NO. 15-674

In the
Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
PETITIONERS,

v.

STATE OF TEXAS, ET AL.,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF LEGAL SCHOLARS RONALD A. CASS AND CHRISTOPHER C. DEMUTH AND THE JUDICIAL EDUCATION PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici legal scholars and the Judicial Education Project respectfully submit this brief to assist the Court in addressing an important administrative-law question. Amici legal scholars have taught and written extensively on administrative law, and thus have a strong interest in this case. With their affiliations provided for identification purposes only, they are:

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The Judicial Education Project, a non-profit educational organization in Washington, D.C., is dedicated to defending the Constitution as envisioned by its Framers—a federal government of enumerated, limited powers. The Judicial Education Project educates citizens about these constitutional principles, with a focus on the judiciary's role in our democracy.

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[1] The parties have consented to the filing of this brief in letters on file in the Clerk's office. Pursuant to Supreme Court Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Amici received no compensation for offering the views reflected herein.

This brief is limited to addressing the third question presented: Whether the Secretary of Homeland Security's immigration program had to be implemented through notice-and-comment rule-making. Amici take no position on any of the other questions presented. Nor do they express any view on the merits of the administration's program. Were it not for the posture of the case, this brief could have been filed in support of neither party. Amici are concerned exclusively with the Secretary's failure to follow the Administrative Procedure Act's requirements for notice-and-comment rulemaking. Ignoring those requirements has become a recurrent problem in agency decision-making. This Court should reject the Secretary's attempts to undermine that foundational principle of American administrative law.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a so-called "memorandum," the Secretary of Homeland Security has sought to establish a new program, known as Deferred Action for Parents of Americans ("DAPA"), that would make several million aliens eligible to receive "lawful presence," employment authorization, and other benefits otherwise barred to them by law. Congress considered—but did not adopt—a very similar program. Reasonable people can and do disagree about the merits of the program; and as this case comes before the Court, immigration is a central theme of a contentious election campaign. Yet the Secretary asserts his authority to implement DAPA, altering the status of more than four million immigrants, through the equivalent of a government press release—on no legal authority except a general "vesting" of his discretionary powers and without the notice-and-comment procedures that, in the administrative state, serve to safeguard constitutional interests in lawful, transparent, and accountable democratic government. For good measure, the Secretary insists that his program is judicially unreviewable. None of these contentions can be reconciled with the text or structure of the Administrative Procedure Act ("APA").

The APA has been described as resolving "long-continued and hard-fought contentions" and providing a "formula upon which opposing social and political forces have come to rest." *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 523 (1978) (quoting *Wong Yang*

Sung v. McGrath, 339 U.S. 33, 40 (1950)). The APA seeks to reconcile a complex, democratic society's demands for expertise and efficiency with the equally compelling imperatives of lawful, accountable government. *See generally* Pat McCarran, *Three Years of the Federal Administrative Procedure Act—A Study in Legislation*, 38 Geo. L. J. 574 (1950). On this foundation rest the APA's procedural and judicial-review provisions. *See* 5 U.S.C. §§ 553, 554, 701-706.

The federal judiciary has been assiduous in safeguarding the APA's "formula" against erosion, evasion, or emendation on either side. Courts may not require agencies to adopt procedures beyond those required by the APA or an agency's organic statutes. *See Vermont Yankee*, 435 U.S. at 549; *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015). Conversely, agencies must follow, and may not evade, the procedures—including provisions for judicial review—that the law demands. *See, e.g., Vermont Yankee*, 435 U.S. at 549 n.21 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 417 (1971)); *Mahler v. Eby,* 264 U.S. 32, 44 (1924); *see also Sackett v. EPA*, 132 S. Ct. 1367 (2012).

Agencies' perennial temptation to depart from the APA's formula is particularly strong where, as here, presidential direction of agency policies provides an aura of democratic legitimacy, humanitarian and economic concerns are substantial, and the Congress that might provide a statutory framework for a coherent administrative program appears deadlocked. None of these considerations, however, grant an agency the power to act in the

absence of congressional authorization—and certainly not in the face of statutory commands directing how the agency should proceed. The APA is not a straightjacket; it affords agencies a great deal of leeway in choosing their own procedures. *Cf. SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). On that same account, though, agencies must abide by the APA's modest but unmistakable procedural commands. *See Vermont Yankee*, 435 U.S. at 549 n.21; *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979); *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). Those commands help "secure the values of government transparency and public participation," *Iowa League of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013), by ensuring that agencies provide reasoned explanations for their decisions after evaluating and responding to comments.

In this case, the Secretary has conspicuously failed to comply with the APA. The Secretary's deferred-action program is a substantive "rule," as the APA defines that term, and not a mere statement of policy, as the Secretary contends. It must therefore comply with the APA's notice-and-comment procedures. Canons against the circumvention of APA rulemaking requirements, as well as compelling reasons of law and policy, prohibit the Secretary's attempt to evade those basic requirements.

ARGUMENT

I. Rules With Substantive Legal Effect Must Comply With The APA's Notice-and-Comment Requirements.

The agency action under review is reflected in the Secretary's memorandum concerning its "Deferred Action for Parents of Americans and Lawful Permanent Residents" program. Pet. App. 411a–419a. Before this litigation, the administration concluded that it lacked authority, in the absence of congressional legislation, to implement the program *at all*. *See, e.g.*, State Br. 9. Yet the Secretary now confidently asserts his authority to implement the program as a routine exercise of his enforcement discretion—and to do so *without notice and comment*.

