It does *not* refer to how future requests for deferred action outside the DACA program would be handled. Still, the rescission memorandum also did not forbid the agency from granting such requests, and it acknowledged the background principle of deferred action as "an act of prosecutorial discretion meant to be applied only on an individualized case-by-case basis." And the memorandum closed by stating that "no limitations are placed by this guidance on the otherwise lawful enforcement or litigation prerogatives of DHS"—presumably including granting deferred action on a case-by-case basis to some people who would have been eligible for DACA.

If allowed to go into effect, the rescission of DACA would undoubtedly result in the loss of deferred action for the vast majority of the 689,800 people who rely on the program. But the rescission memorandum does not mandate that result because it leaves in place the background principle that deferred action is available on a case-by-case basis. Plaintiffs' primary argument against this conclusion is a citation to *United States ex rel. Parco v. Morris*, which is said to be "the only other decision to address an Executive Branch decision to terminate a deferred-action program without undergoing notice-and-comment rulemaking." But as the district court noted, the key factor in that case was the contention that under the policy at issue, "'discretion' was exercised favorably in all cases of a certain kind and then, after repeal of the regulation, unfavorably in each such case." DACA, by contrast, explicitly contemplated case-by-case discretion, and its rescission appears to have left in place background principles of prosecutorial discretion.

Plaintiffs also argue that the DACA rescission is not a general policy statement because it is binding as a legal interpretation that a DACA-like program would be illegal. But again, this argument answers the wrong question. The Acting Secretary's legal conclusion that a DACA-like program is unlawful does not constrain the discretion of line-level DHS employees to grant deferred action on a case-by-case basis, and those employees lack authority to institute such an agency-wide program in the first place. And plaintiffs do not point to any reason why *this* Acting Secretary's legal conclusion about DACA would bind subsequent Secretaries if they were to disagree with its reasoning—just as Acting Secretary Duke reversed course from previous Secretaries who concluded DACA was legal. This is not a "new 'binding rule of substantive law,'" , affecting the rights of the people and entities regulated by the agency; it is an interpretation of the agency's own power, and plaintiffs do not explain why it should be read as binding future DHS Secretaries. The district court correctly dismissed plaintiffs' notice-and-comment claims.

C. Due Process: Deferred Action

The *Garcia* plaintiffs—individual DACA recipients—have brought a substantive due process claim alleging that the rescission deprived them of protected interests in their DACA designation, including the renewal of their benefits. The district court dismissed this claim, holding that there is no protected entitlement in either the initial grant of deferred action under DACA or the renewal of benefits for existing DACA enrollees. On appeal, the *Garcia* plaintiffs challenge this ruling only as it applies to the renewal of DACA benefits, not as to the initial grant.

"A threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution." It is possible to have a property interest in a government benefit, but "a person clearly must have more than an abstract need or desire for [the benefit]. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Although "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion," , a legitimate claim of entitlement may exist where there are "rules or mutually explicit understandings that support [a plaintiff's] claim of entitlement to the benefit . . . ." The dispute here focuses on whether such "mutually explicit understandings" existed between the government and DACA recipients with respect to the renewal of DACA benefits.

The *Garcia* plaintiffs assert that they and the government "'mutually' understood that DACA recipients would be able to renew their benefits and protection on an ongoing basis so long as they fulfilled the program's criteria." But this argument is undercut by the DACA FAQs published by DHS, which explicitly state that "USCIS retains the ultimate discretion to determine whether deferred action is appropriate in any given case even if the [renewal] guidelines are met." The FAQs also state that any individual's "deferred action may be terminated at any time, with or without a Notice of Intent to Terminate, at DHS's discretion," and Secretary Napolitano's DACA memorandum claims that it "confers no substantive right, immigration status or pathway to citizenship." Whether or not these provisions are legally operative, they do not indicate that the government shared plaintiffs' expectation of presumptive renewal.

Attempting to overcome this facially discretionary language, plaintiffs emphasize several factors. First, they say, the very nature of the DACA project was such that presumptive renewal was required to encourage people to participate; a two-year term with no presumption of renewal would not have been attractive enough to outweigh the risks to the applicants. Moreover, Secretary Napolitano's DACA memorandum itself states that grants of deferred action under DACA will be "subject to renewal," and the actual criteria for renewal were "nondiscretionary" in nature. Finally, the plaintiffs point to a more than 99% approval rate for adjudicated DACA renewal applications. This, they assert, is powerful evidence of a mutual understanding of presumptive renewal.

All these points might have revealed a question of fact as to whether a mutually explicit understanding of presumptive renewal existed—thereby avoiding dismissal on the pleadings—if plaintiffs were bringing a claim that, for example, their individual DACA renewals were denied for no good reason. But it is hard to see how an expectation of renewal within the confines of the existing DACA policy could have created a mutually explicit understanding that the DACA program *itself* would not be terminated wholesale. That is, a 99% renewal rate under DACA provides no evidence that the government shared an understanding that the DACA program would continue existing indefinitely to provide such renewals. None of plaintiffs' cited authorities appear to address this kind of claim.

While we may agree with much of what plaintiffs say about the cruelty of ending a program upon which so many have come to rely, we do not believe they have plausibly alleged a "mutually explicit understanding" that DACA—created by executive action in a politically polarized policy area and explicitly couched in discretionary language—would exist indefinitely, including through a change in presidential administrations. On that basis, we affirm the district court's dismissal.

D. Due Process: Information-Sharing

Several of the complaints allege a different due process theory: DACA recipients had a protected interest based on the government's representations that the personal information they submitted with their applications would not be used for enforcement purposes, and the government violated this interest by changing its policy to allow such use. The district court held that the plaintiffs had plausibly alleged facts that state a claim under this theory.

As with their other due process claim, the question whether DACA recipients enjoy a protected due process right protecting them from having the government use their information against them for enforcement purposes turns on the existence of a "mutually explicit understanding[]" on that point between the government and DACA recipients. The DACA FAQs published by DHS state the following information-use policy:

Information provided in this request *is protected from disclosure* to ICE and CBP for the purpose of immigration enforcement proceedings unless the requestor meets the criteria for the issuance of a Notice to Appear or a referral to ICE under the criteria set forth in USCIS' Notice to Appear guidance. Individuals whose cases are deferred pursuant to DACA will not be referred to ICE. The information may be shared with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal, including for assistance in the consideration of DACA, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense. The above information sharing policy covers family members and guardians, in addition to the requestor. This policy, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied

upon to create any right or benefit, substantive or procedural, enforceable by law by any party in any administrative, civil, or criminal matter.

The statement that applicant information "is protected from disclosure" to the enforcement arms of DHS is a strong commitment, and plaintiffs plausibly allege that DACA recipients reasonably relied on it.

The government of course points to the express caveat that the information-sharing policy "may be modified, superseded or rescinded at any time." But as the district court held, this qualifier is ambiguous as to whether it allows the government to change its policy only prospectively, or also with respect to information already received—and this ambiguity presents a fact question not amenable to resolution on the pleadings. Plaintiffs' interpretation that a policy change would only apply prospectively is a plausible one, given that the policy is written in terms of what will happen to "[i]nformation provided in *this request*," rather than DACA-derived information generally. (emphasis added). It is at least reasonable to think that a change in the policy would apply only to those applications submitted after that change takes effect. And while the government also relies on the language stating that the policy does not create enforceable rights, such a disclaimer by an agency about what its statements do and do not constitute as a legal matter are not dispositive. Plaintiffs have plausibly alleged a mutually explicit understanding that DACA applicants' information would be protected from disclosure.

The government argues in the alternative that plaintiffs have failed to plausibly allege that DHS actually changed its policy. Plaintiffs' allegations rest on a set of FAQs about the DACA rescission that DHS published the same day it issued the rescission memorandum, September 5, 2017. In those rescission FAQs, the previous language stating that personal information "is protected from disclosure" has been replaced with the following:

Information provided to USCIS in DACA requests *will not be proactively provided* to ICE and CBP for the purpose of immigration enforcement proceedings, unless the requestor meets the criteria for the issuance of a Notice to Appear or a referral to ICE under the criteria set forth in USCIS' Notice to Appear guidance.

The government's first response—that the differing language in the two FAQs does not actually reflect a difference in policy—is hard to swallow. It does not take much parsing of the text to see the significant difference between "protect[ing]" something from "disclosure" on the one hand, and merely declining to "proactively provide[]" it on the other. This is especially so when the entities in question (and to which USCIS presumably *would* now provide information *re*actively) are fellow components of the same umbrella agency.

Changing gears, the government also points to yet a third set of FAQs, published months after the rescission and not part of the record in this case, which state:

Information provided to USCIS for the DACA process will not make you an immigration priority for that reason alone. That information *will only be proactively provided* to ICE or CBP if the requestor meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria set forth in USCIS' Notice to Appear guidance. *This information-sharing policy has not changed in any way since it was first announced*, including as a result of the Sept. 5, 2017 memo starting a wind-down of the DACA policy.

The government notes that a district court relied on FAQs containing this language in parallel litigation to dismiss a nearly identical information-use due process claim.

But this case is critically different because in *Batalla Vidal* the plaintiffs had attached the new version of the FAQs to their complaint. As the court there explained, "Plaintiffs . . . have effectively pleaded themselves out of court by relying on a document that contradicts their otherwise-unsupported allegation of a change to DHS's information-use policy." By contrast, here the most recent FAQs were not attached to or referenced in any of the complaints—indeed, they postdate the filing of the complaints. Therefore, the normal rule applies: materials outside the complaint cannot be considered on a motion to dismiss.

Even if it could be considered, this newest FAQ would not conclusively resolve the question of fact surrounding DHS's current information-sharing policy because it still contains the language that suggests a change from the pre-rescission policy. Plaintiffs have plausibly alleged that DHS has changed its policy.

Finally, in order to state a substantive due process claim, plaintiffs must allege conduct that "shock[s] the conscience and offend[s] the community's sense of fair play and decency." The government makes a passing argument that this standard is not satisfied because the information-sharing policy has always contained some exceptions, but as the *Garcia* plaintiffs put it, "[a]pplicants accepted those limited, acknowledged risks when they applied for DACA. They did not accept the risk that the government would abandon the other assurances that were 'crucial' to 'inducing them to apply for DACA.'" (alterations incorporated). We agree. Plaintiffs have stated a due process claim based on the alleged change in DHS's information-sharing policy.

E. Equal Protection

The district court also held that plaintiffs stated a viable equal protection claim by plausibly alleging that the DACA rescission disproportionately affected Latinos and individuals of Mexican descent and was motivated by discriminatory animus.

Because the district court denied the government's motion to dismiss plaintiffs' equal protection claim at the pleading stage, we take all of the complaints' allegations as true and construe them in the light most favorable to the plaintiffs We agree with the district court that plaintiffs plausibly alleged an equal protection claim.

Most significantly, plaintiffs allege that the rescission of DACA disproportionately impacts Latinos and individuals of Mexican heritage, who account for 93% of DACA recipients. The complaints also allege a history of animus toward persons of Hispanic descent evidenced by both pre-presidential and post-presidential statements by President Trump, who is alleged to have decided to end DACA, even though the directive to the Acting Secretary was issued from Attorney General Sessions. Finally, the district court properly considered "the unusual history behind the rescission," all of which appeared in the record submitted by the government. As the district court noted, "DACA received reaffirmation by the agency as recently as three months before the rescission, only to be hurriedly cast aside on what seems to have been a contrived excuse (its purported illegality). This strange about-face, done at lightning speed, suggests that the normal care and consideration within the agency was bypassed."

The government contends that the equal protection claim is foreclosed by *AADC*, in which the Supreme Court stated that "as a general matter . . . an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." But in the context of this case, the challenge to the rescission of DACA is not raised "as a defense against [] deportation," and is not a claim of "selective enforcement." Rather, it is a freestanding claim that the Executive Branch, motivated by animus, ended a program that overwhelmingly benefits a certain ethnic group. Thus, the equal protection claim does not implicate the concerns motivating the Court in *AADC* and underscored by the government: inhibiting prosecutorial discretion, allowing continuing violations of immigration law, and impacting foreign relations. The two cases cited by the government do not support its position, as both of them involved an individual noncitizen making an equal protection argument in an attempt to avoid his own deportation. Plaintiffs' challenge to the rescission of DACA—which is itself discretionary—is not such a case.

The government also contends that even if not totally barred by *AADC*, plaintiffs' claims must be subject to the heightened pleading standard applied to selective-prosecution claims in the criminal context. But this argument meets the same objection: as the district court held, plaintiffs' challenge is not a selective-prosecution claim. We are therefore not persuaded by the government's arguments.

The Supreme Court's recent decision in *Trump v. Hawaii*, does not foreclose this claim. There, statements by the President allegedly revealing religious animus against Muslims were "[a]t the heart of plaintiffs' case . . . ." The Court assumed without deciding that it was proper to rely on the President's statements, but nevertheless upheld the challenged executive order under rational basis review. Here, by contrast, plaintiffs provide substantially greater evidence of discriminatory motivation, including the rescission order's disparate impact on Latinos and persons of Mexican heritage, as well as the order's unusual history. Moreover, our case differs from *Hawaii* in several potentially important

respects, including the physical location of the plaintiffs within the geographic United States, the lack of a national security justification for the challenged government action, and the nature of the constitutional claim raised.

Therefore, we conclude that plaintiffs have stated a plausible equal protection claim.

VII.

The rescission of DACA—based as it was solely on a misconceived view of the law—is reviewable, and plaintiffs are likely to succeed on their claim that it must be set aside under the APA. We therefore affirm the district court's entry. The district court also properly dismissed plaintiffs' APA notice-and-comment claim, and their claim that the DACA rescission violates their substantive due process rights. The district court also properly denied the government's motion to dismiss plaintiffs' APA arbitrary-and-capricious claim, their claim that the new information-sharing policy violates their due process rights, and their claim that the DACA rescission violates their right to equal protection. of a preliminary injunction. The district court also properly dismissed plaintiffs' APA notice-and-comment claim, and their claim that the DACA rescission violates their substantive due process rights. The district court also properly denied the government's motion to dismiss plaintiffs' APA arbitrary-and-capricious claim, their claim that the new information-sharing policy violates their due process rights, and their claim that the DACA rescission violates their right to equal protection.

* * *

The Executive wields awesome power in the enforcement of our nation's immigration laws. Our decision today does not curb that power, but rather enables its exercise in a manner that is free from legal misconceptions and is democratically accountable to the public. Whether Dulce Garcia and the hundreds of thousands of other young dreamers like her may continue to live productively in the only country they have ever known is, ultimately, a choice for the political branches of our constitutional government. With the power to make that choice, however, must come accountability for the consequences.

AFFIRMED.

Trump v. NAACP

Ruling Below: *NAACP v. Trump*, 321 F. Supp. 3d 143 (D.D.C. 2018).

Overview: This is a case concerning whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable; and whether DHS's decision to wind down the DACA policy is lawful. The petitioners move to appeal the orders of the district court denying their motions to dismiss for lack of jurisdiction and for failure to state a claim.

Issue: (1) Whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable; and (2) whether DHS's decision to wind down the DACA policy is lawful.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al., *Plaintiffs*

v.

Donald J. TRUMP, et al., *Defendants*

United States District Court, District of Columbia

Decided on August 17, 2018

[Excerpt; some citations and footnotes omitted]

BATES, *District Judge*:

Before the Court is the government's motion for a stay pending appeal of the April 24, 2018 order vacating the rescission of the Deferred Action for Childhood Arrivals ("DACA") program and the August 3, 2018 order denying reconsideration of the April 24, 2018 order. Also before the Court is the government's unopposed motion for clarification that the August 3, 2018 order was a final, appealable judgment.

The government seeks a stay of the Court's orders in their entirety or, in the alternative, at least insofar as they require the Department of Homeland Security ("DHS") to begin accepting applications for initial grants of DACA benefits and for advance parole under the DACA program. Plaintiffs oppose the government's motion in part, urging the Court not to stay its orders in their entirety, but agreeing that a stay as to initial DACA applications would be proper. For the reasons that follow, the government's motion to clarify will be granted, and its motion for a stay pending appeal will be granted in part. The Court will stay its order as to new DACA

applications and applications for advance parole, but not as to renewal applications.

The Court is mindful that continuing the stay in this case will temporarily deprive certain DACA-eligible individuals, and plaintiffs in these cases, of relief to which the Court has concluded they are legally entitled. But the Court is also aware of the significant confusion and uncertainty that currently surrounds the status of the DACA program, which is now the subject of litigation in multiple federal district courts and courts of appeals. Because that confusion would only be magnified if the Court's order regarding initial DACA applications were to take effect now and later be reversed on appeal, the Court will grant a limited stay of its order and preserve the status quo pending appeal, as plaintiffs themselves suggest.

I. MOTION FOR STAY PENDING APPEAL

Under Federal Rule of Civil Procedure 62(c), district courts generally have the authority to stay their orders pending appeal In determining whether to grant such a stay, courts consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."

Traditionally, courts in this Circuit have considered these factors on a "'sliding scale,' whereby 'a strong showing on one factor could make up for a weaker showing on another.'" Although recent decisions of the Supreme Court have called this approach into question, "the district judges in this Circuit continue to adhere to binding precedent and apply the sliding scale approach to determine whether a movant is entitled to an injunction pending resolution of its appeal," , and plaintiffs do not dispute the propriety of that approach here. Thus, if "the three other factors strongly favor issuing" a stay, then the government "need only raise a 'serious legal question' on the merits" for that stay to issue.

As to the first factor, the Court finds that the government's appeal raises "serious legal question[s]." Those questions include whether DHS's decision to rescind DACA was subject to judicial review under the Administrative Procedure Act ("APA"), and, if so, whether that decision was arbitrary and capricious. Of course, this Court has already answered both questions in the affirmative: as the Court has explained at length elsewhere, DACA's rescission was both reviewable and unlawful because it was based chiefly on a "virtually unexplained" conclusion that DACA was unlawful. Nevertheless, the government has assembled a "substantial case on the merits," and the fact that the Court has thus far been unpersuaded by that case does not preclude the issuance of a stay,

The remaining factors lend sufficient support to plaintiffs' proposal for a limited stay pending appeal to render that stay appropriate in light of the government's "substantial" legal case. But they do not support the government's request for a stay of the Court's order in its entirety.

The second factor—the risk of irreparable injury to DHS—favors a stay, but only as to initial DACA applications and applications for DACA-based advance parole. The Court is unmoved by the government's assertion of injury resulting from its being "enjoined from implementing an act of Congress." Gov't's Mot. at 8. As the Court has already explained, DHS has been implementing that act of Congress (the Immigration and Nationality Act) under an ill-considered (and hence possibly incorrect) understanding of its enforcement authority. Unlike an injunction prohibiting the exercise of statutory authority altogether, this Court's order simply corrects the improper exercise of that authority. To the extent that such an injury is cognizable at all, it is insufficient to justify staying the Court's order here.

The Court accepts, however, that the additional staff and other resources required for DHS to process initial DACA applications would constitute a cognizable injury. DHS estimates that full implementation of the Court's order would lead to the filing of over 100,000 initial DACA applications and 30,000 requests for advance parole, which would in turn require the hiring of 72 temporary employees and the reassignment or hiring of 60 full-time employees. But these burdens apply only as to initial DACA applications, since DHS has been accepting renewal applications since mid-2012, with the exception of a brief period in late 2017 and early 2018. The second factor therefore favors plaintiffs' proposed limited stay, not the government's full stay.

The third factor, the risk of injury to plaintiffs, again favors continuing the stay as to initial DACA applications and applications for advance parole, but not as to renewal applications. Although the government maintains that the termination of existing DACA benefits—which would immediately end DACA beneficiaries' work authorizations and could lead to their removal from the United States—is not an irreparable harm, this untenable proposition has been rejected by this Court and by several others. And although there are currently two preliminary injunctions in place requiring DHS to continue accepting renewal applications, as the Court has previously noted, "those injunctions are both on expedited appeals and hence could be reversed in the not-too-distant future." This Court's order—which, unlike the preliminary injunctions entered in parallel litigation, is a final judgment—will therefore prevent irreparable harm to plaintiffs and all current DACA beneficiaries should those other injunctions be reversed. Hence, it will not be stayed as to renewal applications.

By contrast, the Court agrees with the district court in Regents that "while plaintiffs have demonstrated that DACA recipients . . . are likely to suffer substantial, irreparable harm as a result

The second factor therefore favors plaintiffs' proposed limited stay, not the government's full stay. of the rescission, they have not made a comparable showing as to individuals who have never applied for or obtained DACA" benefits. The same is true of advance parole. Thus, like the second factor, the third factor supports a stay as to initial DACA

applications and applications for advance parole, but not as to renewal applications.

The fourth and final factor—the public interest—also favors this limited stay. The Court has already recognized the disruption that would ensue if DHS were to begin accepting initial DACA applications pursuant to the Court's order but that order were later reversed on appeal. Just as this potential for disruption previously counseled in favor of a 90-day stay of the Court's order of vacatur, it now suggests that the public interest would be served by a stay pending appeal as to initial DACA applications. Like the second and third factors, however, this fourth factor does not support a stay as to renewal applications, since DHS is already accepting those applications.

In sum, because the government's appeal raises "serious legal questions," and because the remaining factors—harm to DHS, harm to DACA beneficiaries, and the public interest—favor a stay of the Court's order of vacatur as to initial DACA applications and applications for DACA-based advance parole, the Court will grant the government's request for a stay as to those applications. But because the three equitable factors do not favor a stay as to applications for the renewal of DACA benefits, pursuant to the "sliding scale" approach employed in this Circuit, the Court will not stay its order as to renewal applications. And the Court notes again that plaintiffs agree to this limited stay of the Court's order pending appeal.

II. MOTION FOR CLARIFICATION

Finally, the government has moved for clarification that the Court's August 3, 2018 order was a final, appealable judgment. The government also seeks an order dismissing plaintiffs' constitutional challenges to DACA's rescission as moot. Plaintiffs oppose the dismissal of their constitutional claims but agree that the Court's August 3, 2018 order is final and appealable.

Initially, the Court deferred ruling on plaintiffs' constitutional challenges to DACA's rescission pending DHS's response to the April 24, 2018 order vacating DACA's rescission on administrative grounds. Because the Court has since declined to reconsider its April 24, 2018 order, a decision on plaintiffs' constitutional challenges to DACA's rescission is unnecessary. Moreover, the Court has already entered final judgment on plaintiffs' remaining administrative and constitutional claims. Thus, the Court's August 3, 2018 order denying reconsideration "adjudicat[ed] all the claims and all the parties' rights and liabilities" in this action and was therefore a final, appealable order.

For the foregoing reasons, the government's motion for a stay pending appeal will be granted in part, and the Court will stay its order of vacatur as it applies to initial DACA applications and applications for DACA-based advance parole. The government's motion to clarify will also be granted. A separate order has been issued on this date.

ORDER

Upon consideration of [the government's unopposed motion for clarification and the

government's motion for a stay pending appeal, and for the reasons given in the Memorandum Opinion issued on this date, it is hereby

ORDERED that the motion for clarification is **GRANTED**; it is further

ORDERED that the motion for a stay pending appeal is **GRANTED IN PART AND DENIED IN PART**; it is further

ORDERED that, pursuant to Federal Rule of Civil Procedure 62(c), [69] the April 24, 2018 order vacating the rescission of the Deferred Action for Childhood Arrivals ("DACA") program and [77] the August 3, 2018 order denying reconsideration of the April 24, 2018 order are **STAYED** pending the government's appeal in this matter to the extent that those orders require the Department of Homeland Security to begin accepting initial DACA applications or applications for advance parole under the DACA program; it is further

ORDERED that, in all other respects, the stay of the April 24, 2018 and August 3, 2018 orders is **LIFTED** and those orders shall take immediate effect; and it is further **ORDERED** that the Court's April 24, 2018 and August 3, 2018 orders are clarified to constitute together a final, appealable judgment that "adjudicat[ed] all the claims and all the parties' rights and liabilities" in this action.

SO ORDERED.

McAleenan v. Vidal

Ruling Below: *Nielsen v. Vidal.*, F.2d (2nd Cir. 2018).

Overview: This is a case concerning whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable; and whether DHS's decision to wind down the DACA policy is lawful. The petitioners move to appeal the orders of the district court denying their motions to dismiss for lack of jurisdiction and for failure to state a claim.

