18-485(L)

18-488(CON)

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARTIN JONATHAN BATALLA VIDAL, MAKE THE ROAD NEW YORK, on behalf of itself, its members, its clients, and all similarly situated individuals, ANTONIO ALARCON, ELIANA FERNANDEZ, CARLOS VARGAS, MARIANO MONDRAGON, CAROLINA FUNG FENG, on behalf of themselves and all other similarly situated individuals, STATE OF NEW YORK, STATE OF MASSACHUSETTS, STATE OF WASHINGTON, STATE OF CONNECTICUT, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF HAWAII, STATE OF ILLINOIS, STATE OF IOWA, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF OREGON, STATE OF PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF VIRGINIA, STATE OF COLORADO,

Plaintiffs-Appellees,

(*Caption continued on inside cover*)

On Appeal from the United States District Court
for the Eastern District of New York
Nos. 16-CV-4756 & 17-CV-5228 (Nicholas G. Garaufis, U.S.D.J.)

BRIEF FOR AMICI CURIAE PUBLIC CITIZEN, INC., AND NATURAL RESOURCES DEFENSE COUNCIL, INC., SUPPORTING APPELLEES AND AFFIRMANCE

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April 11, 2018

v.

DONALD J. TRUMP, President of the United States, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, KIRSTJEN M. NIELSEN, Secretary of Homeland Security, JEFFERSON B. SESSIONS III, United States Attorney General,

Defendants-Appellants.

CORPORATE DISCLOSURE STATEMENT

Amici curiae Public Citizen, Inc., and Natural Resources Defense Council, Inc., are nonprofit, nonstock corporations. They have no parent corporations, and because they issue no stock, no publicly held corporation owns 10% or more of their stock.

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INTEREST OF AMICI CURIAE[1]

Amicus Curiae Public Citizen, Inc., is a non-profit advocacy organization founded in 1971. Public Citizen appears on behalf of its nationwide membership before Congress, administrative agencies, and courts on a range of issues, including protection of consumers and workers and fostering open and fair governmental processes. Public Citizen often represents its members' interests in litigation and as amicus curiae.

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

Amici have litigated hundreds of cases seeking judicial review of government actions under the Administrative Procedure Act (APA) and special review provisions applicable to particular statutes, as well as non-statutory mechanisms for review of unlawful government action. It is

[1] All parties consented to the filing of this brief. No counsel for any party authored this brief in whole or part. Apart from amici curiae, no person or organization, including parties or parties' counsel, contributed money intended to fund the preparation and submission of this brief.

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

In this case, the government defendants argue that their decision to rescind the Deferred Action for Childhood Arrivals (DACA) program was an exercise of enforcement discretion that is unreviewable under *Heckler v. Chaney*, 470 U.S. 821 (1985). For a generation since *Chaney*, however, courts have recognized that it bars review of individual enforcement decisions, not of adoption by agencies of general policies that affect enforcement decisions. The government's brief, however, addresses this body of law only in a footnote citing a single decision. U.S. Br. 25 n.7. Amici therefore submit this brief to assist the Court by providing a more complete account of the boundaries of *Chaney*'s exception to the general presumption favoring judicial review.

ARGUMENT

Heckler v. Chaney does not bar judicial review of generally applicable agency enforcement policies.

The government's principal submission in this case is that its decision to rescind DACA "reset the agency's enforcement priorities," and that "[a] determination of general enforcement policy, like other enforcement decisions, is traditionally committed to agency discretion by law and thus not subject to APA claims." U.S. Br. 13. That argument stands or falls on the government's assertion that *Heckler v. Chaney*'s holding that individual exercises of enforcement discretion are unreviewable, 470 U.S. at 831–32, is equally applicable to the promulgation of general policies governing enforcement discretion. *See* U.S. Br. 13, 24–25. Even assuming that the rescission of the DACA program is properly viewed only as a matter of "enforcement," *but see* States' Br. 24–25, the government's position is contrary to decades of precedent recognizing that *Chaney*'s reasoning does not extend to agency actions adopting general policies governing enforcement.