That bold assertion of executive power threatens to upend the APA and its carefully wrought formula. To a startling extent, the Secretary's defense of his program rests on supposed peculiarities of immigration law—a conferral of "lawful presence" that according to the Secretary has no legal consequence, U.S. Br. 66; or the establishment of a comprehensive administrative machinery, governing millions of people, that rests on nothing except the Secretary's general authority to enforce, or not, the laws of this country, *id*. at 61, 63. In that light, the APA's formula and its underlying constitutional logic bear rehearsing.

The APA sets out the basic framework to govern "a vast and varied federal bureaucracy." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). It is designed to address the

challenges of the administrative state by allowing agencies to exercise varied executive powers—subject, however, to procedural requirements designed by Congress and, with few circumscribed exceptions, to judicial review.

The APA recognizes two principal forms of agency action: rulemaking, and adjudication. The APA "is predicated upon working out a logical distinction between rule making and adjudication and upon interpreting and integrating the various exceptions with this basic distinction." Robert W. Ginnane, *"Rule Making" "Adjudications" and Exemptions Under the Administrative Procedure Act*, 95 U. Pa. L. Rev. 621, 642 (1947). To that end, the APA broadly defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[.]" 5 U.S.C. § 551(4). When an agency "makes"—formulates, amends, or repeals—a rule, *see id.* § 551(5), it is ordinarily required to proceed through a familiar "three-step" notice-and-comment procedure. *Perez,* 135 S. Ct. at 1203.

Congress did not impose that procedure by happenstance. It is an essential part of a compromise that allowed executive agencies to wield rulemaking power while accounting for the significant separation-of-powers concerns that arise from delegating such authority to executive agencies. *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 Nw. U. L. Rev. 1557 (1996). Congress, being directly elected and vested with

"[a]ll" legislative powers granted in the Constitution, U.S. Const. Art. I, § 1, can choose whether to assign reasons for an exercise of those powers; conduct its deliberations on the record; or give interested persons an opportunity to participate in its proceedings. Agencies *must* do these things as the price of exercising delegated power. *See* 5 U.S.C. § 553(c). In this fashion, notice-and-comment rulemaking safeguards lawful, transparent, and accountable government. *See, e.g.*, *Chrysler Corp.*, 441 U.S. at 303 (noting that the APA's procedural requirements "assure fairness and mature consideration of rules of general application") (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969)).

The APA also recognizes that procedural requirements, imposed in furtherance of constitutional government, may impose burdens on the Executive that are not always necessary. The statute thus carves out narrow exceptions to notice-and-comment requirements. The specified exceptions include exemptions for certain government benefits, 5 U.S.C. § 553(a)(2); "rules of agency organization, procedure, or practice," *id.* § 553(b)(3)(A); "good cause," *id.* § 553(b)(3)(B); and, as relevant here, "interpretative rules [and] general statements of policy," *id.* § 553(b)(3)(A).

The exceptions are consistent with, and logically derived from, the constitutional structure. *See generally FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536–37 (2009) (Kennedy, J., concurring); *see also* Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 Fla. L. Rev. 1215

(2014). The powers are delegated *to the Executive*—the one branch of government that can, and is designed to, mobilize and economize on "energy" and "dispatch." The Federalist No. 70, at 423–24 (Hamilton) (Clinton Rossiter ed., 1961). Precisely because powers entrusted to the Executive are naturally open-ended, the APA does not define what does and does not constitute a "good cause" or (as relevant here) a "statement of policy." For that same reason, however, an agency's powers to escape notice-and-comment rulemaking are limited in number and scope. *Batterton v. Marshall*, 648 F.2d 694, 701 (D.C. Cir. 1980) (exceptions are "limited"). The exceptions must be "narrowly construed and reluctantly countenanced." *New Jersey Dep't of Envtl. Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

The courts have characterized policy statements as "musings" or explanations about what an agency may do in the future—agency statements that are "no more subject to review than a press release." *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 422 (1942); *see also National Min. Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014); *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987). The exception remains an exception; notice and comment remains the baseline. Rules that implement statutory policy are rules that have substantive effect and must therefore satisfy notice-and-comment requirements. *Morton*, 415 U.S. at 232; *see also Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014); *Chamber of Commerce v. OSHA,* 636 F.2d 464, 469 (D.C. Cir. 1980).

The structural and interpretive principles just described govern permissive as well as coercive rules. The APA includes explicit provisions that apply when an agency seeks to exempt an individual or groups of individuals from generally applicable law. A permission to do that which is otherwise unlawful is a *license*. *See* 5 U.S.C. § 551(8) (defining "license" as "the whole or a part of an agency … exemption or other form of permission").

The grant of a license differs from an exercise of enforcement discretion because a license, by its nature, changes the legal rights and obligations of the individual to whom the license is granted. When executive officials exercise discretion not to enforce the law in particular cases, the unprosecuted remains a lawbreaker in the eyes of the law. In contrast, the grant of a license affirmatively authorizes the license holder to engage in conduct that would otherwise be unlawful. In the eyes of the law, the conduct is permitted, not just unprosecuted. *See Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1978 (2011) (a license is "a right or permission granted in accordance with law … to do some act … which but for such license would be unlawful" (quoting Webster's Third New International Dictionary 1304 (2002)); Black's Law Dictionary (10th ed. 2014) (defining "license" as "permission, usually revocable, to commit some act that would otherwise be unlawful").

