No. 18-966

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,
Petitioners,

v.

STATE OF NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITY

INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts (including this Court) and administrative bodies, including *Trump v. Hawaii,* 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *City of El Cenizo v. Texas,* 890 F.3d 164 (5th Cir. 2018); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

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[1] The parties have consented in writing to the filing of this *amicus curiae* brief. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae,* its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

This Court should decline to follow a rule announced by the United States District Court for the Southern District of New York ("District Court")—to wit, that agency decisions for which an agency has articulated a sufficiently reasonable basis nevertheless are arbitrary and capricious under the Administrative Procedure Act ("APA"), specifically 5 U.S.C. § 706(2)(A), if that basis is a "pretext" for other, unknown motives. The District Court failed to support its rule in the cases it cited. Worse, since motives unstated in the record and unknown to a reviewing court might be either directives by the President of the United States or ideological positions shared by the President and an agency head, and responsible for both the former's election and the latter's appointment, the District Court's rule would make § 706(2)(A) an unconstitutional infringement on the President's authority to control his subordinates, and on the right of the people to influence the direction of regulatory policy by voting in presidential elections. As the jurisprudence of this Court indicates, arbitrary and capricious review is satisfied if, and only if, a reasoned basis under the governing statute has been articulated for the agency's decision, at least where, as here, no improper motive has been found.

ARGUMENT

I. The District Court Failed To Justify Its Rule.

Agencies are required by 5 U.S.C. § 706(2)(A) to engage in "reasoned decisionmaking." *Judulang v. Holder*, 565 U.S. 42, 53 (2011). Under this standard,

> [n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983) ("*State Farm*").

The District Court went far beyond these requirements, and others articulated by this Court, by purporting to derive a rule that if an agency's stated reason for its decision is a "pretext" for some other motive unknown to the court, even if that motive is not improper, the agency's decision is arbitrary and capricious. Pet. App. ("App.") 312a. In attempting to justify this rule, the District Court first found a requirement that an agency disclose its grounds or basis for its decision in words of this Court:

> [J]udicial review of agency action "requires that the grounds upon which the . . . agency acted be

> clearly disclosed." [*SEC v. Chenery Corp.*, 318 U.S. 80] at 94; *accord Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962) (stating that an agency must "disclose the basis of its" action).

App. 311a-312a. The District Court then declared that "a court cannot sustain agency action founded on a pretextual or sham justification that conceals the true 'basis' for the decision. Indeed, any other rule would deprive the words 'basis,' 'grounds,' and 'disclose' of any force or meaning." App. 312a. The District Court then found, as an "independent basis" for vacating defendants' decision, that it was just such a pretext, even though the court was unable to identify the "real" reason for the decision, or to conclude that the real reason was improper. App. 311a, 313a.

In so arguing, the District Court wholly failed to justify its sweeping anti-pretext rule. To begin with, no ulterior motive was at issue in either *Chenery* or *Burlington Truck Lines*. Rather, in *Chenery*, this Court refused to consider reasons given by counsel at trial that differed from those that the agency, as revealed in the record, had relied on. *Chenery,* 318 U.S. at 92 ("[T]he considerations *urged here* in support of the Commission's order were not those upon which its action was based") (emphasis added). And in *Burlington Truck Lines*, this Court found that the agency had failed to disclose, in important respects, any basis for its action, not that it had disclosed a mere pretext for its real reason. *Burlington Truck Lines*, 371 U.S. at 168 ("Here the Commission made no findings specifically directed to the choice between two vastly

different remedies with vastly different consequences to the carriers and the public. Nor did it articulate any rational connection between the facts found and the choice made."). The failure in *Burlington Truck Lines* was one of explanation; that failure did not imply an ulterior motive, any more than a failure to give *any* reason for an agency action would imply such a motive.

The District Court fared no better in the lower-court cases it cited to support its rule, App. 312a-313a. In *United States Lines, Inc. v. Federal Maritime Com.*, 584 F.2d 519 (D.C. Cir. 1978), the failure was again one of explanation; the agency left gaps in its explanation for its action, which it proposed to fill with unspecified "data" in its files. *Id.* at 533. In *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), the court did find an ulterior motive, but unlike the District Court, it identified that motive, which it saw as improper. *Id.* at 53 ("[W]e are particularly concerned that the final shaping of the rules we are reviewing here may have been by compromise among the contending industry forces, rather than by exercise of the independent discretion in the public interest the Communications Act vests in individual commissioners."). *Home Box Office* thus does not support the District Court's rule that an agency may never have any reason other than those it articulates, even where, as here, that reason is unknown to the court, and may not be improper. Similarly, the courts in the remaining cases the District Court cited articulated specific ulterior motives that they saw as improper. *See* App. 314a-315a (citing discrimination cases); App. 312a-313a (citing *Woods Petroleum Corp. v. U.S. Dept. Of Interior*, 18 F.3d 854, 859 (10th Cir. 1994) (finding "the ulterior motive of