Issue: (1) Whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable; and (2) whether DHS's decision to wind down the DACA policy is lawful.

Kirstjen M. NIELSEN, Secretary of Homeland Security, Et Al., *Petitioner*

v.

Martin Jonathan Batalla VIDAL, Et Al., *Plaintiff-Appellant*

United States Court of Appeals, Second Circuit

Decided on July 5, 2018

[Excerpt; some citations and footnotes omitted]

POOLER, RAGGI, HALL, *Circuit Judges*:

Petitioners move, pursuant to 28 U.S.C. § 1292(b), for leave to appeal November 9, 2017, and March 29, 2018, orders of the district court denying their motions to dismiss for lack of jurisdiction and for failure to state a claim. Upon due consideration, it is hereby **ORDERED** that the petitions are **GRANTED**.

It is further **ORDERED** that these appeals, as well as the appeals docketed under 2d Cir. 18-1521 and 18-1525, be heard in tandem with Petitioners' appeals of the district court's February 13, 2018, preliminary injunction, 2d Cir. 18-485 and 18-488.

Petitioners are directed to file a scheduling notification within 14 days of the date of entry of this order pursuant to Second Circuit Local Rule 31.2.

"It's Now the Supreme Court's Turn to Try to Resolve the Fate of the Dreamers"

The New York Times

Michael D. Shear and Adam Liptak

June 28, 2019

For seven years, the so-called Dreamers — nearly 800,000 young men and women who were brought to the United States illegally as children — have lived in limbo, protected from immediate deportation but without the guarantee of any permanent future in the United States.

On Friday, the Supreme Court agreed to resolve their fate, an announcement that sets in motion what is likely to be a yearlong legal clash over immigration policy and the power of the presidency that will probably culminate next summer with a ruling by the justices.

But by agreeing to take the case, the Supreme Court also provided a window of opportunity during which the Republicans and Democrats in Congress could permanently resolve the status of the young immigrants, perhaps by giving them a chance to earn citizenship.

At stake is a program that protects Dreamers known as Deferred Action for Childhood Arrivals, or DACA, that President Barack Obama created through executive action in 2012. Mr. Trump tried to end the program in 2017, calling it an "end-run around Congress" and saying that Mr. Obama's use of executive authority to protect the immigrants violated "the core tenets that sustain our Republic."

Members of both parties, as well as Mr. Trump on several occasions, have expressed sympathy for the Dreamers, many of them fully assimilated young men and women in school or with careers. But there is no evidence that a deal is likely.

For years, lawmakers have failed to reach any kind of consensus despite repeated attempts at negotiation. In 2018, a possible deal collapsed amid demands from Mr. Trump for restrictive changes to immigration laws and billions of dollars to build a wall along the southwestern border.

This month, the Democrat-led House passed sweeping legislation that would provide a path to citizenship for Dreamers and other immigrants whose legal status Mr. Trump has targeted. But the legislation is already languishing in the Republican-controlled Senate, where opponents view it as amnesty for lawbreakers.

"We will continue to fight tirelessly to protect these outstanding young men and women as we work to ensure America remains a nation of hope, freedom and opportunity for all," Speaker Nancy Pelosi said in a statement after the court's announcement on Friday.

Immigration advocacy groups have said they plan to urge Dreamers to renew their

protections under DACA, which expire every two years, until the fate of the program is decided by Congress or the Supreme Court. Since July 1, the federal government has approved more than 373,000 renewal requests.

During his 2016 presidential campaign, Mr. Trump vowed to end the DACA program, making it part of the anti-immigrant message that helped fire up his supporters. When he won, he promised to follow through even as he expressed sympathy for the Dreamers, a group of whom he had met with years earlier. On the day of his inauguration, he told a Democratic senator that he should not worry about the young immigrants.

But by September 2017, a group of conservative state attorneys general were threatening to sue the government if the president refused to make good on his promise to end the DACA program. Against the advice of lawmakers in both parties, Mr. Trump ordered that the program be terminated.

At the same time, Mr. Trump delayed the program's end by six months, saying he wanted to give Congress time to pass legislation that would permanently protect the Dreamers from deportation and give them an eventual path to citizenship.

"We will resolve the DACA issue with heart and compassion — but through the lawful Democratic process," Mr. Trump said in a statement after ending the program. "It is now time for Congress to act!"

Mr. Trump's six-month deadline initially put pressure on lawmakers in both parties to reach a deal. But that faded when a lower court judge blocked his decision to end DACA and ordered the government to continue operating it.

In November, the United States Court of Appeals for the Ninth Circuit, in San Francisco, ruled against the administration. It acknowledged that presidents have broad powers to alter the policies of earlier administrations but said the legal rationale offered by the Trump administration did not withstand scrutiny. The court also questioned "the cruelty and wastefulness of deporting productive young people to countries with which they have no ties."

In May, a second federal appeals court, the Fourth Circuit in Richmond, Va., issued a similar ruling.

The Trump administration has long sought to persuade the Supreme Court to rule on whether it had the authority to cancel the program. But the justices turned down an unusual petition seeking review in January 2018, before any appeals court had ruled. The administration asked again in November, not long before the Ninth Circuit ruled.

For many months, the Supreme Court took no action on the request, which was at odds with the court's usual practice.

On Friday, before the justices left for their summer break, the court agreed to hear an appeal of the Ninth Circuit decision, Department of Homeland Security v. Regents of the University of California, No. 18-587, along with two others in which appeals courts have not yet ruled: Trump v. NAACP, No.

18-588, and McAleenan v. Vidal, No. 18-589.

The administration has argued that the program was an unconstitutional exercise of executive authority, relying on a ruling from the United States Court of Appeals for the Fifth Circuit, in New Orleans, that shut down a related program created by Mr. Obama, Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA, saying he had exceeded his statutory authority.

In his executive action establishing DAPA, which was blocked by courts before it went into effect, Mr. Obama would have allowed as many as five million unauthorized immigrants who were the parents of citizens or of lawful permanent residents to apply for a program sparing them from deportation and providing them work permits.

After the death of Justice Antonin Scalia in 2016, the Supreme Court deadlocked, 4 to 4, in an appeal of the Fifth Circuit's ruling, leaving it in place and ending what Mr. Obama had hoped would become one of his central legacies.

The Trump administration has argued that the DAPA ruling meant that DACA was also unlawful.

In its decision in November, the Ninth Circuit said the two programs differed in important ways, rejecting the administration's legal analysis. The appeals court affirmed a nationwide injunction ordering the administration to retain major elements of the program while the case moved forward.

Such nationwide injunctions, which have been used by courts to block executive actions in both the Obama and the Trump administrations, have been the subject of much commentary and criticism.

The Supreme Court will hear arguments in the case during its next term, which starts in October. If a deal is not reached, a decision by the court next summer could roil the presidential campaign, no matter which way the court rules.

A decision to let the Trump administration end the program could energize angry Democratic voters and immigration advocates to campaign even more aggressively against the president. If the court prevents Mr. Trump from ending DACA, that could fire up his base of voters.

"Supreme Court to Review DACA Program Protecting Young Undocumented Immigrants"

The Washington Post

Robert Barnes

June 28, 2019

The Supreme Court announced Friday it will consider next term whether the Trump administration illegally tried to end the program that shields from deportation young undocumented immigrants brought to the United States as children.

Lower courts have said that President Trump's decision to terminate the Obama-era program was based on faulty legal reasoning and that the administration has failed to provide a solid rationale for ending it.

The Supreme Court's somewhat reluctant review of the Deferred Action for Childhood Arrivals (DACA) program means that, for the third consecutive year, the high court will pass judgment on a Trump priority that has been stifled by federal judges — this time in a presidential election year and in a case with passionate advocates and huge consequences.

The Supreme Court ended its term Thursday by putting on hold the Trump administration's plan to put a citizenship question on the 2020 Census. In 2018, it narrowly approved the president's travel ban on arrivals from a handful of mostly Muslim countries.

The DACA program has become politically volatile and the object of negotiations — to no end, so far — between Congress and the White House. Initiated in 2012 by a proclamation from President Barack Obama, DACA has protected from deportation nearly 700,000 people brought to the United States as children, a group that's been labeled "dreamers."

The justices have considered since January whether to review a ruling against the administration from the U.S. Court of Appeals for the 9th Circuit in California. It recently denied a request to expedite review of a decision of the U.S. Court of Appeals for the 4th Circuit.

A political solution that would relieve the court of having to decide the program's legality has not been forthcoming. Some experts in the field have wondered if the court's acceptance of the case, or a decision next term, might spur action.

The Trump administration moved to scuttle the program in 2017 after Texas and other states threatened to sue to force its end. Then-Attorney General Jeff Sessions advised the Department of Homeland Security that the program was probably unlawful and that it could not be defended.

Sessions based that decision on a ruling by the U.S. Court of Appeals for the 5th Circuit, which said that another Obama program protecting immigrants was beyond the president's constitutional powers. The Supreme Court deadlocked 4 to 4 in 2016 when considering the issue.

But other courts have rejected that theory, saying DACA is different. They have kept the program in place, requiring that those already enrolled be allowed to renew their participation. California Attorney General Xavier Becerra (D), who is among those fighting the administration's decision, said that more than 373,000 two-year renewals have been approved since January 2018.

Those approved to be in the program are allowed work permits and are protected from deportation, as long as they abide by its regulations and do not violate laws.

"DACA reflects our nation's commitment to helping hardworking people and creates hope and opportunity for a new generation — many of whom were brought to our country as toddlers," Becerra said in a statement after the Supreme Court announcement.

"So far, both lower courts in our legal fight to protect DACA have agreed with us that the Trump Administration's attempt to end it was unlawful."

Judges who have blocked ending the program have said the administration could remedy the legal impasse by providing a detailed reasoning of why the program should be abolished. Instead, it has continued to combat the orders in court.

The fight over the young people protected by the program — the average age is around 24 — has been a fierce battle between Trump and Democrats, who largely defend the initiative.

Trump at times has said he would like to find a way to protect those in the program, but attempts to work out a political compromise have foundered amid the larger partisan debate over immigration and border security.

The administration has been eager to get the issue before the Supreme Court, where it believes the more conservative wing will be on its side.

Solicitor General Noel J. Francisco, representing the administration at the Supreme Court, said in a brief that the cases "concern the Executive Branch's authority to revoke a discretionary policy of non-enforcement that is sanctioning an ongoing violation of federal immigration law by nearly 700,000 aliens."

So far, appeals courts in California, New York, Virginia and a district judge in the District of Columbia have said that reasoning is wrong. (A judge in Texas said the program was illegal but declined to rule that it should cease.) The judges who have ruled against the Department of Homeland Security's justification for ending DACA say it must be based on more than just a belief about its legal underpinnings.

"To be clear: we do not hold that DACA *could not* be rescinded as an exercise of Executive Branch discretion," Judge Kim McLane Wardlaw said in the 9th Circuit's opinion. "We hold only that here, where the

Executive *did not* make a discretionary choice to end DACA — but rather acted based on an erroneous view of what the law required — the rescission was arbitrary and capricious under settled law."

The regents of the University of California, one of the parties challenging the administration, told the Supreme Court there was no hurry to take the case because each DACA recipient had been vetted by the federal government.

The university leadership quoted a tweet from Trump to argue that not even this administration was advocating immediate deportation.

"Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military? Really!" the president tweeted in September.

The court accepted three cases, which will be consolidated for hearing in the new term that starts in October. They are *Department of Homeland Security v. Regents of the University of California*; *Trump v. NAACP* and *McAleenan v. Vidal*.

The court accepted a bundle of new cases Friday before the justices scattered for vacations and summer teaching gigs.

In one, it granted petitions from Bridget Kelly and Bill Baroni, two former aides to former New Jersey Gov. Chris Christie (R) who were convicted of felonies in 2016 for their parts in causing gridlock near the George Washington Bridge as retaliation against a mayor who did not support their boss.

The case is *Kelly v. United States*.

The justices said they will also review a Montana Supreme Court ruling invalidating a state program offering tax credits for funding scholarships. The scholarships could be used at private schools, including religious schools, and the court said that violated a prohibition in the state constitution.

The case is *Espinoza v. Montana Department of Revenue*.

"Supreme Court Doesn't Act on Trump's Appeal in 'Dreamers' Case"

New York Times

Adam Liptak

January 22, 2019

The Supreme Court took no action on Tuesday on the Trump administration's plans to shut down a program that shields some 700,000 young undocumented immigrants from deportation.

The court's inaction almost certainly means it will not hear the administration's challenge in its current term, which ends in June. The justices' next private conference to consider petitions seeking review is scheduled for Feb. 15.

Even were they to agree to hear the case then, it would not be argued until after the next term starts in October under the court's usual procedures. A decision would probably not arrive until well into 2020.

The move left the program in place and denied negotiating leverage to President Trump, who has said he wanted to use a Supreme Court victory in the case in negotiations with Democrats over immigration issues.

Mr. Trump tried to end the program in 2017, calling it an unconstitutional use of executive power by his predecessor and reviving the threat of deportation for immigrants who had been brought to the United States illegally as young children.

But federal judges have ordered the administration to maintain major pieces of the program, Deferred Action for Childhood Arrivals, or DACA, while legal challenges move forward.

In November, the United States Court of Appeals for the Ninth Circuit, in San Francisco, ruled against the administration. It acknowledged that presidents have broad powers to alter the policies of earlier administrations but said that the legal rationale offered by the Trump administration did not withstand scrutiny. The court also questioned "the cruelty and wastefulness of deporting productive young people to countries with which they have no ties."

Mr. Trump has criticized that ruling and has said he would be vindicated in the Supreme Court. He also predicted that a Supreme Court victory in the case, United States Department of Homeland Security v. Regents of the University of California, No. 18-587, would strengthen his hand in negotiations with Democratic lawmakers over immigration issues.

"I think it's going to be overturned in the United States Supreme Court, and I think it's going to be overwhelmingly overturned," Mr. Trump said at a cabinet meeting this month,

adding, “So if we win that case — and I say this for all to hear — we’ll be easily able to make a deal on DACA and the wall as a combination.”

Mr. Trump has taken inconsistent positions on the program. Even as he tried to end it, he called upon Congress to give legal status and an eventual path to citizenship to the young immigrants, who are sometimes called “Dreamers.” More recently, he offered to extend the program in exchange for concessions on a border wall.

The administration has argued that the program, instituted by the Obama administration, was an unconstitutional exercise of executive authority, relying on a ruling from the United States Court of Appeals for the Fifth Circuit, in New Orleans, concerning a related program. The Supreme Court deadlocked, 4 to 4, in an appeal of that ruling.

But the Ninth Circuit said the two programs differed in important ways, undermining the administration’s legal analysis. The appeals court affirmed a nationwide injunction ordering the administration to retain major elements of the program while the case moved forward. Such nationwide injunctions, which have been used by courts to block executive actions in both the Obama and the Trump administrations, have been the subject of much commentary and criticism.

Also on Tuesday, the administration told the court that it would ask it to hear an appeal of a trial judge’s ruling barring the addition of a question on citizenship to the next census. The administration’s filing said it would ask the justices to bypass the appeals court and put the case on a very fast track, culminating in arguments in April or May.

That was necessary, the solicitor general, Noel J. Francisco, wrote, because “the government must finalize the census questionnaire by the end of June 2019 to enable it to be printed on time.”

“It is exceedingly unlikely that there is sufficient time for review in both the court of appeals and in this court by that deadline,” Mr. Francisco wrote.

"Appeals court finds Trump administration's move to end DACA 'arbitrary and capricious'"

The Washington Post

Ann E. Marimow and Robert Barnes

May 17, 2019

A federal appeals court ruled Friday that the Trump administration had been "arbitrary and capricious" in its bid to end an Obama-era program that shields young undocumented immigrants from deportation.

The U.S. Court of Appeals for the 4th Circuit partially reversed an earlier ruling in the case brought by the immigrant advocacy organization CASA de Maryland.

In a 2-to-1 decision, the court said the government had failed to "give a reasoned explanation for the change in policy, particularly given the significant" interests involved, according to the majority opinion written by Judge Albert Diaz and joined by Judge Robert King.

The decision is similar to one reached by the U.S. Court of Appeals for the 9th Circuit. The Trump administration has asked the Supreme Court to intervene. But the request has been pending for months, and the justices have stopped putting the case on their weekly discussion list.

It is expected that the Supreme Court will have to deliver the final word on the program, called Deferred Action for Childhood Arrivals, or DACA, most likely in the term that begins in October. It could be that the justices are waiting for all of the appeals courts considering the issue to weigh in; another case challenging the administration's DACA decision has been argued in the U.S. Court of Appeals for the D.C. Circuit.

In the case decided Friday, Judge Julius N. Richardson said in his dissent that the administration had acted within its authority and noted the limited role of the judiciary.

"It is not our place to second-guess the wisdom of the discretionary decisions made by the other branches. The rescission of DACA was a controversial and contentious decision, but one that was committed to the executive branch," wrote Richardson, who was recently named to the court by President Trump. Diaz was nominated by President Barack Obama, and King by President Bill Clinton.

The Justice Department declined to comment on the ruling Friday.

"We recognize the struggle is not over and there are more battles to fight in the Supreme Court on this road to justice, but our families are emboldened by knowing that they are on the right side of history — the only question is whether all this country's institutions can be certain of the same," said Gustavo Torres,

executive director of CASA de Maryland, the immigrant organization that was the lead plaintiff in the case.

A series of lower-court judges ruled against the administration, finding that Trump's decision to end the program was based on faulty legal reasoning. Those decisions allowed immigrants already enrolled to renew their participation — meaning DACA remained in place. The program has shielded nearly 700,000 young people, often referred to as "dreamers."

The ruling from the Richmond-based 4th Circuit partly reverses a decision from the late U.S. District Judge Roger W. Titus of Maryland, who last year said — in a ruling that broke with the views from lower courts — that the administration had the authority to wind down the program.

Trump cited that decision in his favor in a message at the time on Twitter: "Federal Judge in Maryland has just ruled that 'President Trump has the right to end DACA,' " Trump wrote.

In his decision, Titus, who was appointed to the federal bench in Maryland by President George W. Bush and died in March, criticized Trump for his "unfortunate and often inflammatory rhetoric," and noted that, were he not a judge constrained to interpreting the law, he would opt for a different result.

"An overwhelming percentage of Americans support protections for 'Dreamers,' yet it is not the province of the judiciary to provide legislative or executive actions when those entrusted with those responsibilities fail to act," Titus wrote, adding later, "This Court does not like the outcome of this case, but is constrained by its constitutionally limited role to the result that it has reached. Hopefully, the Congress and the President will finally get their job done."

"Federal Appellate Court Sides with UC Regents in Fight to Preserve DACA"

Daily Bruin

Megana Sekar

November 8, 2018

A federal appeals court supported the University of California Board of Regents in their case against the current federal administration's decision to end Deferred Action for Childhood Arrivals on Thursday.

The United States Court of Appeals for the Ninth Circuit blocked the Department of Homeland Security's decision to terminate DACA benefits and discontinue applications. The three-judge panel supported past decisions that required the Trump administration continue accepting applications and renewals.

DACA is an executive action issued by former President Barack Obama in 2012 to help undocumented individuals who arrived to the country as children to obtain work permits, college degrees and driver's licenses. Trump announced he would rescind the program in September 2017, and the UC countered immediately, saying the repeal violated undocumented persons' due process rights.

UC President Janet Napolitano was the U.S. secretary of Homeland Security under President Obama when he created DACA.

One of the ninth circuit judges, Kim McLane Wardlaw, said the Obama administration did not overreach the executive branch's powers because it made the choice about how to direct deportation resources. She said executive agencies do not have the resources to deport every undocumented individual, which led Obama to pause deportation proceedings for minors through the creation of DACA.

The Court said the government's decision to repeal DACA was based on an arbitrary and possibly misguided view of the law, and is therefore subject to review by the courts.

UC spokesperson Claire Doan said in a statement the University welcomes the appellate court's decision and is now calling on the Trump administration to stop its efforts to repeal DACA.

Doan added while Thursday's ruling was a win for the UC, Congress must enact permanent protections for DACA recipients including a path to citizenship, so students will not have to worry about their futures.

On Monday, the United States Department of Justice and the U.S. solicitor general filed a petition asking the Supreme Court to decide the issue before the ninth circuit court made its decision. The Supreme Court previously rejected a similar request to pre-emptively intervene in February. The Trump administration is expected to appeal this

decision until the issue reaches the highest court.

"U.S Court Orders Trump Administration to Fully Reinstate DACA Program"

Reuters

Andrew Chung

August 3, 2018

A federal judge on Friday ruled that the Trump administration must fully restore a program that protects from deportation some young immigrants who were brought to the United States illegally as children, including accepting new applications for the program.

U.S. District Judge John Bates in Washington, D.C., said he would stay Friday's order, however, until August 23 to give the administration time to decide whether to appeal. Bates first issued a ruling in April ordering the federal government to continue the Deferred Action for Childhood Arrivals, or DACA, program, including taking applications. He stayed that ruling for 90 days to give the government time to better explain why the program should be ended.

On Friday Bates, who was appointed by former President George W. Bush, a Republican, said he would not revise his previous ruling because the arguments of President Donald Trump's administration did not override his concerns.

Under DACA, roughly 700,000 young adults, often referred to as "Dreamers", were protected from deportation and given work permits for two-year periods, after which they must re-apply to the program.

The program was created in 2012 under former President Barack Obama, a Democrat.

Two other federal courts in California and New York had previously ordered that DACA remain in place while litigation challenging Trump's decision to end it continued. Those rulings only required the government to process DACA renewals, not new applications.

Another lawsuit in a Texas federal court is seeking to end DACA.

A spokesman for the U.S. Department of Justice said on Friday that the government would continue to defend its position that it "acted within its lawful authority in deciding to wind down DACA in an orderly manner."

Congress so far has failed to pass legislation to address the fate of the Dreamers, including a potential path to citizenship.

Friday's ruling came in lawsuits filed by several groups and institutions, including the National Association for the Advancement of Colored People and Princeton University.

“Federal Judge Says Trump Administration Failed to Justify DACA Rescission”

Politifact

Miriam Valverde

August 6, 2018

A federal judge said the Trump administration's rescission of a program deferring the deportation of young immigrants was "arbitrary and capricious" because it "failed adequately to explain its conclusion that the program was unlawful."

U.S. District Judge John D. Bates on April 24 gave the administration 90 days to issue a new memo rescinding Deferred Action for Childhood Arrivals (or DACA) that gives a "fuller explanation" on why the program lacks statutory and constitutional authority.

Without a new memo, the initial September directive rescinding DACA will be vacated, and the original program will be restored, Bates wrote. That means the administration would have to resume accepting and processing new applications for DACA, in addition to renewal requests.

Earlier this year, and in separate cases, federal judges in California and New York ordered the Trump administration to continue the program and accept renewal applications. The September memo said no new renewal applications would be accepted after Oct. 5, 2017. The administration in those previous cases had not been ordered to accept new applications.

"We believe the judge's ruling is extraordinarily broad and wrong on the law," White House press secretary Sarah Huckabee Sanders said at an April 25 briefing.

The case before Bates, in the U.S. District Court for the District of Columbia, was brought by the National Association for the Advancement of Colored People and the Trustees of Princeton University.

Bates said the Trump administration had not cited any statutory provision with which DACA was in conflict.

The Justice Department said the ruling did not change its stance challenging DACA's constitutionality.

"DACA was implemented unilaterally after Congress declined to extend benefits to this same group of illegal aliens," said Justice Department spokesman Devin O'Malley.

O'Malley said DACA "was an unlawful circumvention of Congress" and susceptible to the same legal challenges that "effectively ended" another Obama-era program, Deferred Action for Parents of Americans and Lawful Permanent Residents.

Pending a new memo and the judge's evaluation of its merits, we continue to rate this promise as In the Works.

"Supreme Court Says White House Can Withhold DACA Documents for Now"

The Wall Street Journal

Jess Bravin and Brent Kendall

December 8, 2017

A divided Supreme Court on Friday temporarily blocked a lower court from requiring the Trump administration to release internal documents related to its September decision to end a program protecting undocumented immigrants who came to the U.S. as children.

The court's emergency action halting the document release comes just days after it issued an emergency order for the White House in another major case, allowing President Donald Trump's latest travel ban affecting six predominantly Muslim countries to be fully implemented during litigation over the policy.