A. *Chaney* involved a challenge to the failure of the Food & Drug Administration (FDA) to take enforcement action against the use of unapproved drugs for execution of prisoners facing death sentences. The

Supreme Court framed the issue before it in accordingly narrow terms as one involving "the extent to which determinations by the FDA not to exercise its enforcement authority over the use of drugs in interstate commerce may be judicially reviewed." 470 U.S. at 828. Emphasizing the breadth of the presumption in favor of judicial review under the APA and the narrowness of the exception for actions "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), the Court nonetheless found that the presumption of reviewability did not apply to "an agency's decision not to undertake certain enforcement actions," 470 U.S. at 831, because of the "general unsuitability for judicial review" of such decisions, *id*. The Court went on to explain that "general unsuitability" in terms that made plain that the decisions it deemed unsuitable for judicial review were individual decisions not to take enforcement action:

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

Id. at 831–32 (emphasis added).

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

In accordance with the limits on the Supreme Court's rationale in *Chaney*, the D.C. Circuit has held that an agency's adoption of rules or general policies establishing criteria for enforcement *is* reviewable. *See Edison Elec. Inst. v. EPA*, 996 F.2d 326 (D.C. Cir. 1993); *Nat'l Wildlife Fed'n v. EPA*, 980 F.2d 765 (D.C. Cir. 1992). In *Crowley Caribbean*

Transport, Inc. v. Peña, 37 F.3d 671 (D.C. Cir. 1994), for example, that court explained that *Chaney* bars review of a "*single-shot* non-enforcement decision"—that is, "an agency's decision to decline enforcement in the context of a single case"—but "an agency's statement of a *general enforcement policy* may be reviewable for legal sufficiency where the agency has expressed the policy as a formal regulation after the full rulemaking process … or has otherwise articulated it in some form of universal policy statement." *Id*. at 676.

Crowley identified three bases for its conclusion that the *Chaney* presumption that individual enforcement decisions are not reviewable does not apply to an agency's promulgation of a general enforcement (or non-enforcement) policy. First, because enforcement policies are not tied to the particular facts of an individual enforcement action, "they are more likely to be direct interpretations of the commands of the substantive statute rather than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision and that are, as *Chaney* recognizes, peculiarly within the agency's expertise and discretion." *Id*. at 677.

Second, an agency's statement of a non-enforcement policy "poses special risks" that the agency "has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities," *id.* (quoting *Chaney,* 470 U.S. at 833 n.4), rendering a presumption of non-reviewability "inappropriate." *Id.*

Finally, "an agency will generally present a clearer (and more easily reviewable) statement of its reasons for acting when formally articulating a broadly applicable enforcement policy, whereas such statements in the context of individual decisions to forego enforcement tend to be cursory, ad hoc, or post hoc." *Id*.

Based on these considerations, *Crowley* articulated, and the D.C. Circuit has subsequently followed, a generally applicable corollary to *Chaney*: While "agencies' nonenforcement decisions are generally unreviewable under the Administrative Procedure Act, … an agency's adoption of a general enforcement policy is subject to review." *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808 (D.C. Cir. 1998) (holding that court had jurisdiction to review federal Maritime Administration's policy of not enforcing restrictions on use of ships constructed with federal subsidies).

Other circuits have similarly held that "*Chaney* applies to individual, case-by-case determinations of when to enforce existing regulations rather than permanent policies or standards." *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996) (rejecting Secretary of Agriculture's contention that a policy of not enforcing a zero-tolerance standard for contaminated poultry was unreviewable under *Chaney*); *see also Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 236 (5th Cir. 2015) (citing *Crowley* and holding that EPA's determination whether to promulgate a "broadly applicable … policy" was not an exercise of unreviewable enforcement discretion under *Chaney*).

