No. 18-587

# In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL., PETITIONERS

*v.*

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH 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 the Donald J. Trump, President of the United States; Jefferson B. Sessions III, Attorney General of the United States; Kirstjen M. Nielsen, Secretary of Homeland Security; U.S. Department of Homeland Security; and the United States.

Respondents are the Regents of the University of California; Janet Napolitano, President of the University of California; the State of California; the State of Maine; the State of Maryland; the State of Minnesota; the City of San Jose; Dulce Garcia; Miriam Gonzalez Avila; Saul Jimenez Suarez; Viridiana Chabolla Mendoza; Norma Ramirez; Jirayut Latthivongskorn; the County of Santa Clara; and Service Employees International Union Local 521.

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## PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

The Solicitor General, on behalf of the United States Department 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 Ninth Circuit.

### OPINIONS BELOW

The order of the district court granting respondents' motion for a preliminary injunction and denying the government's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) (App. 1a-70a) is reported at 279 F. Supp. 3d 1011. 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. 71a-90a) is reported at 298 F. Supp. 3d 1304.

## JURISDICTION

On January 9, 2018, the district court denied the government's Rule 12(b)(1) motion, entered a preliminary injunction, and certified its Rule 12(b)(1) decision for interlocutory appeal. On January 12, 2018, the district court granted in part and denied in part the government's Rule 12(b)(6) motion and certified its decision for interlocutory appeal. The government filed a notice of appeal of both the January 9 and January 12 orders on January 16, 2018 (App. 91a-95a). The Ninth Circuit granted permission to appeal both the January 9 and January 12 orders on January 25, 2018. App. 96a. 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 appeal 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 this petition. 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 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." 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. App. 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." App. 101a.

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

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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).

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). 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. App. 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. App. 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. 64-1, 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 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. 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

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[2] Citations to the district court docket are to *Regents of the University of California* v. *DHS*, No. 17-cv-5211.

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." App. 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]." App. 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. App. 118a. The memorandum also explained that DHS would "provide a limited window in which it w[ould] adjudicate certain requests for DACA." App. 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." App. 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 (DHS Information-Sharing Guidance); see

USCIS, DHS, *Frequently Asked Questions: Rescission of DACA* (Sept. 5, 2017), https://go.usa.gov/xPVmE.

e. Shortly after DHS's decision to rescind DACA, respondents brought these five related suits in the Northern District of California 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. 21a-22a. Similar challenges were filed in the Eastern District of New York and in the District of Columbia. See, *e.g.*, *Batalla Vidal* v. *Nielsen*, No. 16-cv-4756 (E.D.N.Y. filed Sept. 19, 2017); *NAACP* v. *Trump*, No. 17-cv-1907 (D.D.C. filed Sept. 18, 2017). A summary of the proceedings in the Northern District of California (*Regents*) 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 *Regents*, the government filed the administrative record in October 2017. Litigation ensued in which respondents obtained orders from the district court directing a vast expansion of the administrative record, in addition to immediate discovery. See, *e.g.*, D. Ct. Doc. 79 (Oct. 17, 2017). The government sought review of

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[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.

those orders in a mandamus petition in the court of appeals, which a divided panel of the Ninth Circuit denied. 875 F.3d 1200 (2017). After granting a stay of the district court's orders, 138 S. Ct. 371 (2017), this Court granted the government's petition for a writ of certiorari, vacated the Ninth Circuit's judgment, and remanded for further proceedings. 138 S. Ct. 443 (2017) (per curiam). On remand, the district court stayed its orders requiring expansion of the administrative record and authorizing discovery "pending further order." D. Ct. Doc. 225, at 1 (Dec. 21, 2017).