Federal courts in San Francisco had ordered the White House and several agencies to turn over the materials in response to suits filed by the states of California, Maine, Maryland and Minnesota, among other parties, over plans to end the Deferred Action for Childhood Arrivals, an Obama administration program that has allowed some 800,000 young people to work in the U.S. since 2012.

DACA, as the program is known, is scheduled to end in March. Attorney General Jeff Sessions recommended the policy shift in September, reiterating his long-held belief that President Barack Obama had overstepped his authority on behalf of illegal immigrants.

"The Department of Justice is pleased with the Supreme Court's decision today putting on hold the district court's overreach," said department spokesman Devin O'Malley. "The Department of Homeland Security acted within its lawful authority in deciding to wind down DACA in an orderly manner, and the Justice Department believes the courts will ultimately agree."

"What is the Trump administration trying so hard to hide?" California Attorney General Xavier Becerra said after the court's action. "The administration owes the American people a real explanation for its decision to upend the lives of 800,000 Dreamers, stripping them of their ability to work and study, stirring fear and threatening our economy."

The challengers argue that the termination violates both the Constitution and the Administrative Procedure Act, and sought records documenting the method by which the government reached its decision. They argued that access to the records was crucial in assessing whether the administration changed policy positions in an arbitrary manner.

The government produced 256 pages, of which 192 were court opinions from litigation over a separate Obama-era program, never implemented because of court orders, that would have temporarily protected from deportation illegal immigrants whose children are U.S. citizens.

U.S. District Judge William Alsup, of the Northern District of California, said the administration released very few documents related to its decision and "excluded highly relevant materials from the administrative record." He ordered the government to provide DACA-related materials considered by Elaine Duke, who was then-acting secretary of Homeland Security, and by officials who provided input or advice on canceling the program. Judge Alsup's decision was upheld by the Ninth U.S. Circuit Court of Appeals.

The Trump administration asked the Supreme Court to block that disclosure, maintaining that its decision to cancel DACA fell beyond judicial review, and that even if the lawsuits could proceed, it had no obligation to disclose the records.

The Supreme Court, voting 5-to-4 along conservative-liberal lines, halted release of the materials while considering the government's arguments. The court gave the challengers until Dec. 13 to file their legal response.

The majority acted without comment.

The dissenters, however, contended that the government had scant justification to withhold the documents.

"Judicial review cannot function if the agency is permitted to decide unilaterally what documents it submits to the reviewing court as the administrative record," Justice Stephen Breyer wrote in a 10-page dissent, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan.

"Effective review depends upon the administrative record containing all relevant materials presented to the agency, including not only materials supportive of the government's decision but also materials contrary to the government's decision," the dissent said.

In an unusual move, Judge Alsup submitted a statement to the Supreme Court explaining his discovery orders.

The government's petition "leaves the incorrect impression that the district court endorsed unfettered discovery toward defendants," Judge Alsup wrote. Instead, he says, "any discovery should be 'limited, narrowly directed, [and] reasonable.' "

Judge Alsup wrote that he reviewed 84 DACA-related documents the government produced and ruled that 48 of them didn't qualify for a privilege allowing the government to withhold them.

Additionally, he said that while the government acknowledged that "verbal inputs" likely influenced the decision to cancel DACA, they were omitted from the administrative record.

Separately, the Trump administration has been fighting a similar order to produce

documents in a New York lawsuit filed by 16 states and DACA recipients.

A federal trial judge in Brooklyn ordered the government in October to turn over materials considered by the departments of Justice and Homeland Security in connection with ending DACA.

The Second U.S. Circuit Court of Appeals had paused the order until U.S. District Judge Nicholas Garaufis considered whether the administration's withdrawal of the immigration policy was "immune from judicial review," as Justice Department lawyers had argued.

Judge Garaufis rejected those arguments in a ruling last month, clearing the way for the lawsuit to move forward. The Second Circuit is considering whether to lift the hold on his order requiring the government to turn over DACA-related documents.

“DACA Has Not Been Saved—And It May Be In Its Last Days”

Pacific Standard

Jack Herrera

November 26, 2018

If you read headlines in the last month, you might think that the Deferred Action for Childhood Arrivals program, known as DACA, was in good shape. "Dreamers Win Round in Legal Battle to Keep DACA," the *New York Times* announced on November 8th, the day a federal appeals court upheld a California judge's injunction forbidding the Trump administration from rescinding the program. "Today's decision is a tremendous victory," Xavier Becerra, California's attorney general, said in a statement.

For many Dreamers (as DACA recipients are commonly called), however, the month's news, like other supposed wins for DACA, inspired little optimism.

"I see a lot of people call [these court decision] victories," says Indira Marquez Robles, a DACA recipient attending university in Atlanta. "In a way, I do see it as a victory. But with these victories, there's no real change. I always feel like it's more like just holding on."

Legal experts tend to agree with Marquez Robles. Though DACA has scored a string of legal successes since the Trump administration attempted to end the program, these have done little to protect the program.

For the past 14 months, as her DACA status has remained uncertain, Marquez Robles and her mother have taken turns sending each other news and updates from the courts. Their near-daily check-ins about the program began in September of 2017, when the Trump administration announced its decision to end the Obama-era program that protects certain undocumented immigrants who arrived in the country as children from deportation.

That announcement threw DACA recipients like Marquez Robles into a state of deep uncertainty. Besides the sudden inability to renew their DACA status, Dreamers had to contend with a new threat: The government had their names on a list of all DACA applicants. What if the immigrant-hostile Trump administration used that list to locate and deport young immigrants and their families?

A slew of subsequent court cases assuaged these immediate worries, at least temporarily. Three judges, in three separate cases in California, Washington, D.C., and New York, issued injunctions preventing the Trump administration from rescinding the program. Though the administration can still reject new applications, the injunctions mandate that the government continue to accept DACA renewals, as ending the

program for existing recipients would be, according to the California judge, "arbitrary and capricious." (That judge's opinion, in *Regents of the University of California v. Department of Homeland Security*, was the one that was upheld by the Ninth Circuit earlier this month.) Marquez Robles renewed her status this year, as have thousands of other Dreamers since the California court first issued the injunction.

Another court case, this one in Maryland, dealt with the issue of the list—the government's collection of DACA-recipient names. Two different agencies come into play in the decision. The first, United States Citizenship and Immigration Services, is the agency that actually has the list. The Department of Homeland Security houses USCIS, as well as the primary agency tasked with immigration enforcement: Immigration and Customs Enforcement.

As of now, USCIS has not shared the list of names with ICE, and is barred from doing so by the federal court in Maryland. In the case, *Casa de Maryland v. DHS*, the court issued an injunction barring the federal government from sharing DACA-related information with immigration enforcement, except in limited scenarios—for instance, if a DACA recipient has already been served a notice to appear in court.

As a result of these court decisions, DACA recipients have gained back many of the protections that disappeared back in September of 2017. But those protections are not set in stone. There has been no final decision that determines DACA's status; all the aforementioned court decisions are still winding their way through an appeals process. Depending on how higher courts rule in the coming months, the injunctions protecting Dreamers could disappear for good.

But Marquez Robles says she's noticed that the public's attention toward the program's fate has steadily diminished since last year. Teachers and other people in her life used to check in on her, but now the issues facing DACA recipients seems to have slipped out of many peoples' minds.

"There was this whole surge of 'Defend DACA' when it first got canceled," Marquez Robles says. "Nowadays, some people still talk about it. But I have to rely on the people I've worked with in advocacy organizations, or [other DACA recipients]. We check up on each other."

Though DACA recipients and their advocates remain anxious about DACA's status, the program seems to have lost the public's attention. And the periodic headlines declaring new "victories" might create the illusion, for those less informed, that DACA is winning its fight.

In reality, DACA is on the ropes. Right now, the most immediate threats to the program come from a judge in Houston, Texas, and the Supreme Court.

In Texas, U.S. District Judge Andrew Hanen, one of the most notoriously anti-immigrant judges in the country—under President Barack Obama, Hanen struck down parts of DACA and prohibited a program that would have protected undocumented parents of U.S. citizens—is currently hearing *Texas*

v. Nielsen, a case that could end DACA. Unlike the court cases in California and other states, *Texas v. Nielsen* does not consider whether or not the Trump administration has a right to end DACA, but instead considers whether or not DACA is constitutional in the first place. A coalition of states, led by Texas, sued the federal government, alleging that the program is illegal. Though Hanen surprised legal observers by declining to issue a preliminary injunction suspending DACA, he has given strong indications that he intends to rule DACA illegal. "If the nation truly wants a DACA program it is up to Congress to say so," Hanen said in August.

With the possibility of multiple competing court rulings in the country, it's likely that the nation's highest court will soon weigh in—and when it comes to ending DACA, the Trump administration has given indication that it likes its chances. As Mayra Joachin, a staff attorney with the National Immigration Law Center, explains, the Trump administration took the "rare and unusual" step of asking the Supreme Court to take up the *Regents*case in California before it even got to the Ninth Circuit.

Joachin says that there is a "high likelihood" that the Supreme Court will soon take up the *Regents* case. Though the timeline is difficult to predict, Joachin says that the Court will likely announce its decision to take up the case by early January, and then hear oral arguments sometime in March and April. Until then, the DACA program's status will likely remain the same, unless the Supreme Court cancels the lower court's injunction.

"Where do I think this is going to go? I don't have a crystal ball," says Shoba Wadhia, a law professor and director of the Center for Immigrants' Rights Clinic. "But I think one thing is clear: No court has found DACA to be unconstitutional, and multiple courts believe the government's justification for ending DACA was arbitrary and a mistake of law."

Wadhia co-authored a letter signed by over 100 law professors nationwide that argued DACA is perfectly constitutional. However, despite many legal scholars' belief in the program's legality, the fact that the Trump administration has asked the Supreme Court to take up the *Regents* case could indicate that they believe the Court—full with Trump's two recent conservative appointees—will rule in the administration's favor.

With so many court cases, the future of DACA is impossible to predict, but it's likely that the judicial process protecting the program will soon run out of steam, and the program will lose its last defense. The Supreme Court could rule against DACA in the *Regents* case, or could confirm Hanen's ruling if he eventually rules against the program. The *Casa de Maryland*case, which stops ICE from getting a list of DACA recipients, is still being appealed, so even that last protection could vanish.

For Joachin and others in the undocumented advocacy community, there is some hope that Congress will step in and save the program before it meets its end in the courts.

"It's difficult to predict what will actually pass within the new Congress, but statements from [likely Speaker of the House] Nancy Pelosi indicate that protecting DACA will be a priority for Democrats," Joachin says. The Congressional Progressive Caucus has also indicated that DACA is a priority.

As so much remains up in the air, Marquez Robles says she's begun to feel numb to the constantly changing legal situation. "It's been a normalized process, being in this limbo," she says. With her future, and the future of thousands of other Dreamers still in question, she says all she can do now is focus on her studies. "So much is uncertain and unclear, but I'm still in college," she says. "I don't want to disregard that privilege, and I want to keep studying because that's the dream."

Kansas v. Garcia

Ruling Below: *State v. Garcia*, 401 P.3d 588 (2017).

Overview: Ramiro Garcia was stopped for speeding and, upon further information, police found out that he illegally used social security number on various federal and state forms. He was charged with identity theft under state law.

Issue: (1) Whether the Immigration Reform and Control Act expressly pre-empts the states from using any information entered on or appended to a federal Form I-9, including common information such as name, date of birth, and social security number, in a prosecution of any person (citizen or alien) when that same, commonly used information also appears in non-IRCA documents, such as state tax forms, leases, and credit applications; and (2) whether the Immigration Reform and Control Act impliedly preempts Kansas' prosecution of respondents.

STATE OF KANSAS, *Plaintiff-Appellee*

v.

RAMIRO GARCIA, *Defendant- Appellant*

Supreme Court of Kansas

Decided on September 8, 2017

[Excerpt; some citations and footnotes omitted]

BEIER, *Supreme Court Judge*:

This companion case to *State v. Morales* and *State v. Ochoa-Lara*, this day decided, involves defendant Ramiro Garcia's conviction on one count of identity theft.

The State's basis for the charge was Garcia's use of the Social Security number of Felisha Munguia to obtain restaurant employment. A Court of Appeals panel affirmed Garcia's conviction in an unpublished opinion.

We granted Garcia's petition for review on three issues: (1) whether there was sufficient evidence that Garcia acted with an "intent to defraud," an element of identity theft; (2) whether the federal Immigration Reform and Control Act of 1986 (IRCA) preempted the prosecution; and (3) whether it was clearly erroneous for the district court judge not to give a unanimity instruction. Because we decide that Garcia's conviction must be reversed because the State's prosecution based on the Social Security number was expressly preempted, we do not reach Garcia's two other issues.

FACTUAL AND PROCEDURAL HISTORY

On August 26, 2012, Officer Mike Gibson pulled Garcia over for speeding. Gibson asked Garcia where he was going in such a hurry. Garcia replied that he was on his way to work at Bonefish Grill. Based on the results of a routine records check on Garcia, Gibson contacted Detective Justin Russell, who worked in the financial crimes department of the Overland Park Police Department. Russell was in the neighborhood and came to the scene to speak with Garcia.

The day after speaking with Garcia, Russell contacted Bonefish Grill and obtained Garcia's "[e]mployment application documents, possibly the W-2, the I-9 documents." Russell then spoke with Special Agent Joseph Espinosa of the Social Security Office of the Inspector General. Espinosa told Russell that the Social Security number Garcia had used on the forms belonged to Felisha Munguia of Edinburg, Texas.

As a result of the investigation, Garcia was charged with one count of identity theft. The complaint alleged:

"That on or about the 25th day of May, 2012, in the City of Overland Park, County of Johnson, and State of Kansas, RAMIRO ENRIQUEZ GARCIA did then and there unlawfully, willfully, and feloniously obtain, possess, transfer, use, sell or purchase any personal identifying information, or document containing the same, to wit: [S]ocial [S]ecurity number belonging to or issued to another person, to wit: Felisha Munguia, with the intent to defraud that person, or anyone else, in order to receive any benefit, a severity level 8, nonperson felony, in violation of K.S.A. 21-6107, K.S.A. 21-6804 and K.S.A. 21-6807.

Before trial, Garcia filed a motion to suppress the I-9 form he had filled out during the hiring process, relying on an express preemption provision in IRCA. At the hearing on the motion, Garcia noted, and the State agreed, that the State did not intend to rely on the I-9 as a basis of prosecution. Garcia then argued that, because the information contained on the I-9 was transferred to a W-4 form, the W-4 should be suppressed as well. The district judge refused to suppress the W-4.

At trial, Khalil Booshehri, a manager at Bonefish Grill, testified that Garcia had been a line cook for the restaurant and had been a good employee. Booshehri testified that Garcia was paid for his work as a line cook, was allowed to eat while on duty, and was eligible for overtime pay.

Jason Gajan, a managing partner at Bonefish Grill, testified about the restaurant's hiring process. The process typically begins with a short, informal interview when a person comes in looking for an application. If the manager determines that the person meets the restaurant's basic requirements, he or she is given a card with instructions explaining how to fill out an online application.

With respect to Garcia's hiring specifically, the State introduced his employment application into evidence. The application contained basic information about Garcia's work history and education. The application did not disclose a Social Security number, although it contained a statement by Garcia

that, if hired, he could verify his identity and legal right to work in the United States.

After receiving Garcia's application, Bonefish Grill decided to hire Garcia.

Once a hiring decision has been made, the restaurant sends an e-mail to the new hire with a packet of information, including documents to fill out. Gajan believed that in addition to the information packet, new hires also received W-4 and I-9 forms.

Garcia filled out electronic W-4 and K-4 tax forms, both of which were admitted into evidence. Each of the forms contained a Social Security number and was digitally signed by Garcia. Gajan testified that, in addition to the employee filling out the forms, Gajan would have had to see a paper Social Security card and then manually input the number from the card into an electronic document. After verifying the documents, Gajan would also have digitally signed the document himself. According to Gajan, he could not have proceeded with the hiring process if Garcia had not filled out the required forms.

Gajan also testified about the benefits Bonefish Grill offered to employees and the benefits Garcia received. According to Gajan, Garcia was paid for the hours he worked at Bonefish Grill, including overtime pay on occasion. During his shifts, Garcia was allowed to eat at the restaurant. In addition, Bonefish Grill offered employees health and dental insurance, as well as paid vacation; but Gajan conceded that Garcia had not worked at Bonefish Grill long enough to receive these benefits. Gajan believed that Garcia would have received workers compensation benefits had he been injured on the job.

The State's final witness was Espinosa. He testified that he had searched the "Social Security Master File Database" and determined that the Social Security number Garcia had used was not assigned to Garcia. The number was assigned to Felisha Mari Munguia, who was born in 1996. The database showed that Munguia had been issued a second Social Security card in 2000. Espinosa also provided examples of hypothetical consequences that might be caused by a person using someone else's Social Security number. In a "case specifically like this," if a person were to

> "come and work under your [S]ocial [S]ecurity number, it would report back wages for you[,] presumably making you insured into federal government programs that you may have not otherwise been entitled to.
>
> "Conversely to that, let's say that you were receiving some disability or retirement benefits from one of these government programs. These earnings could adversely affect you, because it would indicate that you are working when in fact you might not be working, and you could be terminated from those benefits."

During cross-examination, Espinosa testified that he had never spoken to Munguia.

In closing argument, the prosecutor acknowledged that Garcia was "a hard worker" and "did well at his job." He

conceded that "Mr. Booshehri did everything but tell you he was a very valuable employee. Mr. Gajan had nothing bad to say about him. He worked hard for Bonefish." But, according to the State, those facts did not matter because "in the State of Kansas, you cannot work under someone else's [S]ocial [S]ecurity number." The prosecutor also noted that Gajan "would not have hired [Garcia] if he did not have a [S]ocial [S]ecurity number."

After deliberations, the jury found Garcia guilty of identity theft. The district judge later sentenced Garcia to 7 months in prison but granted 18 months' probation.

This appeal followed.

DISCUSSION

Garcia challenges his conviction because, in his view, this identity theft prosecution against him was preempted by IRCA.

All preemption arguments, including the as-applied one advanced by Garcia in this case, are based upon the Supremacy Clause of the United States Constitution. The Supremacy Clause gives Congress the power to preempt state law. When evaluating whether a state law is preempted, "'[t]he purpose of Congress is the ultimate touchstone.'

Before focusing on the use of the Kansas identity theft statute challenged here, it is helpful to review the general law of preemption under the precedents of the United States Supreme Court and this court.

When all types, categories, and subcategories of preemption claims are considered, we discern eight possible ways a party may challenge an application of state law, alleging it is preempted by federal law.

First, there are traditionally two basic types of such challenges: facial and as-applied. When a party raises a facial challenge to application of state law, he or she claims that the law is preempted in all or virtually all cases.

In contrast, when a party raises an as-applied preemption challenge, he or she argues that state law may be constitutional when applied in some cases but not in the particular circumstances of his or her case. In an as-applied challenge, the law under scrutiny can itself be "textually neutral," meaning "one [cannot] tell that the" law undermines federal policy "by looking at the text [alone]. Only when studying certain applications of the laws" do conflicts arise.

All of this said, "facial" and "as-applied" labels "parties attach to claims are not determinative" of the analysis a court will ultimately employ in a preemption case. And the boundary between the two types of challenges is not impenetrable. Still, as with other types of cases alleging that a law is unconstitutional, "[t]he distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." Garcia challenges the use of law of general application to himself alone, *i.e.*, advances an as-applied claim. The State does not challenge his characterization. The relief provided in this case will flow solely to Garcia. The fact that the holding in his favor may have wider application, *Morales*

and *Ochoa-Lara*, does not mean his preemption argument should be labeled "facial."

Regardless of whether a particular challenge qualifies as facial or as-applied, any preemption claim also fits one of two other categories: express and implied.

Express preemption depends upon the words used by Congress, which may explicitly limit a state's ability to legislate or apply its own constitutional or common law. "There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision."

Implied preemption arises when a federal statute's "structure and purpose" demonstrate that state law can have no application.

Implied preemption is further analytically divided into two subcategories: field and conflict.

A field preemption claim involves circumstances in which Congress has legislated so comprehensively on a subject that it has foreclosed any state regulation in that area. "Where Congress occupies an entire field, . . . even complementary state regulation is impermissible."

Conflict preemption involves just that—conflict between federal law and state law. A conflict preemption claim can arise in one of two situations, which have been labeled "impossibility" and "obstacle."

Conflict-impossibility preemption arises in circumstances in which compliance with both federal and state law is, practically speaking, impossible.

Conflict-obstacle preemption involves circumstances in which application of state law erects an obstacle to achievement of Congress' objectives.

As we turn to evaluating the applicability of these preemption concepts in this case, we first address two preliminary matters: preservation of the preemption issue and the potential applicability of a presumption against preemption.

Preservation of Preemption Issue

As stated above, a party's label on his or her preemption challenge does not inevitably control the analysis a court can employ. Simply put, a court's analysis of a preemption challenge is not bound to color within any party's lines. This approach to preemption challenge analysis is consistent with the more widely applicable practice of allowing a party who properly preserves a federal claim to make any appellate argument in support of that claim.

Here, Garcia's preemption issue was preserved in the district court through defense IRCA arguments in favor of suppression and a subsequent evidentiary objection. In his brief to the Court of Appeals, Garcia advanced express, field, and conflict-obstacle preemption challenges—all as-applied to Garcia only. The State responded in kind in its brief. In Garcia's petition for review to this court, he repeated his three-pronged approach to preemption. It was not until oral argument that his counsel, when pressed, concentrated his argument on as-

applied, field preemption. Again, even after this limitation, we are free to consider any type, category, or subcategory of preemption supported by the appellate record and applicable law.

Potential Application of Presumption Against Preemption

The United States Supreme Court has sometimes recited that it presumes no preemption. And we have recited and applied such a presumption in some but not all of this court's earlier preemption cases.

But the reality is that under United States Supreme Court precedent, the necessity of indulging such a presumption in an express preemption case is far from clear.

Three members of the current Court—Chief Justice John G. Roberts and Justices Clarence Thomas and Samuel A. Alito—and the now departed Justice Antonin G. Scalia have recognized that the Court has not consistently applied the presumption to express preemption cases and have said it should not be so applied. And the wording of opinions authored by Justice Anthony M. Kennedy betray at least some ambivalence about the merit of applying a presumption of Congressional intent when Congress has already included express preemption language in a statute.

Indeed, careful review of a single case exposes the range of positions on application of the presumption in an express preemption case held by Court members. In that case, *Riegel v. Medtronic, Inc.*, the Court considered whether federal law preempted state-law claims of negligence, strict liability, and implied warranty in a case regarding the manufacture of a balloon catheter. Justice Scalia, writing for a majority including Chief Justice Roberts and Justices Kennedy, Souter, Thomas, Breyer, and Alito, interpreted an express preemption clause without applying the presumption and held that state law was preempted. Justice Stevens concurred in part and in the judgment; he would not have applied the presumption and agreed that the state law was preempted. Finally, Justice Ginsburg dissented. She would have applied the presumption and would have held that the state law was not preempted.

Lacking contrary clarity from the United States Supreme Court, we hold that it is unnecessary to apply a presumption against preemption when a court evaluates the merit of an express preemption claim, as long as the language of the congressional enactment at issue is clear. This makes logical and legal sense. There is simply no need to presume congressional intent when Congress has stated its intent explicitly. We agree that

> "[w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation.

This approach also has the considerable virtue of consistency with our modern rubric

for statutory interpretation and construction in all other contexts. "The fundamental rule of statutory interpretation is that the intent of the legislature is dispositive if it is possible to ascertain that intent. Our "primary consideration in ascertaining the intent of the legislature" is the language of a statute; we think "the best and only safe rule for determining the intent of the creators of a written law is to abide by the language that they have chosen to use." This court does not move from interpretation of plain statutory language to the endeavor of statutory construction, including its reliance on extra-textual legislative history and canons of construction and other background considerations, unless the plain language of the legislature or Congress is ambiguous.

Express Preemption

"The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." In line with that power, Congress enacted the Immigration and Nationality Act (INA), which "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'"

In 1986, Congress supplemented the INA by enacting IRCA, which comprehensively regulates employment of aliens. According to a 1986 House Report, Congress sought "to close the back door on illegal immigration so that the front door on legal immigration may remain open," and it attempted to achieve this goal predominantly through employer sanctions.