Precisely because licenses have substantive effect, the APA recognizes that exemptions from generally applicable law—no less than coercive orders—pose challenges for the rule of law. When an

agency creates an exemption prospectively for a group of individuals—and not in response to a specific individual's application for an exemption—the rule governing the process by which licenses will be granted requires notice and comment. 5 U.S.C. § 553(d)(1) (substantive rules include those that "grant[] or recognize[] an exemption or relieve[] a restriction"); *id* § 551(9) (defining "licensing" as the "agency process respecting the grant, renewal, denial … or condition of a license"); *Nat'l Mining*, 758 F.3d at 251–52 ("an agency action that sets forth legally binding requirements for a private party to obtain a permit or license is a legislative rule").

The need to comply with notice-and-comment procedures in promulgating such rules is confirmed by the APA's text and structure. Congress recognized both the difference *and the commonality* between coercive and permissive rules. A coercive rule, validly enacted, compels prompt compliance upon proper notice—30 days after publication, under the terms of the APA. *See* 5 U.S.C. § 553(d). By contrast, a "substantive rule which grants or recognizes an exemption or relieves a restriction" is exempt from the 30-day publication requirement, *id.* § 553(d)(1), for an obvious reason: the beneficiaries of the exemption need no warning, only an invitation. The rules remain substantive nonetheless: Congress specifically did *not* exempt them from notice-and-comment requirements in the APA's neighboring section. *See id.* § 553(b); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another …, it is generally

presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'").

II. The Secretary's Program Is Invalid Because It Violates Notice-And-Comment Rule-making Requirements.

Because the Secretary's program establishes a new "agency process respecting the grant … of a license," 5 U.S.C. § 551(9), the Secretary was obligated to comply with the APA's notice-and-comment requirements. The Secretary's attempt to escape those requirements conflicts with the APA's text, structure, and purpose.

A. The Secretary's Program Is A Substantive Rule Requiring Notice And Comment.

DAPA is a rule under the APA, and the Secretary does not contend otherwise. Through this rule, the Secretary has sought to establish a new process for granting exemptions and relieving restrictions for a broad class of millions of aliens who are unlawfully present in the United States. Pet. App. 416a–417a ("I hereby direct USCIS to *establish a process*, similar to DACA" (emphasis added)). Through that process, aliens may obtain lawful presence, work authorization, and other benefits. *See* U.S. Br. 45 (conceding that the program creates benefits that would not exist "without" DAPA). Aliens who under DAPA are deemed eligible to receive benefits are invited to file applications with the United States Citizenship and Immigration Services ("USCIS"), which is directed to "begin accepting" those applications. Pet. App. 418a. A rule

of that description has substantive effect. It (i) establishes a new licensing process for exempting millions of individuals from applicable law; (ii) imposes numerical criteria to govern future licensing proceedings that are not derived from the statute; and (iii) binds agency officials.

1. DAPA Exempts Individuals From Applicable Law.

The Secretary labels "deferred action" pursuant to DAPA as "a form of prosecutorial discretion," through which "the Secretary deprioritizes an individual's case." Pet. App. 413a. In virtually the same breath, however, the Secretary acknowledges that "deferred action" entails quite a bit more than merely describing the Secretary's enforcement priorities: it establishes an alien's "lawful presence" in the United States, renders him or her eligible to receive a work authorization, and has continuing effect. U.S. Br. 7, 37, 45; *see Victoria v. Napolitano*, No. 12cv1827, 2013 WL 3746133, *4 (S.D. Cal., July 15, 2013) (a decision not to prosecute an alien is not the same as an affirmative grant of deferred action because it does not make aliens eligible for work authorizations). When the Secretary deems an alien "lawfully present," he is affirmatively deciding that the alien is authorized to stay and, by virtue of this decision, will no longer accrue "unlawful presence" for purposes of the temporary reentry bar. *See* 8 U.S.C. § 1182(a)(9)(B)(i)–(ii); U.S. Br. 9 n.3, 41 n.8.

The Secretary argues that eligibility for work authorization is an automatic consequence of lawfully promulgated rules—not DAPA—and that no direct legal consequences flow from a grant of

deferred action itself. U.S. Br. 68. That is not correct, for reasons respondents explain. State Br. 67. DAPA fundamentally alters the nature of deferred action, granting new benefits and effectively amending an earlier promulgated rule setting the terms on which an alien will be permitted to remain in the country.

Even apart from rendering an alien eligible for work authorization, DAPA creates new substantive legal rights because it tolls the period of "unlawful presence" that triggers the statutory bars preventing unlawful aliens that leave the country from reentering. *See* Pet.App. 44a n.99 (conceding the point and explaining why tolling is a benefit for minors and some adults). Congress has barred aliens from reentering for three years if they have been unlawfully present in the country for 180 days or more, and ten years if they have been unlawfully present for 12 months or more. *See* 8 U.S.C. § 1182. Congress has also directed that the period of unlawful presence can be tolled, but for no more than 120 days and only if certain, specific conditions are satisfied. *See id*. § 1182(a)(9)(B). The Secretary's program changes these requirements When the Secretary deems an alien "lawfully present" under DAPA, the alien is permitted to remain in the country and the statutory bars for reentry are indefinitely tolled. That *legal* consequence goes far beyond "merely address[ing] DHS's internal computation of time," as the Secretary suggests in a cursory footnote. U.S. Br. 68 n.16.

The consequences of "deferred action" materially distinguish DAPA from traditional non-enforcement

policies (such as the Department of Justice's "Petite Policy"), which the government wrongly describes as analogous. *See* U.S. Br. 70–71; *see also* State Br. 54–55 (explaining why the grant of lawful presence also distinguishes DAPA from the Family Fairness Program and other programs that the Secretary wrongly cites as precedents). None of those policies render lawful what Congress has deemed unlawful. None of them entitle the "deprioritized" to some other benefit. Unlike DAPA, none of them provides a mechanism to adjudicate any case (let alone millions). And none establishes a reticulated process through which permission is granted and the deprioritized may avail themselves of benefits.