While the litigation over the record proceeded, the government filed a motion to dismiss all five suits under Federal Rule of Civil Procedure 12(b)(1) and (6). D. Ct. Doc. 114 (Nov. 1, 2017). At the threshold, the government argued that respondents' claims are not reviewable because DHS's decision to rescind DACA is committed to agency discretion by law, see 5 U.S.C. 701(a)(2); and because judicial review of the denial of deferred action, if available at all, is barred under the INA prior to the issuance of a final removal order, see 8 U.S.C. 1252. The government also argued that respondents' arbitrary-and-capricious claims fail because DHS rationally explained the decision to wind down the discretionary DACA policy given the Acting Secretary's conclusion that the policy is unlawful and the imminent risk of its being invalidated in the *Texas* case. Finally, the government argued that respondents' other claims are without merit because the rescission of DACA is exempt from notice-and-comment requirements; does not violate principles of equal protection or due process; and does not change or affect the policies governing the use of aliens' personal information.

Respondents opposed the government's motion to dismiss and filed a motion for a preliminary injunction, seeking to prevent the government from rescinding the DACA policy. D. Ct. Doc. 111 (Nov. 1, 2017); D. Ct. Doc. 205 (Nov. 22, 2017).

3. On January 9, 2018, the district court denied the motion to dismiss to the extent it was based on Rule 12(b)(1), and entered a preliminary injunction requiring the government to "maintain the DACA program on a nationwide basis." App. 66a; see App. 1a-70a.

The district court first ruled that the rescission of DACA was not committed to agency discretion by law. The court acknowledged that an agency's decisions "not to prosecute or initiate enforcement actions are generally not reviewable as they are 'committed to an agency's absolute discretion.'" App. 27a (quoting *Chaney*, 470 U.S. at 831). But it concluded that the rescission of DACA was different because it involved a "broad enforcement polic[y]," rather than an "'individual enforcement decision'"; it rescinded a policy of enforcement discretion, instead of announcing a new one; and the "main" rationale for rescinding the prior policy was its "supposed illegality," which the court concluded it was authorized to assess. App. 28a-30a (citation omitted). The court also concluded that the INA did not preclude review because "plaintiffs do not challenge any particular removal but, rather, challenge the abrupt end to a nationwide deferred-action and work-authorization program." App. 30a-31a.

The district court then ruled that respondents were entitled to a preliminary injunction, concluding that they had demonstrated a likelihood of success on their claims that the rescission of DACA was arbitrary and capricious. App. 41a-62a. The court acknowledged that

"a new administration is entitled to replace old policies with new policies so long as they comply with the law," App. 2a, and the court did not dispute that DACA was a discretionary non-enforcement policy that was neither mandated nor specifically authorized by statute. It nonetheless concluded that respondents were likely to succeed because "the agency's decision to rescind DACA was based on a flawed legal premise" and because the government's "supposed 'litigation risk' rationale" was an invalid "post hoc rationalization" and, "in any event, arbitrary and capricious." App. 42a.

Finding that respondents had satisfied the remaining equitable requirements for an injunction, App. 62a-66a, the district court ordered the government, "pending final judgment" or other order, "to maintain the DACA program on a nationwide basis on the same terms and conditions as were in effect before the rescission on September 5, 2017." App. 66a. The court specifically directed that the government must "allow[] DACA enrollees to renew their enrollments." *Ibid.*[4]

The district court *sua sponte* certified its order for interlocutory appeal under 28 U.S.C. 1292(b), to the ex-

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[4] The district court identified certain "exceptions" to its injunction —namely, "(1) that new applications from applicants who have never before received deferred action need not be processed; (2) that the advance parole feature need not be continued for the time being for anyone; and (3) that defendants may take administrative steps to make sure fair discretion is exercised on an individualized basis for each renewal application." App. 66a-67a. The court also specified that "[n]othing in [its] order" would prohibit DHS from "remov[ing] any individual, including any DACA enrollee, who it determines poses a risk to national security or public safety, or otherwise deserves, in its judgment, to be removed." App. 67a.

tent it denied the "questions interposed by the government in its motion to dismiss under [Rule] 12(b)(1)." App. 70a.