Section 101 of IRCA became 8 U.S.C. § 1324a. It provides in pertinent part that the employment of unauthorized aliens is unlawful. It also establishes an employment verification system that requires employers to attest to their employee's immigration status. Failure to comply with the requirements can result in civil penalties, and a pattern or practice of violations can result in both civil and criminal penalties against an employer.

In turn, 8 C.F.R. § 274a.2 was promulgated in 1987 by the Immigration and Naturalization Service, which was then part of the Department of Justice, to implement 8 U.S.C. § 1324a. The regulation provides for an employment verification system, and its § 274a.2 identifies Form I-9 as the form to be used by an employer when verifying such eligibility. The employer must ensure that a potential employee completes the I-9, must examine the potential employee's identification and work authorization documents, must complete the employer portion of the I-9, and must sign an attestation. A Social Security card is one of the documents an employer may examine to establish employment eligibility.

Congress included an express preemption clause having to do with employers in IRCA. It also included the following language:

> "A form designated or established by Attorney General under this subsection *and any information contained in* or appended to such form, may not be used for purposes

> other than for enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of Title 18."

Title 18 of the United States Code (2012) deals with Crimes and Criminal Procedure. Section 1001 deals with fraud and false statements generally; § 1028 deals with fraud and related activity in connection with identification documents, authentication features, and information; § 1546 deals with fraud and misuse of visas, permits, and other documents; and § 1621 deals with perjury generally. Despite references in the legislative history to Congress emphasizing penalties for employers rather employees, IRCA specifically amended § 1546 to include criminal sanctions against an alien who commits fraud in the employment eligibility verification process.

Of course, the case before us does not arise under 18 U.S.C. § 1546(b). Rather, it is a State prosecution under a generally applicable statute prohibiting identity theft. The State seeks to punish an alien who used the personal identifying information of another to establish the alien's work authorization. Again, this means that Garcia's preemption challenge, no matter which category, is an as-applied type. He does not seek to prevent all prosecutions under the state law. His challenge can fairly be characterized as "facial" in the traditional sense only insofar that its holding will apply to other aliens in his position, *i.e.*, those who use the Social Security card or other document listed in federal law of another for purposes of establishing employment eligibility.

Garcia has relied heavily on *Arizona*, to support what his counsel termed his field preemption argument. But *Arizona* actually has limited influence on that particular argument.

In *Arizona*, the Supreme Court determined that Congress has fully occupied the field of alien *registration*. On the other hand, the only provision considered in that case that is somewhat analogous to the prosecution's use of the identity theft statute in this case was section 5(C), which made it a misdemeanor for an alien to seek or engage in work. Section 5(C) was not field preempted. Rather, it was preempted under conflict-obstacle theory because it "involve[d] a conflict in the method of enforcement."

Garcia has also directed our attention to the *Puente Arizona v. Arpaio* series of federal decisions.

The first time *Puente Arizona* came before a district judge, the judge was considering whether two Arizona state statutes were constitutional. The plaintiffs were a civil rights organization and separate individuals, including at least one who had been convicted under the challenged laws, which criminalized "the act of identity theft done with the intent to obtain or continue employment" and forgery generally. Plaintiffs sought a preliminary injunction, asking the district judge to enjoin enforcement of the laws. The plaintiffs invoked IRCA to claim that the laws were facially preempted and as applied, under both field and conflict principles. The district judge ruled that the plaintiffs had

demonstrated a likelihood of success for facial field and facial conflict preemption and granted a temporary injunction.

On appeal the Ninth Circuit reversed, holding that the neutral application of the laws to all defendants was fatal to the facial challenge. The circuit panel remanded to the same district judge for consideration of the plaintiffs' as-applied challenges.

On remand, the district judge considered the plaintiffs' conflict and field preemption arguments. He treated the language in 8 U.S.C. § 1324a(b)(5) as a "use limitation" and ruled that Congress intended "to preempt a relatively narrow field: state prosecution of fraud in the I-9 process." "[U]se limitation certainly is relevant in assessing Congress's intent for preemption purposes, but the focus of the provision is quite narrow. *It applies only to Form I-9 and documents appended to the form*." On field preemption, the judge ruled that he could not conclude that Congress had "expressed a clear and manifest intent to occupy the field of unauthorized alien fraud in seeking employment. The focus of the criminal statute, 18 U.S.C. § 1546, is the I-9 process." The district judge also determined prosecution of aliens under the state statutes was not preempted because of conflict either because of the impossibility of enforcing both state and federal law or because enforcement of state law erected a barrier or obstacle to full realization of federal policy goals. "The Court sees no strong showing of conflict between the application of the identity theft and forgery statutes outside the I-9 process and federal statutes that are limited to that process."

In a still later decision in the series, the district judge addressed the plaintiffs' argument that its November 2016 preemption decision in favor of the plaintiffs was narrower than it should be, and he "clarified" his preemption holding. Specifically, the judge recognized that the federal I-9 verification system, which requires a prospective employee to present certain documents demonstrating employment eligibility to the prospective employer and permits the employer to retain copies of those documents, potentially including among them a Social Security card,

> "suggests that Congress intended to protect more than the I-9 and documents physically attached to it. The Court sees no logical reason why Congress would prohibit state law-enforcement officers from using the Form I-9 and documents physically attached to it, and yet permit them to use [designated employment eligibility documents including Social Security cards] submitted with [the] I-9 simply because they were never stapled to the I-9 or were stored by the employer in a folder separate from the I-9. This is particularly true when one considers other statutory sections.

"Section 1324a(d) provides guidance for future variations of the federal employment verification system. It makes clear that even if the Form I-9 is replaced or new documentation requirements are created, the use limitation will continue to prohibit use of the employment verification system for non-enumerated purposes. The statute sates that

'[t]he system may not be used for law enforcement purposes, other than for enforcement of this chapter or sections 1001, 1028, 1546, and 1621 of Title 18. This suggests that Congress intended to bar the use of the verification process itself, not just the I-9 and physically attached documents, in state law enforcement. Additionally, § 1324a(d)(2)(C) provides that '[a]ny personal information utilized by the system may not be made available to Government agencies, employers, and other persons except to the extent necessary to verify that an individual is not an unauthorized alien.' This limitation is not restricted to information contained in or appended to any specific document, but applies generally to the federal employment verification system.

"Statutes imposing criminal, civil, and immigration penalties for fraud committed in the employment verification process also reflect a congressional intent to regulate more than the Form I-9 and physically attached documents. . . .

. . . .

". . . The Court continues to hold the view that Congress did not intend to preempt state regulation of fraud outside the federal employment verification process, as stated in its summary judgment ruling . . . . But the Court concludes from the provisions reviewed above that Congress's preemptive intent was not limited to the Form I-9 and physically attached documents. Congress also regulated—and intended to preempt state use of—other documents used to show employment authorization under the federal system. As the Ninth Circuit has noted, 'field preemption can be inferred . . . where there is a regulatory framework so pervasive . . . that Congress left no room for the States to supplement it.'

"This conclusion is supported by the legislative history of the Immigration Reform and Control Act, which reflects Congress's '[c]oncern . . . that verification information could create a "paper trail" resulting in the utilization of this information for the purpose of apprehending undocumented aliens. If documents presented solely to comply with the federal employment verification system could be used for state law enforcement purposes so long as they were not physically attached to a Form I-9, this congressional intent easily would be undermined.

"The Court's conclusion is also supported by recent decisions from other courts. Reviewing the use limitation and several other provisions of § 1324a, the Supreme Court found that 'Congress has made clear . . . that *any information employees submit to indicate their work status* "may not be used" for purposes other than prosecution under specific federal criminal statues for fraud, perjury, and related conduct.' The Ninth Circuit reached a similar conclusion.

"In summary, the Court concludes that Congress clearly and manifestly intended to prohibit the use of the Form I-9, documents attached to the Form I-9, and documents submitted as part of the I-9 employment verification process, whether attached to the form or not, for state law enforcement purposes . . . . Defendants are preempted from (a) employing or relying on (b) any

documents or information (c) submitted to an employer solely as part of the federal employment verification process (d) for any investigative or prosecutorial purpose under the Arizona identi[t]y theft and forgery statutes. As Plaintiffs concede, Defendants may use [designated employment eligibility documents including Social Security cards] submitted in the I-9 process if they were also submitted for a purpose independent of the federal employment verification system, such as to demonstrate the ability to drive or as part of a typical employment application."

Although we might be inclined to agree with the ultimate *Puente Arizona* decision from the district judge, it nevertheless has limited influence today because we dispose of this case under the plain and unambiguous language of 8 U.S.C. § 1324a(b)(5), an effective express preemption provision having to do with *employees* as well as employers. When the *Puente Arizona* district judge was considering the plaintiffs' as-applied challenges, he was focused only on field and conflict preemption analysis. No party was urging express preemption, which provides a much more direct route to a similar result. The language in 8 U.S.C. § 1324a(b)(5) explicitly prohibited state law enforcement use not only of the I-9 itself but also of the "*information contained in*" the I-9 for purposes other than those enumerated. In short, in March of this year, the *Puente Arizona* district judge admirably recognized that he had unduly narrowed his interpretation of the "use limitation" in the statute. It had simply been incorrect to say that only use of the I-9 and attached documents was covered. But his focus on whether other documents need or need not be attached to the I-9 at some point still ignored the "information contained in" plain language of the statute.

We do not ignore this language. It is Congress' plain and clear expression of its intent to preempt the use of the I-9 form *and any information contained* in the I-9 for purposes other than those listed in §1324a(b)(5). Prosecution of Garcia—an alien who committed identity theft for the purpose of establishing work eligibility—is not among the purposes allowed in IRCA. Although the State did not rely on the I-9, it does not follow that the State's use of the Social Security card information was allowed by Congress. "A State may not evade the pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect."

The "key question" when evaluating whether a state law is preempted is congressional intent. That intent is spelled out for us in 8 U.S.C. § 1324a(b)(5): States are prohibited from using the I-9 *and any information contained within the I-9*as the bases for a state law identity theft prosecution of an alien who uses another's Social Security information in an I-9. The fact that this information was included in the W-4 and K-4 did not alter the fact that it was also part of the I-9.

Because we can dispose of Garcia's preemption claim based on the express preemption language in 8 U.S.C. § 1324a(b)(5), we need not decide the merits of any other possible or actual preemption argument.

CONCLUSION

We reverse Garcia's conviction because the State's identity theft prosecution of him based on the Social Security number contained in the I-9 used to establish his employment eligibility was expressly preempted.

BILES, *Senior Supreme Court Judge*, dissenting:

I disagree that 8 U.S.C. § 1324a(b)(5) (2012) creates an as-applied, express federal preemption barring Ramiro Garcia's state law prosecution for identity theft when he used someone else's Social Security number to complete tax forms while being hired as a restaurant worker. The majority's rationale sets up a sweeping prohibition against identity theft prosecutions for such crimes generally occurring in the employment process. I also cannot conclude any other federal preemption theory carries the day under these facts, so I dissent.

Garcia was convicted under our state's identity theft law for using someone else's Social Security number to receive a benefit, *i.e.*, employment. The statute does not make it illegal to attempt to secure employment as an unauthorized alien. The specific conduct for which Garcia was convicted was using someone else's Social Security number in completing his federal W-4 and state K-4 tax forms. Garcia's immigration status was not relevant to whether this conduct was unlawful, and the conduct was independent of the federal employment verification system. The tax forms are used solely to calculate federal and state income tax withholdings—not to verify a person's authority to work in the United States.

Under these circumstances, the question put to us is whether Garcia's use of someone else's identifying information within the employment setting sufficiently implicates the narrow area controlled by Congress through the federal Immigration Reform and Control Act of 1986 (IRCA). In answering that question, the majority holds states cannot use the Form I-9 or any information contained in it, and the fact that one uses the information elsewhere—the W-4, K-4, and employment application—does not save the case from the preemption explicitly intended by Congress when it passed IRCA. The majority concludes this is an as-applied, express preemption, which states: "A form designated or established by the Attorney General under this subsection *and any information contained in* or appended to such form, may not be used for purposes other than for the enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of Title 18."

This rationale is sweeping because 8 U.S.C. § 1324a(b) requires an employer to verify that an "*individual*" is not an unauthorized alien, which means employers must verify *all* job applicants irrespective of their immigrant or nonimmigrant status. Under the majority's view, federal law effectively prevents *any* prosecution under the Kansas identity theft crime occurring in the employment context if it relies on information that also just happens to be on or attached to a Form I-9. This cannot reflect congressional intent.

The crux of the express preemption question is whether the phrase "any information contained in" the form applies literally to all information on the Form I-9, wherever else it might be found; or more narrowly to the contents of the completed Form I-9. While the majority takes the former view, I take the latter because the Form I-9 and the W-4 and K-4 forms were supplied for different and independent purposes. In Garcia's case, the Form I-9 was not admitted into evidence, so no information *necessarily* gleaned from it was "used" in the State's prosecution. Garcia was not convicted for using someone else's identity on Form I-9 to deceive his employer as to his work authorization. Instead, Garcia was convicted for using another person's Social Security number on tax withholding forms.

The majority reaches its decision through a unique and overly literal interpretation of 8 U.S.C. § 1324a(b)(5). The majority reads the provision to create a congressional "information-use preemption" rather than a "Form I-9-use limitation." In doing so, the majority stretches statutory interpretation past the breaking point and dismisses contrary caselaw.

In *Puente Arizona v. Arpaio*, a federal district court looked at this same statutory language and ruled Congress preempted "a relatively narrow field: state prosecution of fraud in the I-9 process." That same court in a follow-up opinion most recently explained the scope of this preemption by stating:

> "In summary, the Court concludes that Congress clearly and manifestly intended to prohibit the use of the Form I-9, documents attached to the Form I-9, and documents submitted as part of the I-9 employment verification process, whether attached to the form or not, for state law enforcement purposes. Further, as the Supreme Court found in *Smith v. United States*, the ordinary meaning of the term 'use' is '"to employ" or "to derive service from."' The Court will adopt this ordinary meaning of the word 'use.' Thus, the Court holds that Defendants are preempted from (a) employing or relying on (b) any documents or information (c) submitted to an employer solely *as part of the federal employment verification process* (d) for any investigative or prosecutorial purpose under the Arizona identify theft and forgery statutes. *As Plaintiffs concede, Defendants may use List A, B, or C documents submitted in the I-9 process if they were also submitted for a purpose independent of the federal employment verification system, such as to demonstrate ability to drive or as part of a typical employment application."*

The *Garcia* majority attempts to minimize the *Puente Arizona* court's analysis by asserting "no party was urging express preemption." 306 Kan. at , slip op. at 18. But a careful review of both the 2016 and 2017 district court decisions demonstrate that the court did not "overlook" the language in 8 U.S.C. § 1324a(b)(5). The *Puente Arizona* court was familiar with the statutory language and the arguments arising from it—including express preemption. The court

simply interpreted the law differently than the majority does.

Indeed, no other court has interpreted 8 U.S.C. § 1324a(b)(5) as the majority has. There are several decisions, including those from our own state, that have come to opposite or unsupportive conclusions. For instance, in *Arizona v. United States*, the United States Supreme Court noted, "IRCA's express preemption provision, which in most instances bars [s]tates from imposing penalties on employers of unauthorized aliens, is *silent about whether additional penalties may be imposed against the employees*." The *Arizona* Court recognized IRCA's express preemption provision on the employer side but not on the employee side of the equation.

The Iowa Supreme Court recently held that state's identity theft law is not facially preempted by IRCA. Instead, a bare majority of the *Martinez* court held *implied* preemption theories applicable to that state's identity theft law, which is largely similar to ours. Both Kansas' and Iowa's statutes are alike in that they apply to any person, regardless of immigration status, and they apply in any situation—not just the employment authorization verification process.

Another example is *State v. Reynua*. In that case, the *Reynua* court stated, "[W]e cannot read [8 U.S.C. § 1324a(b)(5)] so broadly as to preempt a state from enforcing its laws relating to its own identification documents." The court reasoned, "It would be a significant limitation on state powers to preempt prosecution of state laws prohibiting falsification of state-issued identification cards, let alone to prohibit all use of such cards *merely because they are also used to support the federal employment-verification application*." The *Reynua* court's rationale fully protects federal interests, while the *Garcia* majority's broad reading of 8 U.S.C. § 1324a(b)(5) constitutes a "significant limitation" on our state's police power to protect its citizens from identity theft.

The *Garcia* majority's rationale also runs counter to a unanimous string of Kansas Court of Appeals decisions that have expressly considered this question.

Despite my conclusion that as-applied express preemption is not applicable, I admit to being attracted to the notion that the Kansas statute is preempted as applied in this case under implied theories of either field or conflict preemption, as the Iowa Supreme Court majority recently held. The possibility of dual enforcement tracks—state and federal—is concerning because of the prosecutorial discretion contemplated in the federal IRCA statutory scheme and the discretion our state affords to its prosecutors. Spotty statewide enforcement would seem to manifest the evil—robing the federal government of its discretion—foreseen by Iowa's Chief Justice Cady in his separate *Martinez* concurring opinion.

This apprehension is particularly noteworthy because the identity theft cases reaching our Kansas appellate courts involving unauthorized immigrants seem to be arising from just one prosecuting jurisdiction, which suggests other Kansas prosecutors may be

exercising their discretion differently. I would view an as-applied conflict preemption challenge raised under the proper facts to be a close call. But in the end, the balance is tipped by our state's longstanding caselaw recognizing that """[i]n the absence of express preemption in a federal law, there is a strong presumption that Congress did not intend to displace state law."

This strong presumption, combined with the caselaw recited above and my concern about the sweeping potential impact of the majority's rationale, cause me to dissent.

STEGALL, *Supreme Court Judge*, dissenting:

I join Justice Biles' dissent fully with respect to express preemption. Today's decision appears to wipe numerous criminal laws off the books in Kansas—starting with, but not necessarily ending with, laws prohibiting identity theft. For this reason, I doubt the logic of today's decision will be extended beyond the narrow facts before us. But rather than take solace in this hope, I find in it the irrefutable fact that today's logic is wrong.

"It is well established that within Constitutional limits Congress may pre-empt state authority by so stating in express terms." Thus, as a first principle, Congress cannot preempt state law in matters that lie outside Congress' limited, prescribed powers. Moreover, additional limits on federal preemption have been crafted to guard the prerogatives of states in order not to "disturb" the "federal-state balance."

Even if the majority's interpretation of 8 U.S.C. § 1324a(b)(5) (2012) is correct, and Congress intended to expressly preempt state use of all information contained in a person's I-9 form, it is doubtful Congress has such sweeping powers to interfere with the legitimate government of the states. Can it really be true that the state of Kansas is or could be expressly preempted from using—for any purpose—the name of any citizen who has completed an I-9 form? A name is "information" after all. To ask the question is to answer it.

Therefore, even if I were convinced by the majority's statutory analysis—I am not—I would question the majority's implicit holding that Congress has, in the first place, the constitutional power to prohibit states from using any *information* found on a federal I-9 form. If such a power *did* exist, the delicate federal-state balance achieved by our system of federalism would not merely be disturbed, it would be obliterated.

Finally, I likewise join my colleague in dissent with respect to implied preemption. Unlike Justice Biles, however, I do not find the question a particularly close call.

For these reasons, I respectfully dissent.

"Supreme Court to Rule on Identity Fraud by Undocumented Immigrants"

Bloomberg

Greg Stohr

March 18, 2019

The U.S. Supreme Court will consider letting states prosecute undocumented immigrants for identity theft if they use someone else's Social Security number to apply for a job, agreeing to take up what could be a polarizing fight.

Heeding calls from Kansas and the Trump administration, the justices said they'll decide whether the Kansas Supreme Court was right to say that only the federal government has the power under U.S. immigration law to press those types of prosecutions.

A victory for Kansas would give states a new tool for battling illegal immigration, letting them be more aggressive on an issue handled primarily at the federal level. The court will hear the case during the nine-month term that starts in October.

Kansas says the dispute is more about identity theft than illegal immigration. The state is trying to reinstate the convictions of three men who got restaurant jobs using another person's Social Security number.

"Identity crime is a problem that far exceeds the capacity of the United States alone to prosecute," Kansas Attorney General Derek Schmidt argued in court papers.

In throwing out the convictions, the top Kansas court said the 1986 Immigration Reform and Control Act bars state prosecutions based on information contained in the federal I-9 form, which employers use to verify work eligibility. The court pointed to a provision in the law that lets prosecutors use the I-9 "and any information contained in or appended to such form" only for specified federal crimes.

"It is Congress's plain and clear expression of its intent to preempt the use of the I-9 form and any information contained in the I-9 for purposes other than those listed," the Kansas Supreme Court said in one of the cases, involving Ramiro Garcia.

Withholding Forms

Kansas says prosecutors didn't rely on the I-9 form and instead used Garcia's tax withholding forms, which also contained the stolen Social Security number. The state said the "most natural reading" of the disputed provision is that it bars the use of the I-9 form itself and any attached documents, but not information that also appears on other forms.

The Supreme Court said in a 2012 case involving Arizona that Congress had set up a "comprehensive framework" for preventing the employment of people who are illegally

in the country. The 1986 law doesn't impose criminal penalties on undocumented immigrants but does allow federal prosecutions for fraud.

Lawyers for Garcia and the other two men say Kansas's position can't be squared with the 2012 ruling. "State prosecutions of offenses relating to employment eligibility conflict with the comprehensive federal regime," they argued.

The Trump administration disagrees, saying state prosecutions won't interfere with federal authority.

Kansas's identity-theft law "does not regulate employment," U.S. Solicitor General Noel Francisco argued. "It regulates the use of another person's identity with the intent to commit fraud."

The case is Kansas v. Garcia, 17-834.

"Supreme Court Takes Up Kansas Identity Theft Case"

Reuters

Lawrence Hurley

March 18, 2019

The U.S. Supreme Court on Monday agreed to consider a bid by Kansas to revive the state's policy of prosecuting people for identity theft for using other people's Social Security numbers to gain employment in a case linked to immigration issues.

The justices will hear the state's appeal of a 2017 Kansas Supreme Court ruling that voided the convictions of three restaurant workers and found that a 1986 federal law, the Immigration Reform and Control Act, prevents states from pursuing such prosecutions.

The three men - Ramiro Garcia, Donaldo Morales and Guadalupe Ochoa-Lara - had provided their employers Social Security numbers that were not their own before being prosecuted for identity theft.

President Donald Trump has taken a hard line against illegal immigrants. His administration filed court papers siding with Kansas urging the justices to take up the appeal.

Lawyers on both sides refused to comment on why the three men did not have or did not use their own Social Security numbers, saying it was not relevant to the legal question. People who enter the country illegally do not get assigned Social Security numbers, which are given by the U.S. government to all legal residents.

The number is primarily used to identify people for employment and tax purposes. Its original purpose was to track each person's payments into the Social Security program, which provides money for retirees and people eligible for other social welfare programs.

The state appeals court found that the federal law defined the circumstances under which immigrants can be penalized for providing incorrect information to employers. The law required employers to fill out a form, known as the I-9, attesting that they have reviewed prospective employees' documents and can confirm they are authorized to work in the United States. The law also stated that the form "may not be used for purposes other than for enforcement of this act."

Lawyers for the three men said that because they were using the Social Security numbers listed on their I-9 forms to establish their eligibility to work, they cannot be prosecuted under state law. The cases were prosecuted in Johnson County, located near Kansas City, Missouri.

The U.S. Justice Department said the federal law, signed by former President Ronald Reagan, does not prevent the use of

information contained on the I-9 form if the same false information is also included on other forms, namely federal and state tax forms. During the prosecutions, the state specifically said it was not relying on the I-9 forms.

"Nothing in the statute suggests that Congress intended to carve out an exception to generally applicable state laws for the exclusive benefit of unauthorized aliens," Solicitor General Noel Francisco, the Trump administration's top Supreme Court lawyer, said in the court filing.

Kansas is one of several conservative-leaning states that has sought to crack down on illegal immigrants.

“Feds, Conservatives Weigh States’ Use of I-9s In Prosecutions”

Law360

Tiffany Hu

June 3, 2019

The federal government and several others have urged the U.S. Supreme Court to reinstate the state convictions of three unauthorized immigrants who used stolen Social Security numbers to gain employment, saying the Immigration Reform and Control Act does not preempt the use of information on I-9 documents for state identity theft prosecutions.