The Office of Legal Counsel, in deeming DAPA lawful on grounds quite different from the government's position in this case, has described "deferred action" as an "unusual" form of enforcement discretion. J.A. 76. But that "unusual" form makes no appearance in the APA. In contrast, the APA does have words for "deferred action" and the agency process through which it is granted: it calls it a "license" and the process "licensing." 5 U.S.C. § 551(8) ("license": as "the whole or a part of an agency … exemption or other form of permission."); *id.* § 551(9) ("licensing": the "agency process respecting the grant, renewal, denial … or condition of a license").

The Secretary appears to concede that DAPA establishes a new administrative process for granting licenses and provides aliens with permission to remain lawfully within the country. On its face and as explained below, DAPA creates new criteria that

an alien "must" satisfy to "request consideration for deferred action via DAPA." U.S. Br. 10; *id*. at 45 (noting that "[w]ithout" DAPA, aliens would be treated differently by law-enforcement officials). The benefits of deferred action do not flow from the agency's failure to enforce the law; they are affirmatively granted as a result of the DAPA process.

The Secretary insists that deferred action under DAPA is granted on a case-by-case basis, and that it is temporary and revocable at any time. U.S. Br. 5, 38, 67. But *every* licensing process proceeds case-by-case. And virtually *all* licenses are temporary and revocable. *Atl. Richfield Co.* v. *United States*, 774 F.2d 1193, 1200 (D.C. Cir. 1985) (rejecting the argument that temporary "licenses" are excluded from the sweep of the APA, as having "no basis in law"); *see also Pan-Atlantic Steamship Corp. v. Atlantic Coast Line R. Co.*, 353 U.S. 436, 440 (1957) (a "harmonious reading of [a statute and the APA] requires the latter to be read as supplementing the former and to be construed as applying to temporary as well as to permanent licenses"). The fact that deferred action is granted (on a temporary basis) and can be revoked only confirms that it is a license. A policy of forbearance can be abandoned or discontinued; it is not a "grant" that may be "revoked." *Cf.* 5 U.S.C. § 551(10)(F). Non-enforcement decisions are presumptively unreviewable, *Heckler v. Chaney*, 470 U.S. 821 (1985); license denials and revocations are reviewable unless, as here, Congress has provided otherwise, *see* 8 U.S.C. § 1252(a)(2)(B).

An administrative act that satisfies all APA criteria of a "license" *is* a license. And a rule that grants or recognizes an exemption requires notice and comment. 5 U.S.C. § 553(d)(1).

2. DAPA Imposes New Numerical Criteria To Govern Future Licensing Proceedings.

DAPA also requires notice and comment because it imposes arbitrary criteria that govern the new process by which a private party is able to obtain a license. To receive "deferred action" and "lawful presence" under DAPA, aliens must satisfy specific "parameters" set out by the Secretary. A DAPA applicant must (1) as of November 20, 2014, have a child "who is a U.S. citizen or lawful permanent resident"; (2) have been physically present in the country on November 20, 2014, and when applying for relief; and (3) have been unlawfully present since January 1, 2010. Pet. App. 417a. The Secretary's memorandum provides in mandatory terms that to qualify for deferred action, an alien must "file the requisite applications" "pursuant to the new criteria." *Id.* Each applicant granted deferred action under DAPA *shall* be eligible to apply for work authorization, and that authorization—like the grant of deferred action that must precede it—*shall* extend for a period of three years. Pet. App. 417a–418a.

These specific requirements and numerical "parameters" are not derived from any statute or pre-existing regulation; they are established by and through the Secretary's program. Nor, unlike earlier programs of a more modest scale, is DAPA interstitial to a program or policy contemplated by

the immigration statutes enacted by Congress. *See* State Br. 54–59. The Secretary himself insists that DAPA does not interpret any substantive rule of law; it rests entirely on the general "vesting" of the Secretary's discretionary authority under the immigration laws. *See* U.S. Br. 42, 61, 63, 68–69 (citing 8 U.S.C. § 1103(a), 6.U.S.C. § 202(5)).

"[W]hen an agency wants to state a principle in 'numerical terms,' terms that cannot be derived from a particular record [or statutory language], the agency is legislating and should act through rulemaking." *Catholic Health Initiatives* v. *Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010) (quoting Henry J. Friendly, *Watchman, What of the Night?*, Benchmarks 144–45 (1967)). Notice-and-comment rulemaking is required when an agency "makes 'reasonable but arbitrary (not in the 'arbitrary and capricious' sense) rules that are … not derived from [a statute], because [numerical rules] represent an arbitrary choice among methods of implementation.'" *Id.* at 495 (quoting *Hoctor v. USDA*, 82 F.3d 165, 171 (7th Cir. 1996)).

Judge Friendly's proposition reflects two related tenets, both deeply rooted in the APA.

First, when an agency transposes a vague, general rule into specific criteria applicable to private parties, it is hard to qualify the action as anything *but* substantive rulemaking. "[I]f the relevant statute or regulation 'consists of vague or vacuous terms—such as 'fair and equitable,' 'just and reasonable,' 'in the public interest,' and the like—the process of announcing propositions that specify applications of those terms is not ordinarily one of

interpretation, because those terms in themselves do not supply substance from which the propositions can be derived.'" *Catholic Health*, 617 F.3d at 494–95 (citing Robert A. Anthony, *"Interpretative" Rules, "Legislative" Rules, and "Spurious" Rules: Lifting the Smog*, 8 Admin. L. J. Am. U. 1, 6 n.21 (1994)). That is still more true where, as here, an agency's rule, containing numerical bounds, rests on no pre-existing rule except the agency's general authority. However the agency may describe the exercise of that authority, it involves substantive rulemaking and requires notice and comment. *Hoctor*, 82 F.3d at 170–71.