enabling the Indian lessors to acquire an additional bonus payment from a new potential contracting party"); *XP Vehicles, Inc. v. DOE*, 118 F. Supp. 3d 38, 79 (D.D.C. 2015) (finding allegations of agency favoritism sufficient to state an arbitrary and capricious claim); *Tummino v. Torti*, 603 F. Supp. 2d 519, 544 (E.D.N.Y. 2009) (finding "pressure emanating from the White House" to be an improper basis); *Latecoere Int'l, Inc. v. U.S. Dep't of the Navy*, 19 F.3d 1342, 1356 (11th Cir. 1994) (finding political pressures against using a foreign firm over an American firm to be improper)). In light of the discussion *infra*, the reasoning in these last two cases (especially that of *Tummino*) may have been faulty, but neither case directly supports the District Court's blanket rule against any and all "pretext," even that for an unknown and proper motive.

The root of the District Court's difficulty in justifying its rule[2] was that it conflated "basis" with "motive." That mistake ignores longstanding jurisprudence of this Court under which bases are not always motives. Indeed, under the rational basis requirement for due process, a basis may even be a *post hoc* rationalization, unconnected to any motive that an agency or a legislature may have had for its action. *See, e.g., FCC v. Beach Communications*, 508 U.S. 307,

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[2] This difficulty is perhaps why the District Court twice solicited a concession to its rule from counsel for defendants, Dist. Ct. Doc. No. 150 ("May 9 Conf. Tr.") at 15; Dist. Ct. Doc. No. 366 ("Sept. 14 Conf. Tr.") at 36-37, a concession that was only partially made. No such concession, of course, binds this Court, or prevents an *amicus curiae* from raising the issue. *Estate of Sanford v. Commissioner*, 308 U.S. 39, 50-51 (1939).

314-15 (1993) ("On rational-basis review, … those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it'") (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Of course, the test for whether a regulation is arbitrary and capricious under the APA is not a rational basis test, but rather one requiring reasoned decisionmaking, *Judulang*, 565 U.S. at 53, but the word "basis" against the background of that test does not suggest that "basis" is restricted in meaning, as the district court presupposed, to "motive." Rather, it suggests, or at least leaves room for, a meaning that, while narrower than a *post hoc* rationalization, is broad enough to cover articulated bases that are not, in fact, motives.

II. The District Court's Rule Would Make 5 U.S.C. § 706(2)(A) Unconstitutional.

Not only was the District Court unable to justify its sweeping anti-pretext rule, but strong policy and constitutional considerations weigh against it. Unknown "ulterior motives" for agency action, after all, might be presidential directives or influence based on broad policy or ideological considerations. Since such considerations may play a role in the election of a President, democratic accountability is strongly promoted by what then Professor Elena Kagan termed "presidential administration," meaning the direction of regulatory policy by the President:

> Presidential administration promotes accountability in two principal and related ways. First, presidential leadership enhances transparency, enabling the public to comprehend

> more accurately the sources and nature of bureaucratic power. Second, presidential leadership establishes an electoral link between the public and the bureaucracy, increasing the latter's responsiveness to the former. Modern attributes of the relationship between the President and the public make these claims stronger than ever before.

Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2331-32 (2001).

Indeed, the value of accountability underlay the Constitution's vesting of executive power in a single elected President. As this Court has explained:

> The Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." Art. II, § 1, cl. 1. As Madison stated on the floor of the First Congress, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789).
>
> The removal of executive officers was discussed extensively in Congress when the first executive departments were created. The view that "prevailed, as most consonant to the text of the Constitution" and "to the requisite responsibility and harmony in the Executive Department," was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not "expressly taken away,

> it remained with the President." Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004). "This Decision of 1789 provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument." *Bowsher* v. *Synar*, 478 U.S. 714, 723-724, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986) (internal quotation marks omitted). And it soon became the "settled and well understood construction of the Constitution." *Ex parte Hennen*, 38 U.S. 230, 13 Pet. 230, 259, 10 L. Ed. 138 (1839).
>
> The landmark case of *Myers* v. *United States* reaffirmed the principle that Article II confers on the President "the general administrative control of those executing the laws." [272 U.S. 52, 164 (1926).] It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's famous phrase.

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492-93 (2010) (emphasis in original). As this Court further explained, presidential control of administration is essential to democratic accountability:

> The people do not vote for the "Officers of the United States." Art. II, § 2, cl. 2. They instead look to the President to guide the "assistants or deputies . . . subject to his superintendence." The Federalist No. 72, p. 487 (J. Cooke ed. 1961)

> (A. Hamilton). Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *Id.,* No. 70, at 476 (same). That is why the Framers sought to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong., at 499 (J. Madison).