The solicitor general, a state coalition led by Indiana, and conservative groups the Eagle Forum Education & Legal Defense Fund and the Immigration Reform Law Institute each penned amicus briefs Friday backing the state of Kansas' challenge of a Kansas Supreme Court ruling that the state convictions of Ramiro Garcia, Donaldo Morales and Guadalupe Ochoa-Lara were preempted by the IRCA, which requires employers to verify their employees' immigration status through the use of the I-9 form. The justices agreed to take up the case in March.

In its brief to the high court, the solicitor general's office told the justices that the relevant statute only bars the use of information on I-9 documents in criminal prosecutions. Nothing in the statute prevented the state from prosecuting the trio based on the tax forms on which the Social Security numbers were entered, the solicitor general said.

Furthermore, under the Kansas Supreme Court's ruling, the state would not be able to use any information contained in an I-9 form, including an individual's name, even if the information was actually obtained from different and unrelated documents, the solicitor general argued.

"Because virtually everyone who has a job — citizens and aliens alike — must submit an I-9, the decision below would preclude the use of basic identity information in most state and many federal law-enforcement operations," the government's brief states. "Unsurprisingly, every other court to consider the question has found that result irreconcilable with the statutory text, structure and purpose."

The prosecutions were also not impliedly preempted, as the immigrants had contended, the solicitor general said. Congress has not yet "occupied" the area of law concerning the employment of unauthorized immigrants, and even if it had, the three prosecutions would not be preempted because they were for identity theft and falsifying documents, which does not apply only to those who unlawfully entered the U.S., according to the solicitor general.

"Respondents' contrary position would mean that Kansas could prosecute a U.S. citizen or

authorized alien who presents an employer with a false social security number, but could not prosecute an unauthorized alien who does the same," the brief states. "Nothing in IRCA or elsewhere suggests that Congress intended to carve out an exception to generally applicable state laws for the exclusive benefit of unauthorized aliens."

The amicus brief filed by the state coalition similarly argued that the Kansas Supreme Court improperly determined that the state could not use information on the I-9 regardless of whether it had an independent source, saying that this ruling encouraged "would-be thieves" to skirt prosecution by including information that was stolen in their I-9 forms.

Indiana Solicitor General Thomas Fisher told Law360 on Tuesday that the Kansas Supreme Court's ruling was based on a "clear misinterpretation" of the statute and, if kept in place, would "dramatically diminish" the state's ability to crack down on identity theft crimes.

"If the Kansas decision were affirmed, states would be left unable to enforce laws against identity theft," Fisher said by email. "In fact, under such a scenario, individuals committing identity theft could effectively immunize themselves from state prosecution by simply falsifying federal employment eligibility verification forms among whatever other documents they falsify."

The Immigration Reform Law Institute argued that the prosecutions were not preempted by the statute, while the Eagle Forum Education & Legal Defense Fund's brief focused on the constitutionality of the Kansas Supreme Court's reading of the statute.

The U.S. Chamber of Commerce also filed a brief on Friday, though it said that it was not taking any sides in the case. Instead, the Chamber urged the justices to use the case to make clear that a presumption against preemption should be rejected when a statute has an express preemption clause, noting the "lingering uncertainty" from the lower courts.

An attorney for the Chamber declined to comment Monday. Counsel for the other parties and a representative for the U.S. Department of Justice did not immediately respond to requests for comment.

Garcia, Morales and Ochoa-Lara, who all used other Social Security numbers to be employed at various restaurants, were separately prosecuted and convicted of identity theft or making false statements after law enforcement officers found that the three had used other people's Social Security numbers on various government forms, including the I-9 form and the W-4 and K-4 tax withholding forms. In each case, the I-9 form-related charge was dismissed, and the three were convicted based on their false statements in the other forms.

The Kansas Court of Appeals upheld those convictions, but in September 2017, the Kansas Supreme Court reversed, finding in all three cases that their state convictions were preempted by the IRCA.

"Prosecution of Garcia — an alien who committed identity theft for the purpose of establishing work eligibility — is not among

the purposes allowed in IRCA," the opinion in Garcia's case says. "Although the state did not rely on the I-9, it does not follow that the state's use of the Social Security card information was allowed by Congress."

Kansas filed its petition for a writ of certiorari in December 2017, arguing that the Kansas Supreme Court's ruling raises "serious constitutional questions" about whether federal immigration law can trump states' power to enact and enforce criminal laws. Identity theft is also becoming increasingly common and has broad implications for U.S. citizens and immigrants alike, the state said.

Kansas also argued that the state supreme court's overly broad reading of the IRCA effectively prevents the state from prosecuting even citizens and lawful immigrants who have included false information on their I-9 forms, which would "not even arguably be interfering with federal immigration law prerogatives" outlined in the IRCA. Allowing such an outcome "does not pass the laugh test," it said.

In a March 2018 reply brief, the immigrants implicated in the case countered that the Kansas Supreme Court had reached the right decision in respecting the federal government's "sole authority to determine who is authorized to work." States, however, cannot expand or restrict work authorization, they said.

The state of Kansas is represented by Derek Schmidt, Jeffrey A. Chanay, Toby Crouse, Kristafer Ailslieger, Bryan C. Clark, Natalie Chalmers, Dwight R. Carswell and Steven J. Obermeier of the Office of the Attorney General of Kansas.

Garcia, Morales and Ochoa-Lara are represented by Paul W. Hughes and Michael B. Kimberly of McDermott Will & Emery LLP.

The government is represented by U.S. Solicitor General Noel J. Francisco and Joseph H. Hunt, Jeffrey B. Wall, Hashim M. Mooppan, Christopher G. Michel, Mark B. Stern and Lindsey Powell of the DOJ's Civil Division.

The state coalition is represented by Curtis T. Hill Jr., Thomas M. Fisher, Kian J. Hudson and Julia C. Payne of the Indiana Attorney General's Office, and other attorneys.

The Eagle Forum Education & Legal Defense Fund is represented by Lawrence J. Joseph.

The Immigration Reform Law Institute is represented in-house by Christopher J. Hajec and Lew J. Olowski.

The U.S. Chamber of Commerce is represented by Daryl Joseffer and Jonathan Urick of the U.S. Chamber Litigation Center and Kathleen M. Sullivan of Quinn Emanuel Urquhart & Sullivan LLP.

The case is Kansas v. Ramiro Garcia, case number 17-834, in the U.S. Supreme Court.

"Shocker: Kansas Supreme Court Licenses Identity Theft–But Only By Illegal Aliens"

The Sentinel

Jack Cashill

September 8, 2017

Friday, in a stunning decision, the Kansas Supreme Court ruled in essence that the State of Kansas cannot prosecute illegal aliens for most common forms of identity theft. The ruling in *State of Kansas v. Ramiro Garcia* grants Kansas citizens no such license.

What follows may read like an article from the Onion, but unfortunately it is not. Writing in dissent, Justice Dan Biles observed, "The majority's rationale sets up a sweeping prohibition against identity theft prosecutions for such crimes generally occurring in the employment process." Justice Caleb Stegall agreed, "Today's decision appears to wipe numerous criminal laws off the books in Kansas—starting with, but not necessarily ending with, laws prohibiting identity theft." These Justices did not overstate the enormity of this decision whose majority opinion was written by the predictably liberal Justice Carol Beier. Said Biles, "The majority stretches statutory interpretation past the breaking point."

The facts in the case are beyond dispute. In August 2012, an Overland Park police officer pulled Garcia over for speeding. When asked where he was going in such a hurry, Garcia said he was on his way to work at Bonefish Grill. A routine records check revealed that Garcia had secured his job using someone else's social security number. As a result of the investigation, Garcia was charged with one count of identity theft under Kansas law and eventually convicted in a jury trial. The district judge sentenced Garcia to seven months in prison but granted 18 months' probation.

On appeal, Garcia's attorneys argued that the federal government has preemptive power over immigration and the status of aliens, specifically in regards to an alien who commits fraud in the employment eligibility verification process. In a nutshell, the majority on the court bought that argument.

Wrote Beier, "States are prohibited from using the I-9 and any information contained within the I-9 as the bases for a state law identity theft prosecution of an alien who uses another's Social Security information in an I-9. The fact that this information was included in the W-4 and K-4 did not alter the fact that it was also part of the I-9." Implied, but not stated, was that citizens have no such immunity from state prosecution.

Biles dissented vigorously. "The specific conduct for which Garcia was convicted was using someone else's Social Security number in completing his federal W-4 and state K-4

tax forms," he argued. "Garcia's immigration status was not relevant to whether this conduct was unlawful, and the conduct was independent of the federal employment verification system."

Continued Biles: "Under the majority's view, federal law effectively prevents any prosecution under the Kansas identity theft crime occurring in the employment context if it relies on information that also just happens to be on or attached to a Form I-9. This cannot reflect congressional intent."

The irony of this decision is that in most instances–sanctuary city edicts, federal vote fraud investigation–the left supports the rights of states to resist federal oversight of immigration related issues. But then again, consistency has never been one of the left's virtues.

Hernandez v. Mesa

Ruling Below: *Hernandez v. Mesa*, 885 F.3d 811 (5th Cir. 2018).

Overview: U.S. Customs & Border Patrol Agent Jesus Mesa shot and killed 15-year-ago Mexican national Hernandez. The Hernandez family filed charged against Mesa. Hernandez claimed that the federal law enforcement officer violated Fourth and Fifth Amendment rights for which there is no alternative legal remedy.

Issue: Whether, when the plaintiffs plausibly allege that a rogue federal law-enforcement officer violated clearly established Fourth and Fifth amendment rights for which there is no alternative legal remedy, the federal courts can and should recognize a damages claim under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.

Jesus C. HERNANDEZ, Individually and as the surviving father of Sergio Adrian Hernandez Guereca, and as Successor-in-Interest to the Estate of Serio Adrian Hernandez Guereca; Maria Guadalupe Guereca Bentacour, Individually and as the surviving mother of Sergio Adrian Hernandez Guereca, and as Successor-in-Interest to the Estate of Serio Adrian Hernandez, *Plaintiff-Appellants*

v.

Jesus MESA, Jr., *Defendant- Appellee*

Court of Appeal, Fifth Circuit

Decided on March 20, 2018

[Excerpt; some citations and footnotes omitted]

JONES, *Circuit Judge*:

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

This appeal returned to the court en banc following remand from the United States Supreme Court. Prompted by the High Court, we have carefully considered a question antecedent to the merits of the Hernandez family's claims against United States Customs & Border Patrol Agent Mesa: whether federal courts have the authority to craft an implied damages action for alleged constitutional violations in this case. We hold that this is not a garden variety excessive force case against a federal law enforcement officer. The transnational aspect of the facts presents a "new context" under *Bivens*, and numerous "special factors" counsel against federal courts' interference with the Executive and Legislative branches of the federal government.

BACKGROUND

Because the plaintiffs' claims were dismissed on the pleadings, the alleged facts underlying this tragic event are taken as true. Sergio Hernandez was a 15-year-old Mexican citizen without family in, or other ties to, the United States. On June 7, 2010, while at play, he had taken a position on the Mexican side of a culvert that marks the boundary between Ciudad Juarez, Mexico, and El Paso, Texas. The FBI reported that Agent Mesa was engaged in his law enforcement duties when a group of young men began throwing rocks at him from the Mexican side of the border. From United States soil, the agent fired several shots toward the assailants. Hernandez was fatally wounded.

Hernandez's parents alleged numerous claims in a federal lawsuit against Agent Mesa, other Border Patrol officials, several federal agencies, and the United States government. The federal district court dismissed all claims, but was reversed in part by a divided panel of this court. The panel decision allowed only a *Bivens* claim, predicated on Fifth Amendment substantive due process, to proceed against Agent Mesa alone. This court elected to rehear the appeal en banc. Without ruling on the cognizability of a *Bivens* claim in the first instance, we concluded unanimously that the plaintiffs' claim under the Fourth Amendment failed on the merits and that Agent Mesa was shielded by qualified immunity from any claim under the Fifth Amendment. We rejected the plaintiffs' remaining claims.

The Supreme Court granted certioriari and heard this case in conjunction with *Ziglar v. Abbasi*. In *Abbasi*, the Court reversed the Second Circuit and refused to imply a *Bivens* claim against policymaking officials involved in terror suspect detentions following the 9/11 attacks. The Court, however, remanded for reconsideration by the appeals court whether a *Bivens* claim might still be maintained against a prison warden.

The Court's decision in this case tagged onto *Abbasi* by rejecting this court's approach and ordering a remand for us to consider the propriety of allowing *Bivens* claims to proceed on behalf of the Hernandez family in light of *Abbasi*'s analysis.

DISCUSSION

The plaintiffs assert that Agent Mesa used deadly force without justification against Sergio Hernandez, violating the Fourth and Fifth Amendments, where the fatal shot was fired across the international border. No federal statute authorizes a damages action by a foreign citizen injured on foreign soil by a federal law enforcement officer under these circumstances. Thus, plaintiffs' recovery of damages is possible only if the federal courts approve a *Bivens* implied cause of action. *Abbasi* instructs us to determine initially whether these circumstances present a "new context" for *Bivens* purposes, and if so, whether "special factors" counsel against implying a damages claim against an individual federal officer. To make these determinations, we review *Abbasi*'s pertinent discussion about "*Bivens* and the ensuing cases in [the

Supreme Court] defining the reach and the limits of that precedent."

In *Abbasi*, the Court begins by explaining that when Congress passed what is now 42 U.S.C. § 1983 in 1871, it enacted no comparable law authorizing damage suits in federal court to remedy constitutional violations by federal government agents. In 1971, the *Bivens* decision broke new ground by authorizing such a suit for Fourth Amendment violations by federal law enforcement officers who handcuffed and arrested an individual in his own home without probable cause. Within a decade, the Court followed up by allowing a *Bivens* action for employment discrimination, violating equal protection under the Fifth Amendment, against a Congressman. The Court soon after approved a *Bivens* claim for constitutionally inadequate inmate medical care, violating the Eighth Amendment, against federal jailers. According to the Court in *Abbasi*, these three cases coincided with the "*ancien regime* in which "the Court followed a different approach to recognizing implied causes of action than it follows now."

The "*ancien regime*" was toppled step by step as the Court, starting in the late 1970s, retreated from judicially implied causes of action and cautioned that where Congress "intends private litigants to have a cause of action," the "far better course" is for Congress to confer that remedy explicitly. *Abbasi* acknowledges that the Constitution lacks as firm a basis as congressional enactments for implying causes of action; but the "central" concern in each instance arises from separation-of-powers principles. Consequently, the current approach renders implied *Bivens* claims a "disfavored" remedy. The Court then lists the many subsequent cases that declined to extend *Bivens* under varying circumstances and proffered constitutional violations.

Abbasi goes on to reiterate with an exacting description the two-part analysis for implying *Bivens* claims. We turn to the two inquiries by comparing *Abbasi*'s separation-of-powers considerations and its facts to the present case

A. NEW CONTEXT

The plaintiffs assert that because the allegedly unprovoked shooting of a civilian by a federal police officer is a prototypical excessive force claim, their case presents no "new context" under *Bivens*. This court, including our colleagues in dissent, disagrees. The fact that *Bivens* derived from an unconstitutional search and seizure claim is not determinative. The detainees in *Abbasi* asserted claims for, *inter alia*, strip searches under both the Fourth and Fifth Amendments, but the Supreme Court found a "new context" despite similarities between "the right and the mechanism of injury" involved in previous successful *Bivens* claims. As *Abbasi* points out, the *Malesko* case rejected a "new" *Bivens* claim under the Eighth Amendment, whereas an Eighth Amendment *Bivens* claim was held cognizable in *Carlson*; and *Chappell* rejected a *Bivens* employment discrimination claim in the military, although such a claim was allowed to proceed in *Davis v. Passman*. The proper inquiry is whether

"the case is different in a meaningful way" from prior *Bivens* cases.

Among the non-exclusive examples of such "meaningful" differences, the Court points to the constitutional right at issue, the extent of judicial guidance as to how an officer should respond, and the risk of the judiciary's disruptive intrusion into the functioning of the federal government's co-equal branches. The Court found it an easy conclusion that there were meaningful differences between prior *Bivens* claims and claims alleged in *Abbasi* for unconstitutional "confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil." Even more significant, the Court decided that claims against the prison warden for "compelling" allegations of detainee abuse and prison regulation violations also arose in a "new context" under *Bivens*. Despite close parallels between claims alleged against the warden and *Carlson*, the Court explained that "even a modest extension [of *Bivens*] is still an extension," and the Court remanded for additional consideration of the "special factors."

Pursuant to *Abbasi*, the cross-border shooting at issue here must present a"new context" for a *Bivens* claim. Because Hernandez was a Mexican citizen with no ties to this country, and his death occurred on Mexican soil, the very existence of any "constitutional" right benefitting him raises novel and disputed issues. There has been no direct judicial guidance concerning the extraterritorial scope of the Constitution and its potential application to foreign citizens on foreign soil. To date, the Supreme Court has refused to extend the protection of the Fourth Amendment to a foreign citizen residing in the United States against American law enforcement agents' search of his premises in Mexico. Language in *Verdugo*'s majority opinion strongly suggests that the Fourth Amendment does not apply to American officers' actions outside this country's borders. In *Hernandez*, the Supreme Court itself described the plaintiffs' Fourth Amendment claims as raising "sensitive" issues.

Likewise, the plaintiffs can prevail on a substantive due process Fifth Amendment claim only if federal courts accept two novel theories. The first would allow a *Bivens* action to proceed based upon a Fifth Amendment excessive force claim simply because *Verdugo* might prevent the assertion of a comparable Fourth Amendment claim. The second theory would require the extension of the *Boumediene* decision, both beyond its explicit constitutional basis, Art. I, § 9, cl. 2, the Habeas Corpus Suspension Clause, and beyond the United States government's *de facto* control of the territory surrounding the Guantanamo Bay detention facility. Moreover, even nine years later, no federal circuit court has extended the holding of *Boumediene* either substantively to other constitutional provisions or geographically to locales where the United States has neither *de facto* nor *de jure* control. Indeed, the courts have unanimously rejected such extensions.

The plaintiffs assert that because this is just a case in which one rogue law enforcement officer engaged in misconduct on the operational level, it poses no "new context"

for *Bivens* purposes. On the contrary, their unprecedented claims embody not merely a "modest extension"—which *Abbasi* describes as a "new" *Bivens* context—but a virtual repudiation of the Court's holding. *Abbasi* is grounded in the conclusion that *Bivens* claims are now a distinctly "disfavored" remedy and are subject to strict limitations arising from the constitutional imperative of the separation of powers. The newness of this "new context" should alone require dismissal of the plaintiffs' damage claims. Nevertheless, we turn next to the "special factors" analysis assuming arguendo that some type of constitutional claims could be conjured here.

B. SPECIAL FACTORS

The plaintiffs argue that this case involves no "special factors"—no reasons the court should hesitate before extending *Bivens*. However remarkable this position may seem, it is unremarkable that the plaintiffs hold it. Indeed, they must. The presence of "special factors" precludes a *Bivens* extension. Given *Abbasi*'s elucidation of the "special factors" inquiry, there is more than enough reason for this court to stay its hand and deny the extraordinary remedy that the plaintiffs seek.

Abbasi clarifies the concept of "special factors" by explicitly focusing the inquiry on maintaining the separation of powers: "separation-of-powers principles are or should be central to the analysis." Before *Abbasi*, the Court had instructed lower courts to perform "the kind of remedial determination that is appropriate for *a common-law tribunal*." Underscoring the Court's steady retreat from the "*ancien regime*" discussed above, that language appears nowhere in *Abbasi*. Instead, *Abbasi* instructs courts to "concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." In light of this guidance, the question for this court is not whether this case is distinguishable from *Abbasi* itself—it certainly is—but whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." If such reasons exist, "the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III."

Applying *Abbasi*'s separation-of-powers analysis reveals numerous "special factors" at issue in this case. To begin with, this extension of *Bivens* threatens the political branches' supervision of national security. "The Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence." In *Abbasi*, the Court stressed that "[n]ational-security policy is the prerogative of the Congress and the President." The plaintiffs note the Court's warning that "national security" should not "become a talisman used to ward off inconvenient claims." But the Court stated that "[t]his danger of abuse" is particularly relevant in "domestic cases." Of course, the defining characteristic of this case is that it is *not* domestic. National-security concerns

are hardly "talismanic" where, as here, border security is at issue.

In particular, the threat of *Bivens* liability could undermine the Border Patrol's ability to perform duties essential to national security. Congress has expressly charged the Border Patrol with "deter[ring] and prevent[ing] the illegal entry of terrorists, terrorist weapons, persons, and contraband." Although members of the Border Patrol like Agent Mesa may conduct activities analogous to domestic law enforcement, this case involved shots fired across the border within the scope of Agent Mesa's employment. In a similar context—airport security—the Third Circuit recently denied a *Bivens* remedy for a TSA agent's alleged constitutional violations. Relying on *Abbasi*, the Third Circuit's analysis is instructive:

> [The plaintiff] asks us to imply a *Bivens* action for damages against a TSA agent. TSA employees [ ] are tasked with assisting in a critical aspect of national security—securing our nation's airports and air traffic. The threat of damages liability could indeed increase the probability that a TSA agent would hesitate in making split-second decisions about suspicious passengers. In light of Supreme Court precedent, past and very recent, that is surely a special factor that gives us pause.

The same logic applies here. Implying a private right of action for damages in this transnational context increases the likelihood that Border Patrol agents will "hesitate in making split second decisions." Considering the "systemwide" impact of this *Bivens* extension, there are "sound reasons to think Congress might doubt [its] efficacy."

Extending *Bivens* in this context also risks interference with foreign affairs and diplomacy more generally. This case is hardly *sui generis*: the United States government is always responsible to foreign sovereigns when federal officials injure foreign citizens on foreign soil. These are often delicate diplomatic matters, and, as such, they "are rarely proper subjects for judicial intervention." In fact, in 2014 the United States and Mexican governments established the joint Border Violence Prevention Council as a forum for addressing these sorts of issues. The incident involving Agent Mesa initiated serious dialogue between the two sovereigns, with the United States refusing Mexico's request to extradite Mesa but resolving to "work with the Mexican government within existing mechanisms and agreements to prevent future incidents."

Given the dialogue between Mexico and the United States, the plaintiffs are wrong to suggest that Mexico's support for a new *Bivens* remedy obviates foreign affairs concerns. It is not surprising that Mexico, having requested Mesa's extradition, now supports a damages remedy against him. But the Executive Branch denied extradition and refused to indict Agent Mesa following a thorough investigation. It would undermine Mexico's respect for the validity of the Executive's prior determinations if, pursuant to a *Bivens* claim, a federal court entered a damages judgment against Agent Mesa. In

any event, diplomatic concerns "involve[ ] a host of considerations that must be weighed and appraised"—a sign that they must be "committed to those who write the laws rather than those who interpret them."

Congress's failure to provide a damages remedy in these circumstances is an additional factor counseling hesitation. *Abbasi* emphasized that Congress's silence may be "relevant[] and . . . telling," especially where "Congressional interest" in an issue "has been frequent and intense." It is "much more difficult to believe that congressional inaction was inadvertent" given the increasing national policy focus on border security.

Relevant statutes confirm that Congress's failure to provide a federal remedy was intentional. For instance, in section 1983, Congress expressly limited damage remedies to "citizen[s] of the United States or other person[s] within the jurisdiction thereof." Given that *Bivens* is a judicially implied version of section 1983, it would violate separation-of-powers principles if the implied remedy reached further than the express one. Likewise, under the Federal Tort Claims Act—a law that comprehensively waives federal sovereign immunity to provide damages remedies for injuries inflicted by federal employees—Congress specifically excluded "[a]ny claim arising in a foreign country." Congress also exempted federal officials from liability under the Torture Victim Protection Act of 1991. Taken together, these statutes represent Congress's repeated refusals to create private rights of action against federal officials for injuries to foreign citizens on foreign soil. It is not credible that Congress would favor the judicial invention of those rights.