Second, the APA commands that an agency engaged in rulemaking must give *reasons* for its actions. *See Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). That requirement helps to ensure that agencies act within the scope of their delegated authority, and it protects private parties' opportunity for meaningful judicial review. An "arbitrary choice among methods of implementation" may rest on compelling reasons; on considerations that may or may not pass an "arbitrary and capricious" examination; on no reason except administrative convenience; or even on considerations that are affirmatively foreclosed by an agency's organic statute. *Cf. Judulang v. Holder*, 132 S. Ct. 476, 483–84 (2011) ("[c]ourts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking").

There may be reasons, grounded in relevant and legally permissible considerations, to restrict DAPA licenses to aliens who have been "unlawfully present

since January 1, 2010"; or to prescribe a three-year term for deferred action and employment authorizations (where the earlier DACA program applied for only two years). That reasoning from relevant facts and circumstances to a "method of implementation" is precisely what the notice-and-comment process and the attendant judicial review are meant to elicit. *See Nat'l Small Shipments Traffic Conference, Inc. v. ICC*, 725 F.2d 1442, 1447–48 (D.C. Cir. 1984) ("Notice-and-comment procedures … are especially suited to determining legislative facts and policy of general, prospective applicability"); *see also* Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 Rutgers L. Rev. 313, 318-19 (1996).

Lower courts have regularly applied the test enunciated in *Catholic Health* to require notice and comment for agency rules that could far more readily have been described as non-substantive than is DAPA. For example, an EPA guidance providing a default, numerical toxicity factor that EPA would apply in granting waivers from waste-disposal regulation was held to be a binding substantive rule that required notice-and-comment rulemaking. *General Elec. Co. v. EPA*, 290 F.3d 377, 385 (D.C. Cir. 2002). In *Catholic Health* itself, the invalidated agency "guidance" prescribed a numerical standard, issued under a broadly worded statute, that determined certain insurers' eligibility to recover Medicare costs. *Catholic Health*, 617 F.3d at 495–97. *Hoctor* addressed a rule governing the height of animal fences issued pursuant to a general regulation by the USDA. *Hoctor*, 82 F.3d at 171.

Judge Friendly's proposition does not entail that *every* numerical rule or cut-off issued pursuant to a general statute, regulation, or grant of authority requires notice and comment. For example, established scientific criteria may help an agency to "get" from a general norm to a specific number, especially if the accompanying agency statement explains the reasoning process. *Hoctor*, 82 F.3d at 171 (distinguishing *American Min. Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993), on that basis). But the principle applies when there is simply no way of deriving the numerical cut-off from the general rule or grant of authority.

This case illustrates the good sense of that approach. Just as there is no way of getting from a liability rule to a statute of limitations, *Hoctor*, 82 F.3d at 170, there is no way of excogitating a three-year cut-off from the Secretary's grant of authority, or even the work-authorization regulation. Why not two years (as under DACA)? Why not four? Why January 2010 rather than June 15, 2007 (as under DACA)? Why, for that matter, rely on arbitrary cut-offs rather than qualitative criteria, such as hardship or ties to the community?

To repeat: The Secretary may have good reasons for his choices—reasons that might pass the hardest of hard looks with flying colors. But there is no administrative record against which the agency's choices can be evaluated. And while DAPA offers general reasons for the program, including humanitarian concerns and resource constraints, it provides no reason at all for the choice of criteria and parameters that make the program operational. By

short-circuiting the notice-and-comment process, the Secretary dispensed with his obligation to provide reasons for his actions.

3. DAPA Is A Substantive Rule That Binds Agency Officials.

In distinguishing rules with substantive legal effect from interpretative rules and statements of policy, courts of appeals have relied on an "impact on the agency" test. That test "turns on an agency's intention to bind itself to a particular legal policy decision." *U.S. Tel. Ass'n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994); *see also Prof'ls and Patients for Customized Care v. Shalala*, 56 F.3d 592 (5th Cir. 1995). The court below explicitly relied on the test in this case. Based on the district court's findings of fact, which command deference unless clearly erroneous, the court of appeals twice held that DAPA evinced the agency's intent to bind itself to a future course of conduct. That holding is correct.

As shown above, DAPA on its face establishes rigid, numerical criteria that the agency *will* apply in administering the program, and commands who *shall* be eligible for work authorization and other DAPA benefits and for what length of time. The agency's program thus separates eligible from ineligible applicants, and the criteria are binding with respect to prospective applicants as well as agency personnel. Prospective applicants may not receive, and agency officials may not issue, a DAPA license when, for example, an unlawful alien arrived in February 2010. Aliens who wish to benefit from DAPA must "file the requisite applications" "pursuant to the new criteria." Pet. App. 417a. And the Secretary's memorandum

commands that the USCIS must "begin accepting applications" from the new class of aliens who under DAPA are eligible to receive those benefits. Pet. App. 418a.