Importantly, this Court, in *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 167 (2d Cir. 2004), also approvingly cited the distinction drawn by *Crowley* between reviewable enforcement policies and unreviewable individual enforcement decisions, and the reasons underlying that distinction. *Riverkeeper*, a decision not cited in the government's brief, was a challenge to the failure of the Nuclear Regulatory Commission (NRC) to grant a request that it require certain security measures as conditions on its licensing of the Indian Point nuclear power plant. The challenger argued that the NRC's inaction was reviewable because it reflected a general

policy of failing to enforce adequate security requirements. This Court quoted in full *Crowley*'s explanation of the reasons that an agency's explicit adoption of an enforcement policy is not subject to *Chaney*'s preclusion-of-review holding. *See id*. (quoting *Crowley*, 37 F.3d at 677). The Court found, however, that in the case before it, the NRC had not explicitly "express[ed]" a "broad enforcement polic[y]." *Id*. The Court therefore examined the record to see if it could discern a reviewable "policy not to protect adequately public health and safety with respect to nuclear plants," *id*. at 168, and, finding no such policy, held that *Chaney* precluded review of the agency's failure to take enforcement action in the particular case before it, *id*. at 170.

Applying the principles recognized in these appellate decisions, district courts, in the nearly quarter-century since *Crowley*, have repeatedly reviewed agencies' adoption of express enforcement policies. For example, in *WildEarth Guardians v. DOJ*, 181 F. Supp. 3d 651, 665 (D. Ariz. 2015), the court cited *Crowley* in support of its holding that the Department of Justice's formally expressed "McKittrick policy" of requesting a specific intent rather than general intent instruction in prosecutions for the criminal "taking" of an endangered species did not

involve an exercise of unreviewable enforcement discretion under *Chaney*. In *Chiang v. Kempthorne*, 503 F. Supp. 2d 343, 351 (D.D.C. 2007), the court held that guidelines limiting the time periods for which the government could seek to recover royalties from mineral lessees constituted a reviewable general enforcement policy rather than an unreviewable exercise of enforcement discretion under *Chaney*. And in *Center for Auto Safety, Inc. v. NHTSA*, 342 F. Supp. 2d 1 (D.D.C. 2004), *aff'd on other grounds*, 452 F.3d 798 (D.C. Cir. 2006), the court held that *Chaney* was inapplicable to a challenge to NHTSA's practice of enforcing auto recalls on a regional but not national basis because it was not a "single-shot non-enforcement decision." *Id*. at 12 (quoting *Crowley*, 37 F.3d at 676). *See also*, *e.g.*, *Ringo v. Lombardi*, 706 F. Supp. 2d 952 (W.D. Mo. 2010) (holding that *Chaney* does not preclude review of general policy of non-enforcement of Controlled Substances Act with respect to lethal-injection drugs); *Roane v. Holder*, 607 F. Supp. 2d 216, 226–27 (D.D.C. 2009) (same).

The well-established distinction between individual exercises of enforcement discretion and general enforcement policies that fall outside *Chaney*'s holding that an enforcement decision is generally nonreviewable

has also been recognized by the Department of Justice itself. In its formal opinion concerning the lawfulness of deferred action programs for aliens unlawfully present in the United States, the Department's Office of Legal Counsel (OLC) extensively discussed *Chaney* and the limitations of its holding. *See* OLC, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* (Nov. 19, 2014), 2014 WL 10788677. OLC's opinion stressed two points significant here.

First, OLC stated that agencies "ordinarily" may not "'consciously and expressly adopt[] a general policy'" that abdicates statutory responsibilities. *Id.*, 2014 WL 10788677, at *6 (quoting *Chaney*, 470 U.S. at 833 n.4). Second, OLC recognized that "lower courts, following *Chaney*, have indicated that non-enforcement decisions are most comfortably characterized as judicially unreviewable exercises of enforcement discretion when they are made on a case-by-case basis." *Id*. OLC cited both *Crowley* and *Kenney* for this proposition and endorsed *Crowley*'s distinction between unreviewable "single-shot non-enforcement decisions," *id*. (quoting *Crowley*, 37 F.3d at 676), and "general policies"

that pose risks that the agency "has exceeded the bounds of its enforcement discretion," *id*.

