No. 18-589

# In the Supreme Court of the United States

KIRSTJEN M. NIELSEN, SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

*v.*

MARTIN JONATHAN BATALLA VIDAL, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT


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## QUESTIONS PRESENTED

This dispute concerns the policy of immigration enforcement discretion known as Deferred Action for Childhood Arrivals (DACA). In 2016, this Court affirmed, by an equally divided Court, a decision of the Fifth Circuit holding that two related Department of Homeland Security (DHS) discretionary enforcement policies, including an expansion of the DACA policy, were likely unlawful and should be enjoined. See *United States* v. *Texas*, 136 S. Ct. 2271 (per curiam). In September 2017, DHS determined that the original DACA policy was unlawful and would likely be struck down by the courts on the same grounds as the related policies. DHS thus instituted an orderly wind-down of the DACA policy. The questions presented are as follows:

1. Whether DHS's decision to wind down the DACA policy is judicially reviewable.

2. Whether DHS's decision to wind down the DACA policy is lawful.

## PARTIES TO THE PROCEEDING

Petitioners are Kirstjen M. Nielsen, Secretary of Homeland Security; the U.S. Department of Homeland Security; Jefferson B. Sessions III, Attorney General of the United States; Donald J. Trump, President of the United States; U.S. Citizenship and Immigration Services; U.S. Immigration and Customs Enforcement; and the United States.

Respondents are Martin Jonathan Batalla Vidal, Antonio Alarcon, Eliana Fernandez, Carlos Vargas, Mariano Mondragon, and Carolina Fung Feng, on behalf of themselves and all other similarly situated individuals; Make the Road New York, on behalf of itself, its members, its clients, and all similarly situated individuals; the State of New York; the State of Massachusetts; the State of Washington; the State of Connecticut; the State of Delaware; the District of Columbia; the State of Hawaii; the State of Illinois; the State of Iowa; the State of New Mexico; the State of North Carolina; the State of Oregon; the State of Pennsylvania; the State of Rhode Island; the State of Vermont; the State of Virginia; and the State of Colorado.

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*ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

The Solicitor General, on behalf of the Secretary of Homeland Security and other federal parties, respectfully petitions for a writ of certiorari before judgment to the United States Court of Appeals for the Second Circuit.

### OPINIONS BELOW

The order of the district court granting in part and denying in part the government's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) (App. 1a-58a) is reported at 295 F. Supp. 3d 127. The order of the district court granting respondents' motion for a preliminary injunction (App. 62a-129a) is reported at 279 F. Supp. 3d 401. The order of the district court granting in part and denying in part the government's motion to dismiss under Rule 12(b)(6) (App. 133a-171a) is reported at 291 F. Supp. 3d 260.

## JURISDICTION

On November 9, 2017, the district court granted in part and denied in part the government's Rule 12(b)(1) motion (App. 1a-58a), and certified its decision for interlocutory appeal on January 8, 2018. The government filed a notice of appeal of that decision the same day (App. 59a-61a), and the court appeals granted permission to appeal that decision on July 5, 2018 (App. 175a-176a). The district court entered a preliminary injunction on February 13, 2018 (App. 62a-129a). The government filed a notice of appeal of the preliminary injunction on February 20, 2018 (App. 130a-132a). The district court granted in part and denied in part the government's Rule 12(b)(6) motion on March 29, 2018 (App. 133a-171a), and certified its decision for interlocutory appeal on April 30, 2018. The government filed a notice of appeal of that decision on May 21, 2018 (App. 172a-174a), and the court of appeals granted permission to appeal that decision on July 5, 2018 (App. 175a-176a). The court of appeals' jurisdiction over the appeal of the preliminary injunction rests on 28 U.S.C. 1292(a)(1). The court of appeals' jurisdiction over the appeals of the certified rulings rests on 28 U.S.C. 1292(b). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).

## STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to the petition for a writ of certiorari before judgment in *United States Department of Homeland Security* v. *Regents of the University of California*, also filed today. *Regents* App. 127a-143a.

## STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, charges the Secretary of Homeland Security "with the administration and enforcement" of the immigration laws. 8 U.S.C. 1103(a)(1). Individual aliens are subject to removal if, *inter alia*, "they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Arizona* v. *United States*, 567 U.S. 387, 396 (2012); see 8 U.S.C. 1182(a) (2012 & Supp. V 2017); see also 8 U.S.C. 1227(a) (2012 & Supp. V 2017). As a practical matter, however, the federal government cannot remove every removable alien, and a "principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 567 U.S. at 396.

For any alien subject to removal, Department of Homeland Security (DHS) officials must first "decide whether it makes sense to pursue removal at all." *Arizona*, 567 U.S. at 396. After removal proceedings begin, government officials may decide to grant discretionary relief, such as asylum or cancellation of removal. See 8 U.S.C. 1158(b)(1)(A), 1229b. And, "[a]t each stage" of the process, "the Executive has discretion to abandon the endeavor." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (*AADC*). In making these decisions, like other agencies exercising enforcement discretion, DHS must engage in "a complicated balancing of a number of factors which are peculiarly within its expertise." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). Recognizing the need for such balancing, Congress has provided that the "Secretary [of Homeland Security] shall be responsible for * * * [e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. 202(5) (2012 & Supp. V 2017).

b. In 2012, DHS announced the policy known as Deferred Action for Childhood Arrivals (DACA). See *Regents* App. 97a-101a. Deferred action is a practice in which the Secretary exercises discretion to notify an alien of her decision to forbear from seeking his removal for a designated period. *AADC*, 525 U.S. at 484. Under DHS regulations, aliens granted deferred action may apply for and receive work authorization for the duration of the deferred-action grant if they establish economic necessity. 8 C.F.R. 274a.12(c)(14). A grant of deferred action does not confer lawful immigration status or provide any defense to removal. DHS retains discretion to revoke deferred action unilaterally, and the alien remains removable at any time.

DACA made deferred action available to "certain young people who were brought to this country as children." *Regents* App. 97a. The INA does not provide any exemptions or special relief from removal for such individuals. And, dating back to at least 2001, bipartisan efforts to provide such relief legislatively had failed.[1] Under the DACA policy, following successful completion of a background check and other review, an alien would receive deferred action for a period of two years, subject to renewal. *Id.* at 99a-100a. The policy made clear that it "confer[red] no substantive right, immigration status or pathway to citizenship," because "[o]nly the Congress, acting through its legislative authority, can confer these rights." *Id.* at 101a.

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[1] See, *e.g.*, S. 1291, 107th Cong., 1st Sess. (2001); S. 1545, 108th Cong., 1st Sess. (2003); S. 2075, 109th Cong., 1st Sess. (2005); S. 2205, 110th Cong., 1st Sess. (2007); S. 3827, 111th Cong., 2d Sess. (2010).

DHS explained that information provided in the DACA request process would be protected from disclosure for the purpose of immigration enforcement proceedings unless certain criteria related to national security or public safety were satisfied, or the individual met the requirements for a Notice to Appear. USCIS, DHS, *Deferred Action for Childhood Arrivals: Frequently Asked Questions* (Mar. 8, 2018), https://go.usa.gov/xngCd. DHS also stated, however, that this information-sharing policy "may be modified, superseded, or rescinded at any time without notice," and that it "may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter." *Id.* at 6.

Later, in 2014, DHS created a new policy of enforcement discretion referred to as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). See *Regents* App. 102a-110a. Through a process expressly designed to be "similar to DACA," DAPA made deferred action available for certain individuals who had a child who was a U.S. citizen or lawful permanent resident. *Id.* at 107a. At the same time, DHS also expanded DACA by extending the deferred-action period from two to three years and by loosening the age and residency criteria. *Id.* at 106a-107a.

c. Soon thereafter, Texas and 25 other States brought suit in the Southern District of Texas to enjoin DAPA and the expansion of DACA. The district court issued a nationwide preliminary injunction, finding a likelihood of success on the claim that the DAPA and expanded DACA memorandum was a "'substantive' rule that should have undergone the notice-and-comment rule making procedure" required by the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*

*Texas* v. *United States*, 86 F. Supp. 3d 591, 671 (S.D. Tex. 2015); see *id.* at 607, 647, 664-678.