Nor, under *Abbasi*, does the plaintiffs' lack of a damages remedy favor extending *Bivens*. The Supreme Court has held that "even in the absence of an alternative" remedy, courts should not extend *Bivens* if any special factors counsel hesitation. Thus, the *absence* of a remedy is only significant because the *presence* of one precludes a *Bivens* extension. Here, the absence of a federal remedy does not mean the absence of deterrence. *Abbasi* acknowledges the "persisting concern [ ] that absent a *Bivens* remedy there will be insufficient deterrence to prevent officers from violating the Constitution." For cross-border shootings like this one, however, criminal investigations and prosecutions are already a deterrent. While it is true that numerous federal agencies investigated Agent Mesa's conduct and decided not to bring charges, the DOJ is currently prosecuting another Border Patrol agent in Arizona for the crossborder murder of a Mexican citizen. The threat of criminal prosecution for abusive conduct is not hollow. In some instances, moreover, a state-law tort claim may be available to provide both deterrence and damages. That claim is unavailable here because the DOJ certified that Agent Mesa acted within the scope of his employment, and so the Westfall Act protects him from liability. The plaintiffs concede that Agent Mesa was acting within the scope of his employment. Regardless, *Abbasi* makes clear that, when there is "a balance to be struck" between countervailing policy considerations like deterrence and national security, "[t]he

proper balance is one for the Congress, not the Judiciary, to undertake."

Finally, the extraterritorial aspect of this case is itself a special factor that underlies and aggravates the separation-of-powers issues already discussed. The plaintiffs argue that extraterritoriality cannot constitute a special factor because this would multiply extraterritoriality's significance. But this misunderstands the *Bivens* inquiry and misreads Supreme Court precedent. The plaintiffs' argument relies on *Davis v. Passman*, in which the defendant argued that his conduct was immunized by the Speech or Debate Clause and, alternatively, that the Clause was a "special factor" for *Bivens* purposes. The Court held that the scope of the immunity and weight of the special factor were "coextensive." In other words, if the Clause did not immunize the defendant's conduct, then it was not a special factor. Similarly, the plaintiffs here suggest that extraterritoriality is not a "special factor" if the Constitution applies extraterritorially. This argument conflates the applicability of a constitutional immunity with the scope of a constitutional right, and thereby turns the *Bivens* inquiry upside down. *Bivens* remedies are not "coextensive" with the Constitution's protections. Indeed, in *United States v. Stanley*, the Supreme Court rejected a similar *Davis*-based argument, finding it "not an application but a repudiation of the 'special factors' limitation."

Plaintiffs also suggest that relying on extraterritoriality as an indicator of a "new context" and as a "special factor" double counts the significance of extraterritoriality and stacks the deck against extending *Bivens*. But *Abbasi* explicitly states that one rationale for finding a "new context" is "the presence of *potential special factors*." To the extent that this court double counts the significance of extraterritoriality, the Supreme Court has not foreclosed our doing so.

Indeed, the novelty and uncertain scope of an extraterritorial *Bivens* remedy counsel hesitation. As the Eleventh Circuit recently averred, the legal theory itself may constitute a special factor if it is "doctrinally novel and difficult to administer. An extraterritorial *Bivens* extension is "doctrinally novel." The Supreme Court "has never created or even favorably mentioned a non-statutory right of action for damages on account of conduct that occurred outside the borders of the United States." Nor has any court of appeals extended *Bivens* extraterritorially. Extraterritoriality, moreover, involves a host of administrability concerns, making it impossible to assess the "impact on governmental operations systemwide."

But novelty is by no means the only problem with an extraterritorial *Bivens* remedy. The presumption against extraterritoriality accentuates the impropriety of extending private rights of action to aliens injured abroad. According to the Supreme Court, "[t]he presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." Even when a statute's substantive provisions do apply extraterritorially, a court must "separately

apply the presumption against extraterritoriality" when it determines whether to provide a private right of action for damages. By extension, even if the Constitution applies extraterritorially, a court should hesitate to provide an extraterritorial damages remedy with "potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct."

The D.C. Circuit squarely addressed the issue of extraterritoriality in the *Bivens* context and concluded that it constituted a "special factor." Like this case, the D.C. Circuit's decision in *Meshal v. Higgenbotham* involved a challenge to "the individual actions of federal law enforcement officers" for an injury that occurred on foreign soil. Refusing to extend *Bivens*, the court noted that "the presumption against extraterritoriality is a settled principle that the Supreme Court applies even in considering statutory remedies." Given this presumption, the court concluded that extraterritoriality was a special factor. Concurring, Judge Kavanaugh stressed that "[i]t would be grossly anomalous . . . to apply *Bivens* extraterritorially when we would not apply an identical statutory cause of action for constitutional torts extraterritorially." We agree. Not only would it be "anomalous," it would contravene the separation-of-powers concerns that lie at the heart of the "special factors" concept.

Having weighed the factors against extending *Bivens*, we conclude that this is not a close case. Even before *Abbasi* clarified the "special factors" inquiry, we agreed with our sister circuits that "[t]he only relevant threshold— that a factor 'counsels hesitation'—is remarkably low." Here, extending *Bivens* would interfere with the political branches' oversight of national security and foreign affairs. It would flout Congress's consistent and explicit refusals to provide damage remedies for aliens injured abroad. And it would create a remedy with uncertain limits. In its remand of *Hernandez*, the Supreme Court chastened this court for ruling on the extraterritorial application of the Fourth Amendment because the issue is "sensitive and may have consequences that are far reaching." Similar "consequences" are dispositive of the "special factors" inquiry. The myriad implications of an extraterritorial *Bivens* remedy require this court to deny it.

For these reasons, the district court's judgment of dismissal is **AFFIRMED**.

JUDGMENT ON REHEARING EN BANC

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

DENNIS, *Circuit Judge*, Concurring:

In my view, we need not decide the difficult question of whether a *Bivens* remedy should be available under the circumstances of this case because, under Supreme Court

precedent, Agent Mesa is entitled to qualified immunity. I find compelling the plaintiffs' arguments that Hernández was entitled to protections under the Fourth Amendment in light of *Boumediene v. Bush*, and the circumstances surrounding the border area where Mesa shot and killed him. But the extraterritorial application of these protections to Hernández was not clearly established at the time of Mesa's tortious conduct. Mesa is therefore entitled to qualified immunity.

The plaintiffs contend that questions about the extraterritorial application of constitutional protections do not preclude Mesa's liability. After all, according to the complaint, Mesa essentially committed a cold-blooded murder. Surely every reasonable officer would know that Mesa's conduct was unlawful, the plaintiffs argue. While that is a fair point, I believe this argument is foreclosed by Supreme Court precedent, which holds that the right giving rise to the claim—here, Hernández's Fourth Amendment rights—must be clearly established.

In *Davis v. Scherer*, the Supreme Court held, "A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that *those* rights were clearly established at the time of the conduct at issue." The Court stated that "officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages." In light of *Davis*, the plaintiffs' argument that Mesa forfeited his qualified immunity because his conduct was shockingly unlawful cannot succeed. I am therefore compelled to concur in affirming the district court's dismissal of the plaintiffs' claims.

HAYNES, *Circuit Judge*, concurring:

I concur in the judgment and with the majority opinion's conclusion that *Bivens* should not extend to the circumstances of this case. I write separately to note that when we previously heard this case en banc, it was consolidated with two other appeals, which alleged issues arising under the Alien Tort Statute and Federal Tort Claims Act. Those appeals and claims are not before us today, and they need not be addressed to resolve the *Bivens* claim against Mesa.

PRADO, *Circuit Judge*, dissenting:

Today's en banc majority denies Sergio Hernandez's parents a *Bivens* remedy for the loss of their son at the hands of a United States Border Patrol agent. The majority asserts that the transnational nature of this case presents a new context under *Bivens* and that special factors counsel against this Court's interference. While I agree that this case presents a new context, I would find that no special factors counsel hesitation in recognizing a *Bivens* remedy because this case centers on an individual federal officer acting in his law enforcement capacity. I respectfully dissent.

I do not take issue with the majority's framework for analyzing whether there are special factors counseling hesitation. "[S]eparation-of-powers principles are or should be central to the analysis." the

majority's analysis purports to consider these principles by appropriately asking "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." However, in conducting this analysis, the majority is quickly led astray from the familiar circumstances of this case by empty labels of national security, foreign affairs, and extraterritoriality. These labels—as we say in Texas—are all hat, no cattle.

The majority repeatedly attempts to frame this case around the issue of whether aliens injured abroad can pursue *Bivens* remedies. That characterization, however, overlooks the critical who, what, where, when, and how of the lead actor in this tragic narrative. This case involves one federal officer "engaged in his law enforcement duties" in the United States who shot and killed an unarmed, fifteen-year-old Mexican boy standing a few feet away. The Supreme Court in *Abbasi* went to great lengths to indicate support for the availability of a *Bivens* remedy in exactly the circumstances presented here: an instance of individual law enforcement overreach. As the Court recently reaffirmed in no uncertain terms, *Bivens* is "settled law . . . in [the] common and recurrent sphere of law enforcement." For the following reasons, I would retain *Bivens* in that common sphere and recognize a remedy for this senseless and arbitrary cross-border shooting at the hands of a federal law enforcement officer.

The Supreme Court directed this Court "to consider how the reasoning and analysis in *Abbasi* may bear on this case," so that is where I begin. In *Abbasi*, aliens detained for immigration violations following the September 11 attacks brought a class action suit against high-level federal executive officials and detention facility wardens. The detainees alleged that they had been detained in harsh conditions, including that they were confined in tiny cells for over 23 hours a day, subjected to regular strip searches, denied basic hygiene products and most forms of communication, and subjected to regular verbal and physical abuse by guards. Detainee-plaintiffs brought their *Bivens* claims alleging that the detention and policies authorizing it violated their Fourth and Fifth Amendment rights. After finding the case presented a new *Bivens* context because it challenged "confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack"—a far cry from the three *Bivens* cases the Court had approved in the past—the Court determined that several special factors counseled hesitation that precluded a *Bivens* remedy against the executive officials.

The Supreme Court's analysis of four special factors in *Abbasi* is particularly relevant given the vastly different circumstances presented in this case. First, the Court took issue with the fact that the detainees sought to hold high-level federal executive officials liable for the unconstitutional activity of their subordinates. The Court warned that "*Bivens* is not designed to hold officers responsible for the acts of their subordinates." Because "[t]he purpose of *Bivens* is to deter the *officer*," a *Bivens* claim should be "brought against the individual official for his or her own acts, not

the acts of others." Relatedly, the *Abbasi* Court found it problematic that that the detainees challenged a broad governmental policy, specifically the government's response to the September 11 attacks. The Court noted that "a Bivens action is not 'a proper vehicle for altering an entity's policy.'" Third, the Court disapproved of the fact that the detainees' claims challenged "more than standard 'law enforcement operations.'" Specifically, the Court found the detainees' claims involved "major elements of the Government's whole response to the September 11 attacks, thus . . . requiring an inquiry into sensitive issues of national security." Finally, the Court found it of "central importance" that *Abbasi* was not a "damages or nothing" case. In contrast to suits challenging "individual instances of discrimination or law enforcement overreach," the *Abbasi* plaintiffs challenged "large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners" which could be remedied with injunctive and habeas relief.

Not only are all four of these special factors notably absent here, but this case also presents the limited circumstances in which *Abbasi* indicated a *Bivens* remedy would exist. First, Hernandez's parents do not seek to hold any high-level officials liable for the acts of their subordinates. Instead, and strictlycomporting with *Bivens*, plaintiffs are suing an individual federal agent for his own actions. Relatedly, in suing an individual officer, Hernandez's parents do not challenge or seek to alter any governmental policy. To the contrary, the constitutional constraints Hernandez's parents seek mirror existing Executive Branch policy for Border Patrol agents. Department of Homeland Security regulations and guidelines already require Border Patrol agents to adhere to constitutional standards for the use of lethal force, regardless of the subject's location or nationality. Furthermore, as a case against a single federal officer, this suit would not require unnecessary inquiry or discovery into governmental deliberations or policy-making—certainly not any more than any other regularly permissible *Bivens* suit alleging unconstitutional use of force by a Border Patrol agent. Third, this case has nothing to do with terrorism, nor does it involve a high-level governmental response to a major national security event. Rather, plaintiffs merely challenge "standard 'law enforcement operations.'" While the majority attempts to link this case to border security, which I address separately below, there is no question that a case which involves only one Border Patrol agent and a fifteen-year-old boy is a far cry from *Abbasi*, which involved broad and sensitive national security policies following the deadliest terrorist attack in U.S. history. Finally, unlike the detainees in *Abbasi*, who had several alternative remedies including habeas relief, this is a "damages or nothing" case for Hernandez's parents. It is uncontested that plaintiffs find no alternative relief in Mexican law, state law, the Federal Tort Claims Act ("FTCA"), the Alien Tort Statute ("ATS"), or federal criminal law for their tragic loss. Nor can injunctive or habeas relief redress the irreparable loss of life here. Indeed, individual instances of law enforcement overreach—as alleged here—are by "their very nature . . . difficult to address except by way of damages actions after the fact." Given

that a *Bivens* cause of action is plaintiffs' only available remedy, compensatory relief by way of *Bivens* is both necessary *and* appropriate in this case.

The special factors identified by the majority do not convince me that the Judiciary is not "well suited . . . to consider and weigh the costs and benefits of allowing a damages action to proceed"—particularly given the relatively straight-forward events here. I disagree that recognizing a *Bivens* remedy in this case "threatens the political branches' supervision of national security." According to the majority, national security is implicated because the events giving rise to this suit took place at the border, thereby affecting border security and the operations of the Border Patrol. Relying on the Third Circuit's rejection of *Bivens* liability in the airport security context for a First Amendment retaliation claim, the majority also reasons that implying a *Bivens* remedy in the transnational context "increases the likelihood that Border patrol agents will 'hesitate in making split second decisions.'"

While the shooting in this case took place at the border, it does not follow that border security and the operations of the Border Patrol are significantly implicated. As the original panel majority noted, this case "involves questions of precisely *Bivens*-like domestic law enforcement and nothing more." Plaintiffs allege that an individual Border Patrol agent while on duty on U.S. soil shot and killed an unarmed fifteen-year-old boy. If recognizing a *Bivens* remedy in this context implicates border security or the Border Patrol's operations, so too would any suit against a Border Patrol agent for unconstitutional actions taken in the course and scope of his or her employment. Yet, as the majority recognizes, Border Patrol agents are unquestionably subject to *Bivens* suits when they commit constitutional violations on U.S. soil. It make little sense to argue that a suit against a Border Patrol agent who shoots and kills someone standing a few feet beyond the U.S. border implicates border and national security issues, but at the same time contend that those concerns are not implicated when the same agent shoots someone standing a few feet inside the border.

Moreover, the practical rationale given by the majority for not recognizing a *Bivens* remedy—that Border Patrol agents will hesitate making split-second decisions—is one more commonly and more appropriately invoked in the qualified immunity context. Given that the qualified immunity analysis already incorporates this practical concern, it is odd to invoke it at this stage, particularly when such concerns could be raised in nearly any *Bivens* suit against a federal law enforcement officer. Indeed, although [**38] the majority does not reach the issue of qualified immunity, Agent Mesa has and could continue to raise it as a possible defense to the constitutional claims against him.

Finally, I am troubled by the majority's reliance on a First Amendment retaliation case to raise this "national security" concern. In *Vanderklok*, the Third Circuit considered whether under *Bivens* "a First Amendment claim against a TSA employee for retaliatory prosecution even exists in the context of airport security

screenings." *Vanderklok*, 868 F.3d at 194. While the court refused to recognize such a claim in light of the new context presented and various special factors counseling hesitation, one such special factor the court found particularly relevant was the fact that "TSA employees typically are not law enforcement officers and do not act as such." The court noted that "TSA employees are not trained on issues of probable cause, reasonable suspicion, and other constitutional doctrines that govern law enforcement officers." Here, by contrast, Agent Mesa is a federal law enforcement officer well-trained on relevant constitutional doctrines and permissible use of force. In light of Agent Mesa's status as a federal law enforcement officer, the practical concerns raised in *Vanderlock* pertaining to non-officer TSA employees in the First Amendment retaliation context have little bearing here.

Indeed, *Abbasi* itself cautions against taking the very path the majority errantly takes in this case. "[N]ational-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" As one prominent legal scholar has warned, "national security" justifications are "increasingly becom[ing] the rule in contemporary civil litigation against government officers" and threaten to "dilute the effectiveness of judicial review as a deterrent for any and all unlawful government action—not just those actions undertaken in ostensibly in defense of the nation." When one looks to substantiate the invocation of national security here, one is left with the impression that this case more closely resembles ordinary civil litigation against a federal agent than a case involving a true inquiry into sensitive national security and military affairs, which are properly committed to the Executive Branch. On this record, I would not so readily abdicate our judicial role given the fundamental rights at stake here.

The majority also invokes concerns about interference with foreign affairs and diplomacy as a special factor counseling hesitation. Asserting that the United States is always responsible to foreign sovereigns when federal officials injure foreign citizens on foreign soil, the majority argues that extending a *Bivens* remedy here implicates "delicate diplomatic matters." However, isn't the United States equally answerable to foreign sovereigns when federal officials injure foreign citizens on domestic soil? Again, the majority's argument proves too much. As plaintiffs persuasively argue, if there is a "U.S. foreign policy interest [implicated] in granting or denying a *Bivens* claim to foreign nationals, it is difficult to see how that interest would apply only if the injury occurred abroad." It also bears repeating that Agent Mesa's actions took place within the United States.

I also fail to see how recognizing a *Bivens* remedy here would undermine Mexico's respect for the Executive Branch or create tension between Executive and Judicial determinations. No case holds that a court must first consider whether the Executive Branch has found evidence of criminality before determining whether a civil *Bivens* remedy exists for a given constitutional violation. Further, the majority fails to acknowledge that distinct standards of

proof govern civil and criminal proceedings making different outcomes in these proceedings hardly the stuff of an international diplomatic crisis. Even if one accepts that a Judicial finding of *Bivens* liability combined with an Executive Branch refusal to prosecute or extradite would undermine a foreign country's respect for the Executive Branch, it is difficult to explain how such concerns are only present when a foreign national is injured abroad, but not when a foreign national is injured in the United States. It is unclear how recognizing a *Bivens* remedy for the unconstitutional conduct of a single federal law enforcement officer acting entirely within the United States would suddenly inject this Court into sensitive matters of international diplomacy. Much as with national security, "the Executive's mere incantation of . . . 'foreign affairs' interests do not suffice to override constitutional rights."

The majority also points to Congress's failure to provide a damages remedy as an additional factor counseling hesitation. Noting that the language of 42 U.S.C. § 1983 limits damage remedies to "citizen[s] of the United States or other person[s] within the jurisdiction thereof," the majority first argues that *Bivens* as the "judicially implied version of section 1983" cannot reach further than § 1983. However, it is just as likely that by specifying "other persons within the jurisdiction" Congress intended to extend a § 1983 remedy beyond U.S. citizenship, rather than commenting on its availability for wrongful conduct by state actors with extraterritorial effects. Indeed, Congress enacted § 1983 "in response to the widespread deprivations of civil rights in the Southern States and the inability or unwillingness of authorities in those States to protect those rights or punish wrongdoers." Furthermore, while a *Bivens* action is often described as "analogous" to a § 1983 claim, *Butts v. Martin*, the Supreme Court has "never expressly held that the contours of *Bivens* and § 1983 are identical."

The other statutes highlighted by the majority fail to indicate that Congress expressly intended to preclude a remedy in the circumstances presented here. For instance, the FTCA's exclusion of "claim[s] arising in a foreign country," was meant to codify "Congress's "unwilling[ness] to subject the United States to liabilities depending upon the *laws of a foreign power*." Notably, *Bivens* seeks to remedy violations of United States constitutional protections, and the FTCA expressly does "not extend or apply to a civil action . . . for a violation of the Constitution of the United States." Additionally, any exception for federal officials under the Torture Victim Protection Act of 1991 ("TVPA") has little to say about the availability of a *Bivens* claim here. The TVPA provides a remedy for extrajudicial killings and torture at the hands of individuals acting under color of foreign law. However, these individuals would not have been subject to *Bivens* liability anyways because *Bivens* is limited to federal officials acting pursuant to federal law.

It is also important to note that *Abbasi* found Congress's failure to provide a remedy to the detainees in that case notable because Congressional interest in the government's response to the September 11 terrorist attack "ha[d] been 'frequent and intense' and some

of that interest ha[d] been directed to the conditions of confinement at issue." By contrast here, Congressional interest in cross-border shootings has been negligible making it more likely that congressional inaction is inadvertent rather than intentional. Indeed, as courts have recognized in the statutory interpretation context, drawing inferences from Congress's silence is a difficult and potentially dangerous exercise.

Finally, the majority asserts that "the extraterritorial aspect of this case" is itself a special factor counseling hesitation. Looking to the fact that Hernandez was standing on Mexican soil when he was shot, the majority fears the uncertain scope of *Bivens* liability—extending even to U.S.-based military drone operators—were we to recognize a *Bivens* remedy here. The majority's concern about the effects of such a decision is understandable and I do not take it lightly. However, the limited and routine circumstances presented here of individual law enforcement action as well as established Supreme Court precedent on *Bivens* claims in the military context assure me that there is little danger that recognizing a *Bivens* remedy here will open a Pandora's Box of liability.

First, as I emphasize above, this case is not *sui generis* among *Bivens* cases. In the "common and recurrent sphere of law enforcement," courts across the country routinely administer *Bivens* claims against federal officers for unconstitutional actions occurring within the United States. I readily acknowledge Hernandez was standing on the Mexican side of the culvert when he was shot, but it cannot be forgotten that Agent Mesa was acting from the American side of the culvert. It is hard to understand how the mere fact that a plaintiff happens to be standing a few feet beyond an unmarked and invisible line on the ground would suddenly create a host of administrability concerns or a systemwide impact on governmental operations that would not otherwise exist if the plaintiff was standing a few feet within the United States. As ordinary *Bivens* litigation against a federal law enforcement officer seeking damages for unconstitutional use of force, "the legal standards for adjudicating the claim pressed here are well-established and easily administrable."

But even the majority's concerns about liability for overseas drone operations are also unlikely to materialize. Even assuming foreign nationals injured at the hands of U.S. military personnel overseas could state valid constitutional claims—a hotly debated topic—the Supreme Court has already repeatedly rejected *Bivens* claims in the military context. Furthermore, it is likely that such claims would actually implicate various special factors counseling hesitation specifically identified in *Abbasi* such as requiring a true inquiry into national security issues, intruding upon the authority of the Executive Branch in military affairs, and actually causing officials "to second-guess difficult but necessary decisions concerning national-security policy."

In sum, this Court is more than qualified to consider and weigh the costs and benefits of allowing a damages action to proceed. This case simply involves a federal official engaged in his law enforcement duties acting on United States soil who shot and killed an

unarmed fifteen-year-old boy standing a few feet away. I would elect to recognize a damages remedy for this tragic injury. As Chief Justice John Marshall wrote, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." In this case, I would recognize a *Bivens* remedy for this senseless cross-border shooting at the hands of a federal law enforcement officer. Therefore, I respectfully dissent.

"Justices to Hear Case of U.S. Agent's Shooting of Teenage Across the Mexican Border"

New York Times

Adam Liptak

May 28, 2019

The Supreme Court agreed on Tuesday to decide whether the parents of a teenager killed by an American agent shooting across the Mexican border may sue him in federal court. The justices also issued a decision limiting suits by people who claim they were arrested for exercising their First Amendment rights.

The case concerning the shooting, Hernandez v. Mesa, No. 17-1678, started in 2010, when Jesus Mesa Jr., a border guard, shot a fleeing 15-year-old boy in the head, killing him. The boy, Sergio Hernández Guereca, had been playing with friends in the dry bed of the Rio Grande and was in Mexico when he was struck.

The United States Court of Appeals for the Fifth Circuit, in New Orleans, said Sergio's family could not sue Mr. Mesa.

"This is not a close case," Judge Edith Jones wrote for the majority. Congress could pass a law allowing suits against federal officials by "aliens injured abroad," she said. But without such a law, she wrote, federal courts should not "interfere with the political branches' oversight of national security and foreign affairs."

The Supreme Court has considered the case once before, but it did not issue a definitive ruling. It is likely to do so after it hears arguments in the term that starts in October.

The central question in the case is whether Congress must authorize lawsuits like the one brought by Sergio's parents.

In 1971, in Bivens v. Six Unknown Named Agents, the Supreme Court ruled that congressional authorization was not always needed in suits against federal officials claiming violations of constitutional rights. But the court has grown increasingly uneasy about the decision, which concerned the unconstitutional search of a home in Brooklyn, and it has cautioned that the ruling should not be extended lightly to new contexts.