The Secretary emphasizes that DAPA contains references to the "discretionary" and "case-by-case" nature of the process. The Secretary also holds open the possibility—however remote—that in certain cases the Secretary might step in and waive DAPA's requirements. U.S. Br. 68–73. But whenever an agency promulgates a substantive rule, the question in any future application is always "whether the rule should be waived or applied in that particular instance." *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 39 (D.C. Cir. 1974). The fact that the Secretary reserves his right to waive DAPA in individual cases means only that the Secretary has retained enforcement discretion. *See Heckler v. Chaney*, 470 U.S. 821 (1985). It does not make DAPA any less binding or substantive in nature. If that were the test, no rule would ever have to comply with the APA's notice-and-comment requirements.

Nor does directing immigration officers to consider "other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate," Pet. App. 417a, change the nature of the cut-offs. The fact that a rule is not "ironclad" does not render it a non-binding policy statement under the APA. *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320-22 (D.C. Cir. 1988) (holding that model "substantially curtail[ed]" EPA's discretion and was therefore a legislative rule, even though EPA "retained discretion" to deviate from it).

To the contrary, "[i]f it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is[—]a binding rule of substantive law." *Nader v. CAB*, 657 F.2d 453, 455 (D.C. Cir. 1981) (quoting *Guardian Fed. Savs. & Loan Ass'n v. Federal Savs. & Loan Ins. Corp.*, 589 F.2d 658, 666-667 (D.C. Cir. 1978); *see also Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1113-14 (D.C. Cir. 1974) (exception for procedural rules does not apply to "action which is likely to have considerable impact on ultimate agency decisions").

Insofar as the exercise of officials' residual discretion bears on the inquiry, the district court's findings as well as additional, undisputed evidence strongly support respondents. The inherent difficulty with the "impact" test is its *ex post* nature: it requires experience with an agency's application of the rule at issue. Seeking to make the most of that common difficulty, the Secretary characterizes the States' challenge to DAPA as a premature "facial" challenge to a policy that has never been applied. U.S. Br. 72. But that is simply incorrect. In between the promulgation of DAPA and the district court's preliminary injunction, USCIS issued 108,000 three-year work permits under the expanded program, as set forth in the memorandum at issue in this case. Not a single work permit had a different duration. In addition, USCIS issued 2,000 permits even after the injunction was entered, all of them with three-year terms. The Secretary had to recall those three-year work permits, warning that failure to surrender them would result in the revocation of the deferred action granted under DAPA. In fact, the Secretary

did revoke deferred action for 22 aliens who did not return their work-authorization documents. *See* U.S. Citizenship and Immigration Servs., *DACA Recipients Who Received 3-Year Work Permit Post-Injunction: Quick Facts*, available at https://www.uscis.gov/humanitarian/daca-recipients-who-received-3-year-work-permit-post-injunction-quick-facts.

B. The Secretary's Program Is Not A Mere Statement Of Policy.

The Secretary describes his program as nothing more than a "statement of policy" that is exempt from notice-and-comment requirements. U.S. Br. 65–68. This contention is irreconcilable with the APA's understanding of a "policy statement," as elucidated by courts over the decades.

Reviewing courts look to the nature and substance of an agency's action, not its artful, idiosyncratic, or self-serving characterizations. *Columbia Broad.*, 316 U.S. at 416; *see also CBS Inc. v. United States*, 316 U.S. 407, 416 (1942). That scrutiny serves to prevent agency proceedings and pronouncements from becoming a mere "charade, intended to keep the proceduralizing courts at bay." Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463, 1485 (1992). Suspicion is amply warranted here.

The Secretary purports to rely on oft-quoted language from a footnote in the Attorney General's Manual on the APA, which broadly defines a policy statement as a statement to "advise the public prospectively of the manner in which the agency

proposes to exercise a discretionary power." U.S. Br. 65. That reliance is misplaced.

The most passing glance at DAPA's text and substance shows that it does considerably more than merely "advise" or "propose." As seen, there is nothing tentative about DAPA's new licensing process or the eligibility criteria that DAPA applicants must satisfy. *Cf. Pickus*, 507 F.2d at 1113 (APA exception for procedural rules "[c]ertainly … does not include formalized criteria adopted by an agency to determine whether claims for relief are meritorious").

More fundamentally, the Manual's definition of a policy statement as an agency rule to "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power" cannot bear the weight the Secretary seeks to place on it. Read in isolation, the definition encompasses rules that are clearly substantive in nature. The definition may help to distinguish policy statements from internal rules of procedure (they advise "the public") and from orders (they operate "prospectively"). It does *not* distinguish policy statements from rules of substantive force. If pressed into that service, the definition must be understood as a ceiling rather than a floor: a policy statement must do *no more than* advise the public. *See* John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893, 916 (2004) (statements of policy must be "wholly nonbinding.")

That understanding is buttressed by the APA's structure—specifically, the status of policy statements as an *exception* to the general notice-and-

comment requirements. It is further buttressed by the pre-existing practice that informed the APA and the Attorney General's Manual itself. *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 131 (1998). The "key case" on the distinction between reviewable substantive rules and policy statements is *Columbia Broadcasting System v. FCC*, 316 U.S. 407 (1942). *See* Kenneth C. Davis, *Administrative Powers of Supervising, Prosecuting, Advising, Declaring, and Informally Adjudicating*, 63 Harv. L. Rev. 193, 240 (1949); *see also Pacific Gas*, 506 F.2d. at 42 n.25 (while "the case arose prior to the enactment of the APA … the treatment of the issues is helpful in understanding the difference between a rule and a general statement of policy under the APA."). In *Columbia Broadcasting*, the Federal Communications Commission claimed that its "chain broadcasting" rules were unreviewable in an equity proceeding. The agency asserted that the rules were nothing more than an expression of the agency's general policy, which the Commission proposed to apply in future exercises of its capacious licensing discretion. *Columbia Broad.*, 316 U.S. at 422.