Id. at 497-98.

Of course, Presidents must follow the law, and this Court has upheld some restrictions on the President's power to remove high administrative officials. *See, e.g., id.* at 493 (discussing *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935)). But if § 706(2)(A) is read, as the District Court read it, to imply a rule against all pretextual justifications, even those for a proper if unknown motive, then that section would infringe on the President's constitutional authority, recognized repeatedly by this Court, to control his subordinates, and thus on the constitutional right of the people to influence the administration of the laws by voting in presidential elections.

The President must faithfully execute the laws and follow them, Art. II, § 3, and his subordinates may be required by law to engage in reasoned decisionmaking, as the APA requires, but the District Court's rule

would deprive the President of influence, both direct and indirect, over agency actions: he could neither direct a given result (at least in cases where the stated reason was not a motive) nor exert influence indirectly by relying on ideological affinity in his appointed subordinate, for ideology, however much it could be traced to the views of the people who elected the President, would also be a forbidden basis under the District Court's rule. In short, the District Court's rule would make agency heads unaccountable Platonic Guardians, sheltered from the winds of change that may come from the election of a new President. *In re DOC*, 139 S. Ct. 16, 17 (2018) (Gorsuch, J., concurring) ("[T]here's nothing unusual about a new cabinet secretary coming to office inclined to favor a different policy direction"); *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring and dissenting) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration."); *but see, e.g., Tummino*, 603 F. Supp. 2d at 544 (finding "pressure emanating from the White House" an improper basis).

III. Presidential Influence Is Irrelevant To Arbitrary And Capricious Review.

No different result is mandated by this Court's precedents. Indeed, the consistent stance of this Court has been to treat presidential influence, and political influences generally, as irrelevant in arbitrary and capricious review.

As mentioned above, while concurring and dissenting in *State Farm*, Justice Rehnquist noted with approval that a presidential election was responsible for the agency's changed view. *State Farm,* 463 U.S. at 59. The majority simply ignored this evident presidential influence, however, and never mentioned it in its opinion. This silence is at least consistent with its having been this Court's view that political and ideological motives emanating from the President are irrelevant to arbitrary and capricious review, because irrelevant to the question (the sole question in such review, at least absent an improper motive) of whether a reasoned basis under the statute has been articulated for the decision.

This Court made the irrelevancy of such factors clear in *Massachusetts v. EPA*, 549 U.S. 497, 533-34 (2007), where it found the Environmental Protection Agency ("EPA") to have been arbitrary and capricious in its refusal to regulate greenhouse gasses because it gave *only* broad political and policy grounds, emanating from the President, for its refusal to regulate, and ignored statutory factors:

> If EPA makes a finding of endangerment, the Clean Air Act requires the Agency to regulate

> emissions of the deleterious pollutant from new motor vehicles. . . .
>
> EPA has refused to comply with this clear statutory command. Instead, it has offered a laundry list of reasons not to regulate. For example, EPA said that a number of voluntary Executive Branch programs already provide an effective response to the threat of global warming, 68 Fed. Reg. 52932, that regulating greenhouse gases might impair the President's ability to negotiate with "key developing nations" to reduce emissions, *id.*, at 52931, and that curtailing motor-vehicle emissions would reflect "an inefficient, piecemeal approach to address the climate change issue," *ibid.*
>
> Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment. In particular, while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws.

Id. at 533-34. Notably, while this Court required a reasoned decision by the EPA based on statutory factors, it did not say or hint that it would invalidate a second decision with an adequately-articulated basis in the statute if it suspected or found that the decision was motivated by political pressure.

Similarly, in *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 524-25 (2009), Justice Scalia noted that the wishes of the authority to which the agency was responsible (in this case, he posited, Congress) "would seem an adequate explanation of [the agency's] change of position." The portion of his opinion in which he wrote for the Court, however, made no mention of this political influence. Again, the stance of this Court was one of indifference to presidential or political motives for agency action, and a concentration on the requirement for reasoned decisionmaking based on statutory factors.

This stance—*viz.*, that, at least absent an improper motive, only the adequacy of the agency's articulation of a reasonable basis for its decision in the statute is relevant to whether its action is arbitrary and capricious, and presidential directives are irrelevant—is at odds with the District Court's sweeping anti-pretext rule. That rule would sometimes call for vacating an action supported by such an adequate articulation on the ground that it was a pretext for an unknown motive that was in fact (as it sometimes would be) a presidential directive. In this way, the District Court's rule would make that presidential directive relevant, and dislodge reasoned decisionmaking from its status as the lynchpin of arbitrary and capricious review.

CONCLUSION

For the foregoing reasons, the judgement of the District Court should be reversed.

Respectfully submitted,

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