The Fifth Circuit affirmed the injunction, holding that the DAPA and expanded DACA policies likely violated both the APA and the INA. *Texas* v. *United States*, 809 F.3d 134, 146, 170-186 (2015). The court of appeals concluded that plaintiffs had "established a substantial likelihood of success on the merits of their procedural claim" that DAPA and expanded DACA were invalidly instituted without notice and comment. *Id.* at 178. The court also concluded, "as an alternate and additional ground," that the policies were substantively contrary to law. *Ibid.* The court observed that the INA contains an "intricate system of immigration classifications and employment eligibility," and "does not grant the Secretary discretion to grant deferred action and lawful presence on a class-wide basis to 4.3 million otherwise removable aliens." *Id.* at 184, 186 n.202. It also noted that Congress had repeatedly declined to enact legislation "closely resembl[ing] DACA and DAPA." *Id.* at 185.

After briefing and argument, this Court affirmed the Fifth Circuit's judgment by an equally divided Court, *United States* v. *Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam), leaving the nationwide injunction in place.

d. In June 2017, Texas and other plaintiff States in the *Texas* case announced their intention to amend their complaint to challenge the original DACA policy. D. Ct. Doc. 77, at 238-240 (Oct. 6, 2017).[2] They asserted that "[f]or the[] same reasons that DAPA and Expanded DACA's unilateral Executive Branch conferral of eligibility for lawful presence and work authorization was

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[2] Citations to the district court docket are to *Batalla Vidal* v. *Nielsen*, No. 16-cv-4756.

unlawful, the original June 15, 2012 DACA memorandum is also unlawful." *Id.* at 239.

On September 5, 2017, rather than confront litigation challenging DACA on essentially the same grounds that had succeeded in *Texas* before the same court for the DAPA and expanded DACA policies, DHS decided to wind down DACA in an orderly fashion. *Regents* App. 111a-119a. In the rescission memorandum, then-Acting Secretary of Homeland Security Elaine Duke explained that, "[t]aking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation," as well as the Attorney General's view that the DACA policy was unlawful and that the "potentially imminent" challenge to DACA would "likely * * * yield similar results" as the *Texas* litigation, "it is clear that the June 15, 2012 DACA program should be terminated." *Id.* at 116a-117a. The Acting Secretary accordingly announced that, "[i]n the exercise of [her] authority in establishing national immigration policies and priorities," the original DACA memorandum was "rescind[ed]." *Id.* at 117a.

The rescission memorandum stated, however, that the government "[w]ill not terminate the grants of previously issued deferred action * * * solely based on the directives in this memorandum" for the remaining two-year periods. *Regents* App. 118a. The memorandum also explained that DHS would "provide a limited window in which it w[ould] adjudicate certain requests for DACA." *Id.* at 117a. Specifically, DHS would "adjudicate —on an individual, case by case basis—properly filed pending DACA renewal requests * * * from current beneficiaries that have been accepted by the Department as of the date of this memorandum, and from current beneficiaries whose benefits will expire between

the date of this memorandum and March 5, 2018 that have been accepted by the Department as of October 5, 2017." *Id.* at 117a-118a.

DHS has also made clear that the "information-sharing policy has not changed in any way since it was first announced, including as a result of the Sept. 5, 2017" DACA rescission. USCIS, DHS, *Guidance on Rejected DACA Requests* (Feb. 14, 2018), https://go.usa.gov/xPVmG; see USCIS, DHS, *Frequently Asked Questions: Rescission of DACA* (Sept. 5, 2017), https://go.usa.gov/xPVmE.

e. Respondents—including individual DACA recipients, 16 States, and the District of Columbia—brought these two related suits in the Eastern District of New York challenging the rescission of DACA. Collectively, they allege that the termination of DACA is unlawful because it is arbitrary and capricious under the APA; violates the APA's requirement for notice-and-comment rulemaking as well as the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*; denies respondents equal protection and due process; and permits the government to use information obtained through DACA in a manner inconsistent with principles of due process and equitable estoppel. See App. 12a-17a. Similar challenges were filed in the Northern District of California and in the District of Columbia. See, *e.g.*, *Regents of the Univ. of Cal.* v. *Department of Homeland Sec.*, No. 17-cv-5211 (N.D. Cal. filed Sept. 8, 2017); *NAACP* v. *Trump*, No. 17-cv-1907 (D.D.C. filed Sept. 18, 2017). A summary of the proceedings in the Eastern District of New York (*Batalla Vidal*) follows in this petition. A summary of the proceedings in the other district courts can be found in the

government's petitions in those cases, filed simultaneously with this one.[3]