This Court roundly rejected the Commission's position. Looking behind the agency's opportunistic characterization of its rule, the Court held that when an agency issues a policy, "couched in terms of command and accompanied by an announcement of the Commission that the policy is one 'which we will follow in exercising our licensing power', they must be taken by those entitled to rely upon them as what they purport to be—an exercise of the delegated legislative power." *Columbia Broad.*, 316 U.S. at 422.

Columbia Broadcasting stands for the principle that policy statements are nothing more than "musings" or explanations about what an agency may do in the future; a rule that does "something more" is a substantive rule that must comply with the APA's notice-and-comment requirements. *Id.* at 422.

Long-standing interpretations of the APA have confirmed this understanding. Where, as here, a rule "significantly affects conduct, activity or a substantive interest that is the subject of agency regulation" or when it "affects the standards for eligibility for government programs," notice-and-comment procedures are necessary. Administrative Conference of the United States, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements Recommendation No. 92-1*, 57 Fed. Reg. 30101, 30103 (July 8, 1992) ("application requirements that serve to limit eligibility for a government benefit program" are not exempt from notice-and-comment rulemaking).

III. This Court Should Give Full Force And Effect To The APA's Notice-and-Comment Requirements.

The APA's distinction between substantive (or "legislative") rules on one hand and "interpretative" rules and "statements of policy" on the other has often been described as "murky," *Iowa League*, 711 F.3d at 873, and "enshrouded in considerable fog," *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975). But to hold that DAPA is anything other than a substantive rule is to wander from a mere fog into a night where all the cows are black. *Cf.* G.W.F. Hegel, The Phenomenology of Mind 79 (J. Baillie trans., 2d

ed. rev. 1949). This case illustrates why the authors of the APA thought they *needed* an admittedly difficult, imprecise distinction between substantive and non-substantive rules—and why the enforcement of that distinction is a crucial responsibility of reviewing courts.

A. Agencies May Not Circumvent Notice-and-Comment Requirements.

DAPA, the Secretary insists, has no binding legal effect. Pet. App. 413a; U.S. Br. 66. "Deferred action" may be revoked at any time, for any reason. DAPA itself may be modified or summarily rescinded, perhaps by a different administration, at any moment and for any reason, U.S. Br. 66–67—in which event the "hard-working people" who have availed themselves of the opportunity to "come out of the shadows … and be counted," Pet. App. 415a, may discover that they have been processed and counted for purposes of deportation. This "legal effects" test is the sum and substance of the Secretary's defense of DAPA as a mere statement of policy. That account mischaracterizes DAPA and misstates the law.

Undoubtedly, a rule is substantive when it imposes legal obligations, affects individual rights, or imposes or elaborates a legal norm. *See, e.g.*, *Tex. Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd.*, 201 F.3d 551, 556 (5th Cir. 2000) ("Substantive or legislative rules affect individual rights and obligations and are binding on the courts."); *Syncor Intern. Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (a policy statement, unlike a substantive rule, "does not seek to impose or elaborate or interpret a legal norm"). For reasons explained, DAPA readily

satisfies that test. In any event, the "legal effects" test is a rule of inclusion, not exclusion. Even if DAPA does not have binding legal effect, as the Secretary suggests, that is not, has never been, and cannot be the *exclusive* test for determining when a rule must comply with the APA's notice-and-comment requirements.

The rationale behind the legal effects test, correct so far as it goes, is that an agency that proceeds through guidance documents or policy statements is giving something up; namely, the binding legal effect of its pronouncements. *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995); Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 Tex. L. Rev. 331, 356 (2011). The Secretary invokes that reasoning in defense of his choice of procedure. U.S. Br. 65–66 (citing 1 Richard J. Pierce, Jr., Administrative Law Treatise § 6.3, at 419 (5th ed. 2010)). Courts have not been content, however, to rely on the free play of agency incentives. Instead, they have policed the boundary between substantive and non-substantive rules. That approach reflects the common-sense recognition that agencies have any number of ways to shape, deter, and dictate private primary conduct. *See, e.g.*, Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 Geo. Mason L. Rev. 501, 532–34 (2015). A bare-bones legal-effects test cannot protect against agency evasion and circumvention. *See* G. Lawson, Federal Administrative Law 377 (6th ed. 2013) ("The problem with the legal effects test is that it is readily subject to agency gamesmanship.").

The perceived necessities of a "vast and varied federal bureaucracy," *Free Enter.*, 561 U.S. at 499, have made agency evasion of procedural requirements a constant. And, in recent years, agency gamesmanship and "unorthodox" rulemaking have been recognized as something of a cottage industry by scholars of administrative law. *See, e.g.*, Abbe Gluck, et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 Colum. L. Rev. 1789 (2015). Familiar doctrines of administrative law, however, have *always* guarded against circumvention. Some pertain to the availability of judicial review. The presumption of reviewability, by way of prominent example, is difficult to derive from the APA's text; it is best viewed as a prophylactic rule. *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670–73 (1986). Other anti-circumvention canons help to delineate the domain of judicial deference. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243 (2006) (declining to defer to regulation that merely "parrot[s]" statutory language); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (deference is "undoubtedly inappropriate" when an agency's legal interpretation appears to be a *post hoc* rationalization).

Anti-circumvention rules that address matters of agency procedure and, in particular, notice-and-comment rulemaking are of one piece with this body of administrative law. While some of the tests that have served to distinguish substantive rules from interpretative rules and policy statements look definitional, all are intimately tied to the purpose of blocking agency gamesmanship. *Columbia Broadcasting* was an anti-circumvention decision.