The government of Mexico had urged the Supreme Court to hear the case against Mr. Mesa. "It is a priority to Mexico to see that the United States has provided adequate means to hold the agents accountable and to compensate the victims," Mexico's brief said. "The United States would expect no less if the situation were reversed and a Mexican government agent had killed a U.S. national."

The First Amendment case decided on Tuesday, Nieves v. Bartlett, No. 17-1174, arose from an encounter at the weeklong Arctic Man festival in Alaska, "an event known for both extreme sports and extreme alcohol consumption," Chief Justice John G. Roberts Jr. wrote for the majority. "The mainstays are high-speed ski and snowmobile races, bonfires and parties."

"During that week," the chief justice wrote, "the Arctic Man campground briefly becomes one of the largest and most raucous cities in Alaska."

One participant, Russell P. Bartlett, was arrested after yelling at police officers and refusing to answer questions. Afterward, Mr. Bartlett said, one officer told him, "Bet you wish you would have talked to me now."

He was charged with disorderly conduct and resisting arrest, but prosecutors dropped the charges, saying it was too expensive to pursue them given the distances involved. Mr. Bartlett sued, saying he had been arrested for exercising his First Amendment rights.

The case was the court's third attempt to answer the difficult question of whether the existence of probable cause was always enough to defeat a lawsuit claiming retaliatory arrest.

Last year, the court ruled that Fane Lozman, a critic of a Florida city who was arrested at a City Council meeting, could pursue a case for retaliatory arrest, but only because the city appeared to have had an established and official policy of harassing him. The court also avoided providing an answer in a 2012 case concerning Secret Service agents.

In 2006, the court ruled in Hartman v. Moore that government officials could not be sued under the First Amendment for retaliatory prosecutions where there was probable cause to pursue the prosecution.

On Tuesday, Chief Justice Roberts wrote that the same rule should apply to arrests, with one exception. Suits can proceed, he said, "when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."

Justices Stephen G. Breyer, Samuel A. Alito Jr., Elena Kagan and Brett M. Kavanaugh joined the majority opinion in the case. Justice Clarence Thomas joined most of the opinion, though he would have done without the exception.

Justices Ruth Bader Ginsburg and Neil M. Gorsuch issued partial dissents, with Justice Ginsburg noting that the power to arrest "can be abused to disrupt the exercise of First Amendment speech and press rights."

In her own dissent, Justice Sonia Sotomayor warned that "the majority's approach will yield arbitrary results and shield willful misconduct from accountability."

"Border Patrol Agents Must Be Held Accountable"

Slate

Steve Vladeck

June 24, 2018

One need not look far these days to find agents of U.S. Customs and Border Protection in the news—from the frontlines of the Trump administration's controversial "zero tolerance" policy along the U.S.-Mexico border to citizenship checkpoints along I-95 in northern Maine. Now more than ever, ensuring that CBP agents are held accountable if and when they violate individuals' constitutional rights seems like an obvious imperative.

In March, however, the 5th U.S. Circuit Court of Appeals (the federal appeals court with jurisdiction over Louisiana, Mississippi, and Texas) held that, even if a CBP agent at the U.S.-Mexico border commits what one judge described as a "cold-blooded murder," the victim's family cannot sue him for damages. Among other things, the court of appeals concluded in *Hernández* v. *Mesa* that federal judges generally should not provide such relief in cases presenting any kind of "national security" or "foreign policy" concerns. In the process, the 5th Circuit implied that damages will *never* be available against CBP officers even for egregious violations of clearly established constitutional rights, and it did so at an especially inauspicious time to remove even the specter of deterrence from officers of the nation's largest law enforcement agency.

The *Hernández* case (in which I am co-counsel to the plaintiffs) started with the fatal shooting, on June 7, 2010, of Sergio Adrián Hernández Güereca, a 15-year-old Mexican national who, according to his parents' lawsuit, was playing with friends in the culvert along the U.S.-Mexico border outside El Paso (and was unarmed) when Jesus Mesa, a CBP agent, shot and killed him. Hernández's parents brought a wrongful death action against Mesa, claiming, among other things, that the shooting was in violation of Hernández's rights under the Fourth and Fifth Amendments. Although the case posed interesting (and unanswered) questions about the extent to which the Constitution applies at (and just across) the border, it was resolved by the 5th Circuit, the first time around, on the basis of "qualified immunity"—the idea that, even if Mesa did violate Hernández's rights, it was not "clearly established" at the time of the shooting that Mesa's conduct was unconstitutional (because it was not "clearly established" if the Constitution applied to Hernández at all).

Last June, however, the Supreme Court vacated and remanded the 5thCircuit's decision, ruling that Mesa did not know at the time of the shooting that Hernández was a noncitizen, and therefore could not have known that the person at whom he was shooting might lack constitutional protection.

On remand, the 5th Circuit once again sided with Agent Mesa, this time arguing that federal courts generally should not recognize judge-made damages remedies, especially in cases raising the kinds of national security and foreign policy concerns that tend to arise at the border. In so ruling, the 5th Circuit purported to rely on the Supreme Court's decision last year in *Ziglar* v. *Abbasi*, in which a four-justice majority (out of the six justices who heard the case) refused to recognize a damages remedy against senior government officials for their role in the roundup and detention of immigrants who were Muslim and/or of Arab descent after Sept. 11, 2001.

Abbasi is a deeply disturbing decision, both in how it applies (and ignores) prior precedent and in its more fundamental framing of the role of the federal courts vis-à-vis the political branches. But for all its flaws, *Abbasi* repeatedly stressed that its holding was "not intended to cast doubt on the continued force, or even the necessity" of judge-made damages remedies in search-and-seizure cases, and that "[t]he settled law … in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain [them] in that sphere." In other words, although *Abbasi* frowned on judge-made damages remedies to challenge high-level policy decisions by senior government officials in the midst of national security crises, it went out of its way to *not* similarly disavow damages remedies for "individual instances of … law enforcement overreach." Only one of the six justices who participated in *Abbasi* (Clarence Thomas) disagreed.

Moreover, unlike in *Abbasi*, the plaintiffs in the *Hernández* case have no other possible remedy. A federal statute bars them from suing Mesa under state tort law. And as with most claims against rogue law enforcement officers, there is no meaningful opportunity to challenge the officer's conduct in advance through a suit for declaratory or injunctive relief. Thus, for plaintiffs like Hernández's parents, the alternative to judge-made damages for Agent Mesa's allegedly unconstitutional conduct is, well, nothing. It might be easy to understand, or at least accept, the federal courts' skepticism at going out of their way to provide remedies in a one-off case, where there is no real concern that the officer's allegedly unconstitutional conduct could or would recur. But the tragic facts of Hernández's case are, unfortunately, not the least bit aberrational. The federal appeals court in San Francisco is currently considering similar questions in a case arising out of a fatal cross-border shooting in Arizona, and there was just another fatal shooting by a CBP agent of an unarmed noncitizen along the border near Laredo, Texas. More generally, one need not look far to find CBP agents on the literal and figurative front lines in any number of other contemporary contexts—contexts in which there ought to be common cause in the need to deter constitutional abuse.

To that end, on June 15, we brought the *Hernández* case back to the Supreme Court, asking the justices to review (and reverse) the 5th Circuit's ruling and to recognize that the federal courts can indeed hold CBP agents accountable if and when they violate the Constitution. Now more than ever, there ought to be common cause in ensuring that

CBP agents act consistently with the Constitution, and in providing remedies to their victims in case in which they don't.

"Is There Liability for Cross-Border Shooting?"

Congressional Research Service

Charles Doyle

May 22, 2018

In 2010, a border patrol agent, standing in the United States, shot and killed a 15-year old Mexican boy standing across the border in Mexico. The Hernandez's parents sued. Last June, the Supreme Court returned the case to the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) for further legal proceedings. *Hernandez v. Mesa*. The Fifth Circuit has now ruled that the Hernandez family may not sue the border patrol agent under an implied-cause-of-action Bivens theory.

Bivens refers to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, a 1971 case in which the Supreme Court held that a victim of an unconstitutional search and seizure enjoyed an implied cause of action against the offending agents for damages in the absence of any other legal remedy. In later cases, the Supreme Court has hesitated to recognize an implied cause of action for other constitutional violations. Whether the Court will recognize an implied cause of action in these new-context cases turns on the existence of any special factors suggesting that the existence of any remedy for the constitutional violation should be left to Congress. The Court returned *Hernandez* to the Fifth Circuit for this "special factor" analysis. The Fifth Circuit identified special factors that it held precluded recognition of an implied cause of action.

Background

Although many of the facts are in dispute, all parties seem to agree that Border Patrol Agent Mesa shot and killed Sergio Hernandez across the U.S.-Mexico border. The boy's parents sued Agent Mesa, the United States, and several federal agencies under various theories. The district court dismissed claims under the Federal Tort Claims Act and the Alien Tort Statute. The boy's parents also asserted a *Bivens* cause of action for violations of the Fourth and Fifth Amendments. They contended unsuccessfully that the shooting and death constituted use of excessive force and thus an unreasonable seizure under the Fourth Amendment and a substantive due process violation under the Fifth Amendment.

Agent Mesa for his part invoked qualified official immunity. Qualified official immunity precludes a suit for money damages against government officials arising out of actions occurring in performance of their official duties. The immunity does not extend to conduct that is contrary to clearly established law with which an official would be familiar. Agent Mesa argued that no Fourth or Fifth Amendment precedent clearly covered conduct in a foreign nation.

A Fifth Circuit panel affirmed the district court's dismissal of the Federal Tort Claims Act and Alien Tort statute claims. A full complement of the judges of the Fifth Circuit, sitting en banc, concluded that Agent Mesa was entitled to qualified immunity with respect to the Fifth Amendment *Bivens* claim. The judges affirmed dismissal of the Fourth Amendment claims because they concluded that the Fourth Amendment did not apply outside of the United States to foreign nationals without ties to the United States.

The case arrived before the Supreme Court shortly after the Court had agreed to review another Bivens claims case, *Ziglar v. Abbasi*. Writing for the Court in *Abbasi*, Justice Kennedy emphasized the Court's reluctance to recognize implied causes of action. Justice Kennedy explained that "*Bivens* will not be extended to a new context if there are 'special factors' counselling hesitation in the absence of affirmative action by Congress." He stated further that "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III."

The Supreme Court then turned to *Mesa*. The Court concluded the Fifth Circuit's qualified immunity holding was in error because it failed to address the fact that Agent Mesa had no idea whether the boy was a U.S. citizen. The Court set aside the question of whether Hernandez's Fourth Amendment rights had been violated and returned the case to the Fifth Circuit for a threshold determination of whether the Hernandez family enjoyed a *Bivens* implied cause of action.

Back in the Fifth Circuit

When the case returned from the Supreme Court, the Fifth Circuit decided that the case presented a "new context" for *Bivens* purposes and that "special factors" counselled against recognizing an expanded implied *Bivens* cause of action. If a case does not present a "new context" – that is, if a case is not "different in a meaningful way" from the cases in which the Supreme Court has recognized a *Bivens* implied cause of action – then an implied cause of action exists. The Fifth Circuit pointed out that *Hernandez* presents unresolved and novel Fourth and Fifth Amendment claims.

As for special factors, the Fifth Circuit acknowledged the possibility of an implied cause of action in some new-context cases, but concluded that here the special factors were too many and too weighty for the plaintiffs to overcome. The Fifth Circuit identified five special factors that it believed indicated that establishing a cause of action should be left to Congress. First, the Border Patrol is statutorily authorized to deter and prevent illegal entry by terrorists, gun and drug smugglers, and unauthorized individuals, "duties essential to national security." Second, "extending *Bivens* in this context also risks interference with foreign affairs and diplomacy." Third, Congress might have, but refrained, from establishing a cause of action against federal officials in the Federal Tort Claims Act and elsewhere. Fourth, Congress has established other

remedies for the alleged in the form of criminal prosecution. Fifth, "the extraterritorial aspect of this case is itself a special factor that underlies and aggravates the separation-of-powers issues."

One judge concurred, but would have resolved the case on the basis of qualified official immunity. In his view, the absence of clearly established precedent settled the case in Agent Mesa's favor. Two judges dissented. They agreed that the case presented the issue in a new context. However, they did not consider the majority's special factors all that special. Instead, in their view, the "case simply involves a federal official engaged in his law enforcement duties acting on United States soil who shot and killed an unarmed fifteen-year-old boy standing a few feet away." They would have recognized an implied cause of action should the Hernandez family establish either a Fourth or Fifth Amendment violation.

At this point, the Hernandez family is free to petition the Supreme Court to review the Fifth Circuit's handiwork. It remains to be seen whether the family will petition for review and how the Court would respond to the petition if the family asks for review. On one hand, the Court in *Abbasi* characterized *Bivens* and its progeny as the work of an "ancient regime" (i.e., the standard of a bygone day), a view that would seem to foreclose future recognition of virtually any new *Bivens* implied causes of action. On the other hand, the special factors the Court identified in *Abbasi* were fairly unique (high level executive policy decisions relating to detention following the 9/11 terrorist attacks). The Court may want to take the opportunity to explain just how special *Bivens*-defeating special factors must be. In any event, Congress is free to address the situation legislatively.

"Supreme Court Revives Suit Against Border Agent in Shooting Death"

The Wall Street Journal

Jess Bravin

June 26, 2017

The Supreme Court on Monday revived a claim against a U.S. Border Patrol agent who shot and killed a Mexican teenager standing across the international border, directing a lower court that had dismissed the case to re-examine whether youth's parents are entitled to sue.

In a separate case, the court was unable to resolve whether immigrants held in long-term detention have a right to seek bail, and ordered a new argument on the issue. The case was heard in February by an eight-member court, which apparently divided evenly on the issue. Justice Neil Gorsuch, confirmed in April, likely will provide the deciding vote when the case is argued again in the term that begins in October.

The cross-border shooting case was among the most dramatic heard by the court during the term that ended Monday. According to the suit, 15-year-old Sergio Hernandez and his friends were playing a tag-like game in the dry concrete culvert built to channel the Rio Grande, dividing the U.S. city of El Paso, Texas, from Ciudad Juárez, Mexico.

Border Patrol agent Jesus Mesa Jr. arrived on a bicycle and seized one of the youths, but when Sergio escaped to the Mexican side of the culvert, fatally shot him in the face.

Had the victim been in the U.S. or held American citizenship, or had the shooter worked for a state or local agency, the parents most likely could sue for damages.

But Congress hasn't explicitly authorized lawsuits against federal officials for violating constitutional rights, and the Supreme Court has found only narrow circumstances when they potentially are liable for such misconduct.

Monday's unsigned decision directs the Fifth U.S. Circuit Court of Appeals, in New Orleans, to re-examine whether the Hernandez killing falls into such circumstances, especially under an opinion the high court issued last week further elaborating the "special factors" that determine whether federal officials may be sued.

"The facts alleged in the complaint depict a disturbing incident resulting in a heartbreaking loss of life," the court said. Whether Sergio's parents "may recover damages for that loss in this suit depends on questions" the appeals court should first address.

Although unsigned, Monday's decision was adopted by a 5-3 vote.

In dissent, Justice Stephen Breyer, joined by Justice Ruth Bader Ginsburg, said the parents should have been permitted to press their claim at trial. Among other reasons, Mr. Mesa "knowingly shot from United States territory into the culvert," Justice Breyer wrote, without knowing on which side of the border the bullet would land" or "whether he was shooting at a citizen of the United States or Mexico."

Justice Breyer's dissent included a 1963 blueprint showing a cross-section of the culvert, to buttress his argument that Sergio had been more in an international no-man's-land than deep into a foreign country, and a photo of President Lyndon Johnson and Lady Bird Johnson viewing the channel in 1968.

Justice Clarence Thomas dissented on the other side, writing briefly that the Fifth Circuit properly dismissed the case. Justice Gorsuch wasn't on the court when the case was argued and didn't participate.

"Does the Constitution protect someone on the Mexican side of the border?"

Los Angeles Times

David G. Savage

February 21, 2017

The Supreme Court on Tuesday will take up the case of a Mexican teenager who was shot and killed by a U.S. border agent and try to decide a question that is also at the heart of the legal dispute over President Trump's foreign travel ban: Does the Constitution protect foreign citizens who stand at the nation's borders?

Judges have blocked Trump's order temporarily on the grounds it may violate the constitutional rights of foreign travelers from seven Muslim majority nations. Some of those foreigners live legally in this country and had traveled abroad, while others hold U.S. visas but have never been to the United States. However, the law in this area is far from clear, and it will likely remain so until the high court rules on the issue.

The border shooting case touches on a similar question, and the outcome may affect the travel ban litigation.

In June 2010, Sergio Hernandez, 15, was playing with two friends in the concrete culvert that marks the boundary between El Paso and Juarez, Mexico. Cellphone video shows the boys ran up the culvert on the U.S. side and touched the high fence. They turned to run back to the Mexican side when a U.S. border patrol agent on a bicycle came upon them.

Officer Jesus Mesa Jr. grabbed one of the boys and turned his gun toward the other, Sergio, who had hidden behind a pillar about 60 feet away on the Mexican side. The officer fired three shots and killed the teenager.

Mesa initially claimed he acted in self-defense because the boys were throwing rocks at him. While the video appeared to disprove that, Justice Department investigators later said Mesa was responding to reports of smugglers and he had encountered rocks being thrown.

The killing of the teenager, who was unarmed and posed no apparent threat to the officer, provoked anger on the Mexican side of the border, but U.S. officials refused to extradite Mesa to face charges in Mexico. They also decided against prosecuting him under U.S. law.

Sergio's parents then sued Mesa, alleging the shooting was an unjustified violation of the Constitution. They cited the 4th Amendment's ban on unreasonable seizures and the use of excessive force as well as the 5th Amendment, which says no person shall "be deprived of life or liberty … without due process of law."

A federal judge threw out the suit on the grounds that the Constitution's protections

stop at the border. Since the Mexican teenager was killed on the Mexican side, his family could not sue the border patrol agent, the judge said.

A divided panel of the U.S. 5th Circuit Court of Appeals briefly revived the suit. The majority cited the Supreme Court's ruling in cases regarding the U.S. detention facility at Guantanamo Bay, Cuba, in which the justices said the Constitution and the right to habeas corpus extended to the naval base on Cuban soil because U.S. authorities exercised complete control there. Similarly, the judges said, U.S. agents controlled the area on the U.S-Mexico border.

The full 15-member appeals court then took up the case and decided that because the law was not clear, the border agent could not be held liable for violating it.

The family appealed to the Supreme Court, arguing the justices should not permit a "law-free zone in which U.S. agents can kill innocent civilians with impunity."

The case of Hernandez vs. Mesa will be the first argued in the Supreme Court by lawyers representing the Trump administration.

In an interview, the family's attorney, Robert Hilliard of Corpus Christi, Texas, said the case has similarities to the legal battle over Trump's travel ban. "This is really about the separation of powers and whether the judiciary has a role in reviewing the conduct of the government," he said.

He was referring to the government's contention in the border shooting case that the Supreme Court should throw out the suit and shield U.S. agents from all such claims.

Defending the travel ban, government lawyers made a similar argument, contending judges had no authority to second-guess the president's decision to exclude certain foreigners from entering the country. Last weekend, White House policy advisor Stephen Miller said in TV interviews that judges had no authority to block Trump's order on foreign travelers. "The president's powers here are beyond question," he said. "We don't have judicial supremacy in this country."

As usual, Justice Anthony M. Kennedy appears to hold the key vote. In the past, he has said the reach of the Constitution should turn on practical concerns, including whether U.S. officials are in control. If so, he could join with the court's liberals to say the Constitution constrains U.S. agents operating on a border, thereby clearing the family's lawsuit to proceed. Such a decision would surely be cited by lawyers and judges in the litigation over the travel ban.

But he could also join with the court's conservatives and refuse to open the door for noncitizens outside the country to bring legal claims against U.S. officials. If the court were to split, 4-4, the justices could choose to place a hold on the case and await the confirmation of a ninth justice.

The Senate will begin hearings March 20 on Judge Neil Gorsuch, the president's nominee to fill the vacancy.

Barton v. Barr

Ruling Below: *Barton v. United States AG*, 904 F.3d 1294 (11th Cir. 2018).

Overview: Barton, a native and citizen of Jamaica, was admitted to the U.S. as a B-2 visitor and became a lawful permanent resident. He was arrested and charged with three counts of aggravated assault and one count each of first-degree criminal damage to property and possession of a firearm during the commission of a felony. The Department of Homeland Security charged Barton as deportable. He challenged the charges for removal. The U.S. Government argued that his crimes make him "inadmissible." Barton claimed that since he is an already-admitted lawful permanent resident, he could not be rendered inadmissible.

Issue: Whether a lawfully admitted permanent resident who is not seeking admission to the United States can be "render[ed] … inadmissible" for the purposes of the stop-time rule, 8 U.S.C. §1229b(d)(1).

Andre Martello BARTON., ***Petitioner***

v.

U.S. ATTORNEY GENERAL, ***Respondent***

United States Court of Appeals, Eleventh Circuit

Decided on September 25, 2018

[Excerpt; some citations and footnotes omitted]

NEWSOM, Circuit Judge:

The federal immigration laws give the Attorney General the discretion to cancel the removal of an otherwise removable lawful permanent resident who (among other conditions) "has resided in the United States continuously for 7 years after having been admitted in any status." Importantly for present purposes, though, the continuous-residence requirement is subject to the so-called "stop-time rule." The provision that embodies that rule—at issue here—states that any period of continuous residence terminates when the alien "commit[s] an offense referred to in section 1182(a)(2) of this title that *renders the alien inadmissible* to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest."

The question before us is whether a lawful-permanent-resident alien who has already been admitted to the United States—and who isn't currently seeking admission or

readmission—can, for stop-time purposes, be "render[ed] ... inadmissible" by virtue of a qualifying criminal conviction. Other circuits have divided over the answer. For slightly different reasons, the Second and Fifth Circuits have both held that a lawful permanent resident needn't apply for admission to be "render[ed] ... inadmissible" under the stop-time rule (as has the Third Circuit, albeit in an unpublished opinion). More recently, the Ninth Circuit disagreed, concluding that "a lawful permanent resident cannot be 'rendered inadmissible' unless he is seeking admission."

For the reasons that follow, we agree with the Second, Third, and Fifth Circuits, and disagree with the Ninth.

I

A

Andre Martello Barton is a native and citizen of Jamaica. Barton was initially admitted to the United States on May 27, 1989 as a B-2 visitor for pleasure; approximately three years later, he successfully adjusted his status to lawful permanent resident. Since his admission, Barton has run afoul of the law on several occasions. Initially, on January 23, 1996—for reasons that will become clear, the dates matter—Barton was arrested and charged with three counts of aggravated assault and one count each of first-degree criminal damage to property and possession of a firearm during the commission of a felony. He was convicted of all three offenses in July 1996. Then, a little more than a decade later—first in 2007 and then again in 2008—Barton was charged with and convicted of violating the Georgia Controlled Substances Act. (For present purposes, only Barton's 1996 crimes are relevant to determining whether he is eligible for cancellation of removal. Barton's 2007 and 2008 offenses occurred more than seven years after his admission to the United States—which, as we will explain, is the pertinent timeframe for establishing continuous residence under the cancellation statute.)

The Department of Homeland Security subsequently served Barton with a notice to appear, charging him as removable on several grounds: (1) under 8 U.S.C. § 1227(a)(2)(A)(iii), for being convicted of an aggravated felony related to drug trafficking; (2) under 8 U.S.C. § 1227(a)(2)(B)(i), for violating controlled-substance laws; (3) under 8 U.S.C. § 1227(a)(2)(C), for being convicted of illegally possessing a firearm; and (4) under 8 U.S.C. §1227(a)(2)(A)(ii), for being convicted of two crimes involving moral turpitude not arising out of a single scheme. Barton admitted the factual allegations in the notice and conceded removability based on the controlled-substance and gun-possession offenses but denied that he had been convicted of a trafficking-related aggravated felony or of two crimes involving moral turpitude not arising out of a single scheme. Barton also indicated that he intended to seek cancellation of removal as a lawful permanent resident. The immigration judge sustained the two conceded charges of removability, and the government later withdrew the other two charges.