2. In *Batalla Vidal*, the government filed the administrative record in October 2017, and the district court set December 15 as the deadline for the government's motion to dismiss. As in the parallel Northern District of California litigation, before the government filed its dispositive motion, the district court permitted respondents to engage in broad discovery and directed a vast expansion of the administrative record. D. Ct. Doc. 90, at 10-11 (Oct. 19, 2017). And, as in *Regents*, the government sought review of the district court's orders in a petition for a writ of mandamus in the court of appeals.

While the government's mandamus petition was pending before the Second Circuit, this Court ordered the district court in *Regents* to resolve the government's threshold arguments and to consider whether interlocutory appeal was appropriate, before considering whether any record expansion was necessary. See *In re United States*, 138 S. Ct. 443, 445 (2017) (per curiam). One week later, the Second Circuit denied the government's petition for writ of mandamus in these cases. 17-3345 C.A. Doc. 171 (Dec. 27, 2017). At the same time, however, the court of appeals recognized—as had this Court—that the burdensome obligations imposed by the district court's orders could be obviated if the district court were "to certify its ruling [on the government's threshold defenses] for interlocutory appeal," and noted that "it may be prudent for the District Court

[3] The government largely prevailed in a similar challenge to the rescission filed in the District of Maryland. See *Casa de Maryland* v. *Department of Homeland Sec.*, 284 F. Supp. 3d 758 (2018). An appeal of that decision is pending before the Fourth Circuit.

to stay discovery pending the resolution of such proceedings." *Id.* at 4. Following the court of appeals' decision, on December 30, 2017, the district court stayed its orders requiring expansion of the administrative record and authorizing discovery. Those orders remain stayed.

3. While the litigation over the record proceeded, the government filed its motion to dismiss these suits under Federal Rule of Civil Procedure 12(b)(1) and (6). D. Ct. Doc. 95 (Oct. 27, 2017). On November 9, the district court denied in part and granted in part the government's motion to dismiss under Rule 12(b)(1). App. 1a-58a.

The district court first rejected the government's argument that the rescission of DACA was unreviewable under the APA because it was "committed to agency discretion by law," 5 U.S.C. 701(a)(2). App. 24a-34a. It distinguished *Chaney*, *supra*, on the grounds that (1) these cases concern the rescission of a policy of non-enforcement, rather than the refusal to take a specific enforcement action, and (2) in the court's view the rescission was not based on a "complicated balancing" of factors "within [the agency's] expertise," but on DHS's determination that the DACA policy was unlawful. App. 29a (quoting *Chaney*, 470 U.S. at 831) (brackets in original). The court also held that the INA, 8 U.S.C. 1252, did not require respondents' claims to be channeled through that statute's review scheme because the rescission of DACA itself "did not trigger any specific enforcement proceedings." App. 35a.

The district court dismissed on standing grounds the respondents' claim that DHS failed to provide sufficient notice of the rescission, as well as the States' claims based on DHS's alleged change in its information-sharing

policy. App. 134a-171a. But it found that respondents adequately alleged standing to raise their remaining claims (including the individual respondents' claims based on DHS's alleged change in its information-sharing policy). App. 39a-56a. And it deferred consideration of the government's motion to dismiss under Rule 12(b)(6). App. 57a-58a.

The district court subsequently granted the government's request to certify the court's decision for interlocutory appeal. The government filed a notice of appeal of that decision, App. 59a-61a, and petitioned the Second Circuit for permission to appeal.

4. On February 13, 2018, the district court granted respondents' motion for a preliminary injunction requiring DHS to "maintain the DACA program on the same terms and conditions that existed" before the rescission. App. 126a; see App. 62a-129a.