Its unquestioned doctrine that reviewing courts will conduct an independent, substantive inquiry into the nature of a given rule is an anti-evasion doctrine. Similarly, Judge Friendly's test, applied in *Catholic Health*, is readily understood as an anti-evasion rule. The contrary rule would give agencies an incentive to write broad and vague rules—and to evade notice-and-comment requirements in all future "interpretative" proceedings. *Cf. United States v. Picciotto*, 875 F.2d 345, 346–47 (D.C. Cir. 1989) (agency cannot "grant itself a valid exemption to the APA … and "be free of the APA's troublesome rulemaking procedures forever" through "agency-generated exemptions"). The "impact on the agency" test likewise serves to discourage agencies from disguising effectively binding policies as mere "musings" or "advice."

Anti-evasion rules must not be so broad as to prohibit conduct or to impose obligations that the lawmaker never envisioned. *Vermont Yankee*, 435 U.S. at 549; *Perez*, 135 S. Ct. at 1207. Moreover, the rules must not be so draconian as to deter legitimate and sensible uses of non-substantive rules and thus to drive agencies into "pure ad hocery." *American Min.*, 995 F.2d at 1112. But neither of these perils is present here. By the Secretary's own lights the agency *cannot* administer a program for some four million aliens through ad hoc adjudication: it would never encounter most of those individuals in the first place. And the only procedures that the agency is being asked to follow are the procedures imposed by Congress. Enforcing those procedures is essential to preserving the integrity of the APA and the constitutional values it was designed to protect.

B. Powerful Reasons Of Law and Policy Compel Notice-and-Comment Rule-making In This Case.

The Secretary's "suggestion that under the APA [he] can do without notice and hearing in a policy statement what Congress failed to do when the [immigration] bill died in the last Congress is, to say the least, remarkable." *Citizens Commc'ns Ctr. v. FCC,* 447 F.2d 1201, 1204 n.5 (D.C. Cir. 1971) (Skelly Wright, J.). Still more perplexing is the Secretary's failure to explain and defend his decision to proceed without notice and comment. The Secretary's contention that his policy is "long-standing," U.S. Br. 37, 55, 63, is untenable, for reasons explained by respondents. *See* State Br. 54–59. It is in any event no answer: an agency's "previous failure to comply with the notice and comment requirements of the APA cannot excuse its later violation of those requirements, nor render the latter violation unreviewable." *Mendoza*, 754 F.3d at 1015; *see also Rapanos v. United States*, 547 U.S. 715, 752 (2006) (rejecting agency's "curious appeal to entrenched executive error"). But the Secretary's position is "remarkable" at a deeper level.

No one denies the significant challenges of immigration policy. No one questions the Secretary's broad discretion to set enforcement priorities. At the same time, no one can reasonably dispute that DAPA raises serious questions that are of immense public interest, debate, and concern.

Notice-and-comment rulemaking procedures are tailor-made for precisely these types of situations. The "transparent nature of administrative record

building and agency decisionmaking … facilitates accountability in a host of ways," including prompting appropriate oversight by Congress. Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 Duke L.J. 377, 406–07 (2006). The process ensures that the agency considers and grapples with serious comments offered by interested parties, providing greater democratic legitimacy and outcomes that are more likely to be acceptable to the public at large. And, the process ensures that accountable decision-makers have embraced the grounds for the agency's actions and have exercised judgment in the first instance. *See* Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 Yale L.J. 952, 958–59 (2007).

Equally important, requiring agencies to comply with the APA's notice-and-comment rulemaking procedures simplifies and depoliticizes the judicial review process. It cabins the scope of judicial review to ensure that the agency has complied with its statutory mandates and the procedural requirements of reasoned decision-making, while largely preventing courts from second-guessing the agency's substantive choices. It simplifies any question as to whether the agency has complied with its constitutional obligations to take care that the laws are faithfully executed. It even helps to elucidate standing issues that turn on the significance of the costs imposed by the Secretary's program, which could surely be better understood in the context of a fully developed administrative record.

The issues addressed in the amicus briefs filed in this case in support of the Secretary suggest the range and salience of policy questions, including whether DAPA will result in higher wages for workers, improve the lives of young adults, protect local interests, strengthen family unity for resident LGBT children in Asian and Pacific Islander Communities, enhance educational opportunities and children's psychosocial well-being, serve the interests of religious communities, benefit businesses, and help immigrants contribute to their communities and society as a whole. Those concerns should by all rights be considered by the agency in the first instance, in the open and on the record. That, to repeat, is what the notice-and-comment process is for.

For supporters of DAPA, APA rulemaking procedures should pose no threat or concern. They should be confident that the process will confirm the wisdom of the Secretary's position and help promote sensible and less politicized discussions of immigration policy. For those who harbor concerns about DAPA, the notice-and-comment process would afford an opportunity for the first time to have the Secretary fairly consider and formally respond to their perspectives on the weighty issues it implicates. DAPA's intended beneficiaries would benefit from an orderly process and a resulting agency decision that would not, as the Secretary here insists, be revocable by a different administration the way DAPA was produced—a stroke of a pen. And all citizens would benefit from being assured in these politicized times that, regardless of their views on DAPA's merits, the Secretary's program has been established through

due legal process and not by executive fiat or political contrivance.

In stark fashion, then, this case illustrates the enduring value of a "formula upon which opposing social and political forces have come to rest." *Vermont Yankee*, 435 U.S. at 523. The Court should enforce the APA's procedural requirements.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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