B

As promised, Barton subsequently filed an application for cancellation of removal under 8 U.S.C. § 1229b(a), which, as already explained, allows the Attorney General to cancel the removal of an otherwise removable lawful-permanent-resident alien if—in addition to other requirements not relevant here—the alien "has resided in the United States continuously for 7 years after having been admitted in any status." Importantly, though—as also explained—the continuous-residence requirement is subject to the "stop-time rule," which terminates the accrual of continuous residence when the alien commits a crime that (1) is listed in 8 U.S.C. § 1182(a)(2) and (2) that renders the alien either "inadmissible" under § 1182(a)(2) or "removable" under 8 U.S.C. § 1227(a)(2) or (a)(4).

In his cancellation application, Barton acknowledged his prior criminal convictions and included as exhibits records that, as relevant here, showed that he had committed the crimes that resulted in his convictions for aggravated assault, criminal damage to property, and unlawful gun possession on January 23, 1996. The government moved to pretermit Barton's application, arguing that Barton hadn't accrued the required seven years of continuous residence after his May 27, 1989 admission because, under the stop-time rule, his continuous-residence period ended on January 23, 1996.

In response, Barton contended that his 1996 crimes didn't trigger the stop-time rule. As to § 1229b(d)(1)'s "removable" prong, Barton said that his 1996 offenses didn't qualify because they arose from a single scheme of misconduct constituting one crime involving moral turpitude committed outside his first five years in the United States, whereas the cross-referenced § 1227(a)(2) establishes removability, as relevant here,only for (i) a single crime involving moral turpitude committed within five years of an alien's admission or (ii) multiple crimes involving moral turpitude not arising out of a single scheme. The government didn't press—and has since abandoned—the argument that Barton's 1996 crimes rendered him "removable" for stop-time purposes. Instead, it insisted that Barton's 1996 offenses—even if considered as a single crime involving moral turpitude occurring outside the five-year timeframe—rendered Barton "inadmissible" under § 1182(a)(2), which unlike removability under § 1227(a)(2) isn't limited by a single-scheme requirement. Barton replied—thus teeing up the issue before us—that as an already-admitted lawful permanent resident not seeking admission (or readmission) to the United States, he could not as a matter of law be "render[ed] ... inadmissible" within the meaning of § 1229b(d).

The immigration judge ruled in the government's favor, concluding that Barton's 1996 offenses "render[ed]" him "inadmissible" under § 1182(a)(2), thereby triggering § 1229b(d)(1)'s stop-time rule, thereby prematurely ending his period of continuous residence in the United States, thereby disqualifying him for cancellation of removal.

C

Barton sought review of the IJ's order in the Board of Immigration Appeals, reiterating his argument that a lawful-permanent-resident alien not seeking admission to the United States can't be "render[ed] inadmissible" under § 1182(a)(2) for stop-time purposes. In a non-precedential single-member decision, the Board agreed with the IJ, concluding that Barton's 1996 offenses triggered the stop-time rule and thus forestalled his accrual of the requisite seven years of continuous residence. Citing its earlier decision in *Matter of Jurado-Delgado*, the Board (per the lone member) held that Barton's convictions barred him from seeking cancellation of removal because—so far as we can tell from a very summary order—the phrase "renders the alien inadmissible" in § 1229b(d)(1)'s stop-time rule requires only that the applicant be "potentially" inadmissible, not that he be actively seeking admission.

Barton now petitions for review of the Board's decision. He asserts, as he has all along, that as a lawful permanent resident he "plainly cannot be inadmissible as a result of any offense, as he is not seeking admission to the United States."

II

Under the principle announced in *Chevron U.S.A. Inc. v. NRDC*, "[a]s a general rule, an agency's interpretation of a statute which it administers is entitled to deference if the statute is silent or ambiguous and the interpretation is based on a reasonable construction of the statute." And to be clear, the Supreme Court has held that *Chevron* deference applies with full force when the Board of Immigration Appeals interprets ambiguous statutory terms in the course of ordinary case-by-case adjudication. But so do *Chevron*'s limitations. Accordingly, here as elsewhere, if we determine—employing "traditional tools of statutory construction"—that "Congress has spoken clearly, we do not defer to [the] agency's interpretation of the statute," because "we must give effect to the unambiguously expressed intent of Congress."

The threshold question before us, therefore—at *Chevron* step one, so to speak—is whether the usual rules of statutory interpretation provide a clear answer to the following question: Can a lawful-permanent-resident alien who is not presently seeking admission to the United States nonetheless be "render[ed] ... inadmissible" within the meaning of 8 U.S.C. § 1229b(d)(1)? Although it is undoubtedly true that "the concept of inadmissibility is generally married to situations in which an alien is actually seeking admission to the United States," for the reasons that follow, we hold that an already-admitted lawful permanent resident—who doesn't need and isn't seeking admission—*can* be "render[ed] ... inadmissible" for stop-time purposes.

A

Any application of the "traditional tools of statutory construction," of course, must begin "with the statutory text, and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." At issue here (again) is the stop-time rule, which

(again) terminates the seven years of continuous residence that a lawful permanent resident must accrue in order to qualify for cancellation of removal. In relevant part, the stop-time rule provides as follows:

> [A]ny period of continuous residence ... in the United States shall be deemed to end ... when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

Because the parties here agree that Barton is not ineligible for cancellation of removal on account of having committed an offense that rendered him "removable" under § 1227(a)(2) or § 1227(a)(4), the sole question before us is whether his 1996 convictions rendered him "inadmissible" under § 1182(a)(2). Barton's position is simply stated: He says that he "plainly cannot be *inadmissible* as a result of any offense, as he is not seeking *admission* to the United States." Although Barton's argument has a certain intuitive appeal, we conclude that § 1229b(d)(1)'s plain language forecloses it.

We begin our textual analysis where Barton does—with the word "inadmissible." Standard English-language dictionaries all seem to define "inadmissible" in pretty much the same way: "Not admissible; not proper to be allowed or received." So, in short, an alien like Barton is "inadmissible" if he isn't "proper[ly]"—or doesn't "hav[e] the right to be"—present in the United States.

On, then, to the word "renders," which precedes "inadmissible." Barton asserts that Congress's use of that term—such that the alien must commit an offense that "renders" him "inadmissible"—"requires certain factual circumstances to be in existence to be operative," and thus that it "makes most sense for Congress to have used 'renders' inadmissible to apply to those seeking admission ...." We disagree that the term "renders" necessitates (or even properly suggests) so narrow a reading. Turning again to the dictionaries, we find that they almost uniformly define "render" to mean "to cause to be or to become." Some, interestingly—and we think tellingly—go on to explain that the word "render" can indicate the conferral of a particular condition, or "state."

A "state"-based understanding makes particularly good sense here, where the word that follows "renders" is "inadmissible." By their very nature, "able" and "ible" words connote a person's or thing's character, quality, or status—which, importantly for present purposes, exists independent of any particular facts on the ground, so to speak. Consider, for instance, the following example, taken from one dictionary's definition of the word "render": "Sewage effluent leaked into a well, grossly contaminating the water and rendering it *undrinkable* for 24 hours." The described water isn't properly drunk for a full day—whether or not anyone is actually trying to drink it. It is, by its very nature, not drinkable. Here's another, again from a dictionary definition of "render": "[T]he rains rendered

his escape *impossible*." Because of the rains, the unidentified captive's escape couldn't be made—whether or not he was actually trying to make it. Similar illustrations abound: A terminal illness renders its victim *untreatable* regardless of whether she is actively seeking treatment; rot renders a piece of fish *inedible* regardless of whether someone is trying to eat it; sheer weight renders a car *immovable* regardless of whether someone is trying to move it. You get the point. So too here—an alien can be rendered *inadmissible* regardless of whether he is actually seeking admission.

We simply cannot discern in § 1229b(d)(1)'s text any indication that in order to be "render[ed] ... inadmissible" within the meaning of the stop-time rule, an alien *must* presently be seeking admission. Rather, an alien is "render[ed] ... inadmissible" when he is "cause[d] to be or to become" not "proper[ly]" or "right[ly]" admitted. In other words, "inadmissib[ility]" is a *status* that an alien assumes by virtue of his having been convicted of a qualifying offense under § 1182(a)(2). True, for an alien like Barton, who has already been admitted—and isn't currently seeking admission—that status might not immediately produce real-world admission-related consequences. But it isn't categorically irrelevant to admission either; rather, it may just be that the otherwise-latent status manifests somewhere down the road. Barton is of course correct that, as a general rule, an already-admitted lawful permanent resident needn't seek readmission to the United States. There are exceptions, however. For instance, a once-admitted alien may need readmission if he "has abandoned or relinquished [lawful-permanent-resident] status," "has been absent from the United States for a continuous period in excess of 180 days," or "has engaged in illegal activity after having departed the United States."

So as a matter of both linguistics and logic, at least for stop-time purposes, a lawful permanent resident can—contrary to Barton's contention—be "render[ed] ... inadmissible" even if he isn't currently seeking (and for that matter may never again seek) admission to the United States.

B

In resisting this plain-language interpretation, Barton relies principally on the rule against surplusage—which cautions against needlessly reading a statute in a way that renders (pun fully intended) certain language superfluous. In particular, Barton asserts—

> If an offense referred to in 8 U.S.C. § 1182(a)(2), to wit, a [crime involving moral turpitude], categorically render[s] an alien inadmissible and trigger[s] the stop-time rule, without respect to whether that individual is actually seeking admission, then there would be no need to consider whether, in the alternative, the offense render[s] the alien removable under 8 U.S.C. § 1227(a)(2) or (a)(4).

Although we find Barton's surplusage-based argument a little hard to follow, he seems to be saying something like the following. At the outset, he correctly recognizes that in order to trigger § 1229b(d)(1)'s stop-time rule, two conditions must be met: first, the alien must have "committed an offense referred to in section 1182(a)(2)"; second,

and separately, that offense must "render[] the alien" either "inadmissible ... under section 1182(a)(2)" or "removable ... under section 1227(a)(2) or 1227(a)(4) ...." From that starting point, and presumably fastening on the fact that both § 1229b(d)(1)'s prefatory "referred to" clause and the "inadmissible" prong of the statute's operative clause cross-reference § 1182(a)(2), Barton appears to contend that an alien's commission of any § 1182(a)(2)-based crime that meets the threshold "referred to" condition will also *ipso facto* "render[] the alien inadmissible under section 1182(a)(2)." Thus, he says, there will never be a need to proceed to determine whether a crime qualifies under the operative clause's separate § 1227(a)-based "removable" prong—hence, the argument goes, the surplusage. Barton's solution: Courts should read the stop-time rule "so that the inadmissibility part applies to permanent residents seeking admission, and the [removability] part applies to those permanent residents in the United States already, not seeking admission ...."

We reject Barton's argument for two reasons. As an initial matter, the Supreme Court has repeatedly explained that the usual "preference" for "avoiding surplusage constructions is not absolute" and that "applying the rule against surplusage is, absent other indications, inappropriate" when it would make an otherwise unambiguous statute ambiguous. Rather, faced with a choice between a plain-text reading that renders a word or clause superfluous and an interpretation that gives every word independent meaning but, in the doing, muddies up the statute—courts "should prefer the plain meaning since that approach respects the words of Congress." Because, as we have explained, the statutory language here is clear, it is unnecessary—and in the Supreme Court's words, would be "inappropriate"—to apply the anti-surplusage canon here.

Moreover, and in any event, Barton's surplusage-based argument misunderstands the stop-time rule's operation. Contrary to Barton's assumption, answering "yes" to the first question—whether the alien has "committed an offense referred to in section 1182(a)(2)"—does *not* necessarily require a "yes" to the second question—whether that offense "renders the alien inadmissible ... under section 1182(a)(2)." The reason is that while the mere "commi[ssion]" of a qualifying offense satisfies the prefatory clause, actually "render[ing] the alien inadmissible" demands more. Under § 1182(a)(2), an alien "is inadmissible"—here, as a result of a "crime involving moral turpitude"—only if he is "convicted of, or ... admits having committed, or ... admits committing acts which constitute the essential elements of" the listed offense. In short, while only commission is required at step one, conviction (or admission) is required at step two.

So contrary to Barton's contention, there is no surplusage. The statutory language that he assails as superfluous is in fact the second of two independent requirements, both of which are necessary to trigger the stop-time rule.

III

For the foregoing reasons, we hold, per the stop-time provision's plain language, that a lawful-permanent-resident alien need not be seeking admission to the United States in order to be "render[ed] ... inadmissible." Accordingly, the Board correctly concluded that Barton is ineligible for cancellation of removal because the stop-time rule—triggered when he committed a crime involving moral turpitude in January 1996—ended his continuous residence a few months shy of the required seven-year period.

PETITION DENIED.

"High Court to Review Removal of Lawful Permanent Residents"

Bloomberg Law

Kimberly Strawbridge Robinson

April 22, 2019

The U.S. Supreme Court could make it easier for lawful permanent residents to remain in the country after committing a crime.

The justices agreed today to review an Eleventh Circuit ruling regarding when lawful permanent residents can obtain discretionary "cancellation of removal."

At issue is the "stop-time rule," which pauses the accumulation of the seven-year residency requirement necessary to obtain cancellation.

The rule is triggered, among other times, whenever such non-citizens commit an offense that renders them "inadmissible."

The Second, Third, Fifth, and Eleventh Circuits have all said the rule is kicks in regardless of whether an admitted immigrant is seeking admission to the U.S.

The Ninth Circuit is the only one to hold that immigrants can't be "inadmissible" unless they are actually seeking admission.

Andre Martello Barton, a Jamaican citizen and a lawful permanent U.S. resident, asked the Supreme Court to resolve the dispute after the Eleventh Circuit found that he was a few months shy of qualifying for cancellation of removal.

The court agreed to take the case but likely won't hear it until next term, which begins in October.

There were an estimated 13.2 million lawful permanent residents in the United States as of January 2014, according to the Department of Homeland Security.

The case is Barton v. Barr, U.S., No. 18-725, review granted 4/22/19.

"Court Finds Green Card Holder in the United States 'Inadmissible' for Decades-Old Crime"

Ramineni Shepard Legal Blog

Dayna Lally

September 25, 2018

On September 25, 2018, the Eleventh Circuit found that a U.S. permanent resident ("green card holder") who has already been admitted to the United States- and who isn't currently seeking admission or readmission- can, for stop-time purposes, be rendered "inadmissible" by virtue of a qualifying criminal conviction.

Andre Martello Barton, a native and citizen of Jamaica, was initially admitted to the United States on May 27, 1989 as a B-2 visitor. Approximately three (3) years later, Barton adjusted his status to that of a lawful permanent resident, On January 23, 1996, Barton was arrested and charged with aggravated assault, first-degree criminal damage to property, and possession of a firearm during the commission of a felony. He was convicted for all of the offenses in July 1996.

The Department of Homeland Security ("DHS") subsequently served Barton with a notice to appear; charging him, among other things, under 8 U.S.C. § 1227(a)(2)(A)(ii), for his conviction of two (2) crimes involving moral turpitude not arising out of a single scheme. Barton filed an application for cancellation of removal pursuant to 8 U.S.C. § 1229b(a).

The U.S. Code of Federal Regulations at § 1229b(a) gives the Attorney General the discretion to cancel the removal of a lawful permanent resident who (among other conditions) "has resided in the United States continuously for 7 years after having been admitted in any status." The continuous-residence requirement is, however, subject to the so-called "stop-time rule."

The "stop-time rule", embodied at § 1182(d)(1) of the Code of Federal Regulations, provides that any period of continuous residence in the United States is deemed to end when the alien commits, or has been convicted of, a crime involving moral turpitude.

Barton argued to the Eleventh Circuit that the language of the Immigration and Nationality Act differentiates between those seeking "admission" to the United States and those already in the United States, and therefore, that the inadmissibility part of the statute should apply to permanent residents *seeking admission*, and the removability part should apply to those permanent residents in the United States already, *not seeking admission.*

The Eleventh Circuit panel unanimously rejected Barton's interpretation of the statute. In its opinion, it performed a "state"-based

textual analysis of the statute and found the term "render" to mean "to cause to be or to become." The Eleventh Circuit used obscene examples of the dictionary definition of "render" to support its opinion that an alien can be rendered inadmissible regardless of whether he is actually seeking admission:

"… rot renders a piece of fish inedible regardless of whether someone is trying to eat it…

As of Tuesday, the Second, Third, Fifth, and now Eleventh Circuit courts are of the opinion that a lawful permanent resident need not be seeking admission to the United States in order to be "render[ed] … inadmissible."

Barton's attorney is considering petitioning the U.S. Supreme Court to hear this case. Ramineni Law Associates, LLC is closely monitoring the proceedings and will provide updates as they are available.

"Green Card Holder Can't Be 'Inadmissible,' High Court Told"

Law360

Suzanne Monyak

June 27, 2019

U.S. permanent residents can't be "rendered inadmissible" unless they are seeking admission into the U.S., a Jamaican citizen fighting his deportation told the U.S., a Jamaican citizen fighting his deportation told the U.S. Supreme Court on Wednesday, pushing an interpretation of the immigration statute that has split the federal circuit courts.

Andre Martello Barton, a Jamaican citizen with a U.S. green card, argued in his opening brief at the high court that he was not "rendered inadmissible" more than two decades ago by a firearms offense he committed in 1996 when he was 18, as the government has argued, because Barton had already been legally admitted into the U.S. at that time.

The immigration courts' finding that he was in fact "rendered inadmissible," which was ultimately upheld by the Eleventh Circuit last year, left Barton – now a father of four American Children – unable to stop his deportation years later under the so-called stop-time rule, which stops the clock on the number of years an immigrant accrues in the U.S.

The panel's interpretation has been rejected by the Ninth Circuit but adopted by three other circuit courts.

Permanent residents are eligible for a form of deportation relief called a cancellation of removal if they have lived in the U.S. continuously for at least seven years. But the immigration judge found that Barton had been "rendered inadmissible" by that 1996 crime just shy of reaching that seven-year mark, even though he has lived in the U.S. for nearly two decades by the time of the judge's decision.

The idea that Barton was rendered inadmissible because "hypothetically" in a "counterfactual world" he would have been inadmissible if he had needed to be readmitted into the U.S. in "implausible," Barton told the justice.

"The government's interpretation would improperly rewrite the phrase 'renders the alien inadmissible' as 'could render a hypothetical alien inadmissible," Barton argued.

As an already admitted permanent resident, Barton could only be rendered deportable, not inadmissible, the brief says. And whether an immigrant is "rendered" inadmissible or deportable should refer to a decision that an immigrant has just made, not to one that hypothetically could have been made.

The government's interpretation of the law would require immigration judges to decide two removal hearings – the one at issue and the hypothetical one – which would be "irrational and inefficient," the brief says.

"It is improbable that, buried in a provision for computing the time period for continuous residency, Congress inserted a requirement for immigration judges to effectively restart removal proceedings from scratch," the brief says.

The high court previously examined the stop-time rule in the 2018 case Pereira v. Sessions. In that case, the justices ruled that the government's notices to appear in immigration court served to immigrants must include a hearing's time and place information to be valid under the stop-time rule.

According to court filings, Barton entered the U.S. on a visitor visa in 1989 as a child and became a legal permanent resident three years later. In January 1996, he was arrested and charged with aggravated assault, property damage and possession of a firearm. He was convicted of those three offenses later that year.

He was later charged and convicted of drug offenses under the Georgia Controlled Substances Act in 2007 and 2008, prompting the U.S. Department of Homeland Security to initiate deportation proceedings against him for being convicted of crimes "involving more turpitude," as defined by the Immigration and Nationality Act.

Barton then filed an application for a cancellation of removal as a permanent resident who has resided in the U.S. since 1989. An immigration judge ruled that Barton was not eligible for that relief because his continuous residency ended in 1996, when he was convicted of crimes that rendered him inadmissible and triggered the top-time rule.

Barton appealed, but both the appellate board and Eleventh Circuit sided with the immigration judge's interpretation of the law.

Conducting a word-by-word analysis, the Eleventh Circuit panel applied what is called a "'state'-based understanding" of the language, noting that words that end in "-able" and "-ible" indicated an individual's character or status.

Under that interpretation, the panel said in its September opinion, essentially, a person does not need to act on his or her status in order to be rendered that status.

"A terminal illness renders its victim untreatable regardless of whether she is actively seeking treatment; not renders a piece of fish inedible regardless of whether someone is trying to eat it; sheer weight renders a car immovable regardless of whether someone is trying to move it. You get the point. So too here – an alien can be rendered inadmissible regardless of whether he is actually seeking admission," the opinion said.

Represented by attorneys with Jenner & Block LLP, Barton then petitioned the

Supreme Court in December to weigh in and resolve the split, arguing that the Eleventh Circuit panel got it wrong, The justices agreed to take up the case in April.

Counsel for Barton declined to comment, and a Department of Justice spokesperson did not return a request for comment Thursday.

Barton is represented by Adam G. Unikowsky and Lauren J. Hartz of Jenner & Block LLP and H. Glenn Fogle Jr. of The Fogle Law LLC.

The government is represented by Solicitor General Noel J. Francisco and Joseph H. Hunt, Donald E. Keener, John W. Blakeley and Timothy G. Hayes of the DOJ.

The case is Andre Martello Barton v. William P.. Barr, case number 18-725, in the U.S. Supreme Court.

"Green Card Holder Can't Be 'Inadmissible,' High Court Told"

Law360

Nicole Narea

April 22, 2019

The U.S. Supreme Court on Monday agreed to take up a case to determine whether a U.S. permanent resident can be "rendered inadmissible" under the Immigration and Nationality Act even if the individual is not seeking admission into the country.

The Eleventh Circuit had found in September 2018 that Andre Martello Barton, a Jamaican citizen could not dodge a deportation order through a cancellation of removal — a form of relief available to permanent residents who have lived continuously in the U.S. for at least seven years — because he was rendered inadmissible before reaching that seven-year mark. Barton had petitioned the high court to review the decision in December 2018.

Under the appeals court's interpretation of the INA's language, which has been rejected by the Ninth Circuit but adopted by three other circuit courts, Barton — who entered the U.S. in May 1989 — became inadmissible in January 1996 when he was convicted of a crime, cutting off his required continuous residence under the so-called stop-time rule.

The high court previously examined the stop-time rule in the 2018 case Pereira v. Sessions. In that case, the justices ruled that the government's notices to appear in immigration court served to immigrants must include a hearing's time and place information to be valid under the stop-time rule.

Barton had argued in his petition for a writ of certiorari that the case wan an ideal vehicle to resolve the circuit split because the lower court rulings had "turned entirely on [their] interpretation of the stop-time rule."

Barton also asserted that, under the stop-time rule, a noncitizen who has already been admitted to the U.S. cannot be later found to be inadmissible – only deportable. He acknowledged that certain circumstanced would require that authorities reevaluate a noncitizen's admission, such as when they relinquish their green card, but said that he had done no such thing.

"[Barton] was not 'rendered inadmissible' by his 1996 offense," his petition for a writ of certiorari states. "He had already been admitted to the United States and did not need to be readmitted … [O]nce the alien has been "lawfully admitted,' he cannot be "rendered inadmissible."

Barton had additionally claimed that the appeals court's interpretation of the stop-time rule is "inconsistent with the structure of

federal immigration law." He noted that the INA does not discuss the idea of being "inadmissible" in contexts outside noncitizens seeking admission to the country, as the appeals court has done.

According to court filings, Barton entered the U.S. on a visitor visa in 1989 as a child and because a legal permanent resident three years later. In January 1996, he was arrested and charged with aggravated assault, property damage and possession of a firearm. He was convicted of those three offenses later that year.

He was later charged and convicted of drug offenses under the Georgia Controlled Substances Act in 2007 and 2008, prompting the U.S. Department of Homeland Security to initiate deportation proceedings against him for being convicted of crimes "involving moral turpitude," as defined by the INA.

Barton then filed an application for a cancellation of removal as a permanent resident who has resided in the U.S. since 1989. An immigration judge ruled that Barton was not eligible for the relief because his continuous residency ended in 1996, when he was convicted of crimes that rendered him inadmissible and triggered the stop-time rule.

The BIA rejected his appeal, as did the Eleventh Circuit.

Counsel for Barton and a representative for the DOJ did not immediately respond to requests for comment on Monday.

Barton is represented by H. Glenn Fogle Jr. of the Fogle Law Firm LLC and Adam Unikowsky and Jonathan Langlinais of Jenner & Block LLC.

The government is represented by Solicitor General Noel Francisco of the U.S. Department of Justice.

The case is Barton v. Barr, case number 18-725 in the U.S. Supreme Court.