The district court held that respondents were likely to succeed on their claim that DHS's decision to rescind DACA was arbitrary and capricious, concluding that the decision rests on an "erroneous legal conclusion that the DACA program is unlawful and unconstitutional," and on the "factually erroneous premise" that the courts in the *Texas* litigation had recognized "'constitutional defects . . . as to DAPA.'" App. 91a, 105a (capitalization and citation omitted). It also noted that the decision "appears to be internally inconsistent" because the Attorney General concluded that the policy was unconstitutional, but DHS ordered a wind-down of the policy rather than an immediate termination. App. 107a.

The district court rejected the government's argument that the decision is based on the practical implications of retaining the policy, given its doubtful legality.

The court concluded that the Attorney General's statement that "it is likely that potentially imminent litigation" would lead the *Texas* court to hold DACA unlawful did not reflect "a reasoned assessment of 'litigation risk'" and that the record did not otherwise reflect such an assessment. App. 110a-111a. The court also reasoned that, even if the record did indicate that litigation risk had been taken into account, the rationale was not sufficiently explained, and failed to take "account of reliance interests [the DACA] program has engendered." App. 113a.

After concluding that the balance of harms tipped in respondents' favor, the district court issued a preliminary injunction requiring the government to maintain the DACA policy nationwide, subject to some limitations. App. 126a. Specifically, like the preliminary injunction issued in the *Regents* litigation, the court indicated that DHS was not required to consider new requests for DACA or requests for "advanced parole" from existing DACA recipients, and could adjudicate DACA renewal requests "on a case-by-case, individualized basis." *Ibid.* The government filed a notice of appeal from the district court's preliminary injunction order on February 20, 2018. App. 130a-132a.

5. On March 29, 2018, the district court issued an order granting in part and denying in part the rest of the government's motion to dismiss under Rule 12(b)(6). App. 133a-171a.

The district court denied the motion to dismiss with respect to respondents' claim that the rescission was arbitrary and capricious "[f]or the reasons stated in" its preliminary-injunction decision. App. 137a. It also declined to dismiss respondents' equal-protection claim, concluding that campaign statements by then-candidate

Trump "raise a plausible inference" that DHS's decision to rescind DACA was motived by discriminatory animus. App. 152a-153a. The court dismissed respondents' claims based on DHS's alleged change in its information-sharing policy because, in light of DHS's public announcements, respondents had not "plausibly alleged that DHS actually changed its information-sharing policy." App. 160a. And it dismissed respondents' remaining claims against the rescission of DACA, including with respect to notice-and-comment, the Regulatory Flexibility Act, and procedural due process. App. 146a, 170a.[4]

The district court again granted the government's motion to certify its decision for interlocutory appeal. The government filed a notice of appeal of that decision, App. 130a-132a, and again petitioned the Second Circuit for permission to appeal.

6. On July 5, 2018, the Second Circuit granted the government's petitions for interlocutory appeal of the district court's November 2017 and March 2018 orders, App. 175a-176a, and on July 25 the court of appeals consolidated the pending appeals. Oral argument is tentatively scheduled for January 2019.

**REASONS FOR GRANTING THE PETITION**

These cases concern the Executive Branch's authority to revoke a discretionary policy of non-enforcement that is sanctioning an ongoing violation of federal immigration law by nearly 700,000 aliens. The DACA policy is materially indistinguishable from the related policies

[4] The district court also declined to dismiss respondents' due-process claim based on DHS's alleged failure to process certain renewal requests that arrived late to DHS or contained clerical errors. App. 170a. The government does not challenge that ruling here.

that the Fifth Circuit held were contrary to federal immigration law in a decision that four Justices of this Court voted to affirm. No one contends that the policy is required by federal law. And, in fact, consistent with the view of the Department of Justice, DHS has decided that the policy is unlawful and should be adopted only by legislative action, not unilateral executive action. Yet as a result of nationwide preliminary injunctions issued by the District Courts in the Northern District of California and the Eastern District of New York, DHS has been required to keep the policy in place, now more than a year since the agency's decision.