B. Adoption of the government's current litigation position that its action rescinding DACA falls within the scope of *Chaney*'s preclusion of review of exercises of enforcement discretion would eliminate this distinction, long recognized by courts and by the Justice Department itself. Yet the government's brief barely acknowledges the case law and its own prior statements distinguishing reviewable general policies from unreviewable individual exercises of enforcement discretion: It relegates discussion of precedent on the point to a single footnote that briefly discusses only *Crowley*, without mentioning *Riverkeeper*, *OSG Bulk Ships*, *Kenney*, *Gulf Restoration Network*, or any of the other decisions that have drawn the same distinction. U.S. Br. 25 n.7

The government's abbreviated discussion of *Crowley* suggests that *Crowley* renders general enforcement policies reviewable only when they reflect an agency's "direct interpretations of the commands of [a] substantive statute." *Id*. (quoting *Crowley*, 37 F.3d at 676–77). Contrary to the government's suggestion, "interpretations of the commands of [a] substantive statute" are directly implicated by its action rescinding DACA,

which is based significantly on the purported view that DACA may violate the substantive commands of federal immigration statutes.[2] More fundamentally, the government's truncated quotation of *Crowley* manages to distort the court's meaning and omits parts of the court's reasoning that directly support review of the action at issue here. Contrary to the government's apparent reading, *Crowley* did not hold that general policies are reviewable only when and to the extent that they involve direct interpretations of statutes. Rather, *Crowley* stated broadly that general policies are reviewable. *Part* of the reason for that conclusion is that (as even the language selectively quoted by the government shows) they are "more likely" than individual enforcement decisions to involve interpretation of statutory commands, not that they *necessarily* involve such interpretation. 37 F.3d at 676–77. A statement about the generic characteristics of general policies that make them suitable for review by no means suggests that a policy must share each such characteristic to render it reviewable.

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[2] Ironically, the government's view that there is a litigation risk that DACA could be held unlawful as a violation of statutory commands also assumes that DACA is a reviewable general policy rather than an unreviewable exercise of enforcement discretion.

Moreover, *Crowley* pointed to other features of general policies that tend to distinguish them from individual enforcement decisions and make them suitable for judicial review—in particular, that "an agency will generally present a clearer (and more easily reviewable) statement of its reasons for acting when formally articulating a broadly applicable enforcement policy, whereas such statements in the context of individual decisions to forego enforcement tend to be cursory, ad hoc, or post hoc." *Crowley*, 37 F.3d at 677. That consideration is present here and confirms the amenability of the action rescinding DACA to review against the standards of reasoned explanation that apply under the APA when an agency abruptly changes its course. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

Acceptance of the government's view that its adoption or rescission of broad policies governing its administration of the immigration laws is an unreviewable exercise of enforcement discretion would substantially expand the reach of *Chaney* and upend decades of doctrinal development since the Supreme Court's issuance of that opinion. That doctrinal reversal would have no more basis in reason and precedent than does the

substantive policy change at issue in this case. The Court accordingly should reject the government's contention that its rescission of DACA is unreviewable under *Chaney*. Because that contention is fundamental to the government's position that the district court abused its discretion in holding that the plaintiffs are likely to succeed on the merits of their challenge to DACA's rescission, this Court should affirm the district court's issuance of a preliminary injunction.[3]

CONCLUSION

This Court should affirm the order of the district court.

[3] To the extent that the government suggests that its view of *Chaney* goes to whether the dispute here is "justiciable," U.S. Br. 15, any such suggestion is unwarranted. The "committed to agency discretion by law" limit on judicial review under 5 U.S.C. § 702(a)(1), which *Chaney* construes, is a limit on the right of action for judicial review under the APA, not a limit on the jurisdiction of the federal courts. *See Air Courier Conf. of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991).

Respectfully submitted,

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April 11, 2018

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on April 11, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF COMPLIANCE

The brief complies with Fed. R. App. P. 32(a)(5) and (6); it was prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook. This brief contains 2,917 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable, and therefore complies with the word limitation of Fed. R. App. P. 29 and Second Circuit R. 29-1.

/s/ Scott L. Nelson
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