The government today is filing petitions for writs of certiorari before judgment to the Second, Ninth, and D.C. Circuits, each of which has before it a decision concluding that the rescission of DACA either is or likely is unlawful. As explained in the *Regents* petition, those decisions are wrong and they warrant this Court's immediate review. The government presents each of these petitions to ensure that the Court has an adequate vehicle in which to resolve the questions presented in a timely and definitive manner. The government respectfully submits that the Court should grant each petition for a writ of certiorari before judgment, consolidate these cases for decision, and consider this important dispute this Term.

### A. The Questions Presented Warrant The Court's Immediate Review

The government's petition in *Regents* explains in detail why a grant of certiorari is necessary in order to obtain an appropriately prompt resolution of this important dispute. *Regents* Pet. 15-17. More than eight months ago, this Court recognized the need for an "ex-

peditious[]" resolution of this dispute in its order dismissing without prejudice the government's petition for a writ of certiorari before judgment in *Department of Homeland Security* v. *Regents of the University of California*, 138 S. Ct. 1182 (2018). Absent certiorari before judgment, even if a losing party were immediately to seek certiorari from a decision of one of the courts of appeals, this Court would not be able to review that decision in the ordinary course until next Term at the earliest. In the interim, the government would be required to retain a discretionary non-enforcement policy that DHS and the Attorney General have correctly concluded is unlawful and that sanctions the ongoing violation of federal law by more than half a million people. And the very existence of this litigation (and resulting uncertainty) would continue to impede efforts to enact legislation addressing the legitimate policy concerns underlying the DACA policy.

### B. These Cases Squarely Present The Reviewability And The Lawfulness Of DACA's Rescission

The cases pending before the Second Circuit squarely present both of the questions presented. The respondents raise all of the principal challenges to the lawfulness of the rescission of DACA, including that it is arbitrary and capricious, that it should have gone through notice-and-comment rulemaking, and that it violates equal-protection and due-process principles. The government moved to dismiss all of respondents' claims on justiciability and merits grounds. And although the district court relied solely on respondents' arbitrary-and-capricious claim in entering a preliminary injunction, the court addressed the government's justiciability arguments in its November 9 order denying the govern-

ment's motion to dismiss under Rule 12(b)(1), and addressed all of the government's merits arguments in its March 29 order denying the government's motion to dismiss under Rule 12(b)(6). The appeals of all three orders, moreover, have been consolidated before the Second Circuit. A grant of certiorari before judgment would therefore bring before this Court all of the relevant questions.

### C. The Court Should Grant Each Of The Government's Petitions And Consolidate The Cases For Consideration This Term

To ensure an adequate vehicle for the timely and definitive resolution of this dispute, the Court should grant the government's petition in this case, as well as the petitions in *Regents* and *NAACP*, and consolidate the cases for further review.

As noted in the *Regents* petition, the cases that are the subject of this petition in many ways replicate the cases in the parallel litigation that are the subject of the *Regents* petition. The respondents in each set of cases present essentially the same challenges to the rescission of DACA. The district courts entered identical nationwide preliminary injunctions based exclusively on respondents' arbitrary-and-capricious claims, but then passed on the remaining claims in orders denying the government's motions to dismiss all of respondents' claims. In both sets of cases, the relevant orders from the district courts have all been certified and accepted for interlocutory appeal and have been consolidated before the respective courts of appeals.

Because the *Regents* cases have already been before the Court twice before and because, in light of this Court's previous order, the Ninth Circuit is likely to is-

sue a decision before the Court even considers the government's certiorari petitions, the Court may prefer to grant certiorari in *Regents* over these cases. The Court should, at a minimum, hold this petition pending resolution of the *Regents* petition and any further proceedings before this Court. An order vacating the injunction issued in *Regents* would have no practical consequence unless the injunction in these cases was similarly vacated.

The government respectfully submits, however, that the Court should grant all three petitions and consolidate the cases for this Court's review. In so doing, the Court would ensure that no intervening developments in the lower courts—for example, a reversal of the preliminary injunction by the Ninth Circuit—would impede or complicate the Court's ability to reach all of the claims against the rescission of DACA on which respondents have prevailed in the lower courts and thus provide a definitive resolution of this dispute this Term.

## CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

Respectfully submitted.

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