4. On January 12, 2018, the district court issued a further order granting in part and denying in part the government's motion to dismiss to the extent it was based on Rule 12(b)(6). App. 71a-90a. The court declined to dismiss respondents' arbitrary-and-capricious claims "[f]or the same reasons" stated in its January 9 order. App. 72a. It declined to dismiss the equal-protection claim, concluding that respondents' allegations "raise a plausible inference that racial animus towards Mexicans and Latinos was a motivating factor in the decision to end DACA." App. 87a; see App. 83a-87a. And it declined to dismiss the claim that DHS violated substantive due process by allegedly "chang[ing] its policy" on the use of personal information "provided by DACA recipients," reasoning that such a change would "'shock[] the conscience.'" App. 79a-81a (citation omitted). The court dismissed respondents' remaining claims, including with respect to notice-and-comment, the Regulatory Flexibility Act, procedural due process, equitable estoppel, and equal protection based on a fundamental right to a job. App. 72a-79a, 81a-83a, 87a. The court again *sua sponte* certified its order for interlocutory appeal pursuant to 28 U.S.C. 1292(b). App. 89a.

5. Days later, the government filed notices of appeal of the district court's orders, App. 91a-95a, petitioned the Ninth Circuit for interlocutory appeal of the district court's decisions resolving the government's motion to dismiss under Rule 12(b)(1) and (6), and filed a petition for a writ of certiorari before judgment in this Court.

The court of appeals granted the government's petition for interlocutory appeal and consolidated the appeals. App. 96a; see 18-15133 C.A. Doc. 3 (January 26, 2018). On February 26, 2018, this Court denied the government's certiorari petition "without prejudice," stating that it "assumed that the Court of Appeals will proceed expeditiously to decide this case." 138 S. Ct. 1182. But while briefing in the Ninth Circuit was completed on April 17 and oral argument was held on May 15, the court of appeals has not yet issued a decision as of the printing of this petition.[5]

6. In June 2018, current Secretary of Homeland Security Kirstjen Nielsen issued a memorandum in response to the district court in *NAACP* v. *Trump*, *supra*, providing further explanation of DHS's decision to rescind DACA. App. 120a-126a. Secretary Nielsen concluded that "the DACA policy properly was—and should be—rescinded, for several separate and independently sufficient reasons." App. 122a. First, the Secretary agreed that "the DACA policy was contrary to law" and explained that "[a]ny arguable distinctions between the DAPA and DACA policies" were not "sufficiently material" to convince her otherwise. *Ibid.*; see App. 122a-123a. Second, the Secretary reasoned that, in any event, "[l]ike Acting Secretary Duke, [she] lack[s] sufficient confidence in the DACA policy's legality to continue this non-enforcement policy, whether the courts would ultimately uphold it or not." App. 123a.

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[5] On October 17, 2018, the government informed the court of appeals that, "in order to ensure review by the Supreme Court during its current Term," it intended to file a petition for a writ of certiorari before judgment if the court of appeals did not issue its judgment by October 31. 18-15068 C.A. Doc. 198.

She noted that "[t]here are sound reasons for a law enforcement agency to avoid discretionary policies that are legally questionable." App. 122a-123a. Third, the Secretary offered several "reasons of enforcement policy to rescind the DACA policy," regardless of whether the policy is "illegal or legally questionable." App. 123a. The Secretary also explained that, although she "do[es] not come to these conclusions lightly," "neither any individual's reliance on the expected continuation of the DACA policy nor the sympathetic circumstances of DACA recipients as a class" outweigh the reasons to end the policy. App. 125a. The government promptly informed the court of appeals of Secretary Nielsen's memorandum. 18-15068 C.A. Doc. 184 (June 22, 2018).

**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 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.

In denying the government's previous petition for a writ of certiorari before judgment "without prejudice,"

this Court "assumed that the Court of Appeals will proceed expeditiously to decide this case." 138 S. Ct. 1182 (2018). That has not happened. Although the court of appeals heard oral argument on May 15, 2018, it has yet to issue its decision. And while no one, respondents included, contends that the legality of DACA's rescission will be finally resolved without this Court's review, absent prompt intervention from this Court, there is little chance the Court would resolve this dispute for at least *another year*.

Accordingly, 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 below, 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.

## I. THE QUESTIONS PRESENTED WARRANT THIS COURT'S IMMEDIATE REVIEW

Congress has vested this Court with jurisdiction to review "[c]ases in the courts of appeals * * * [b]y writ of certiorari * * * *before or* after rendition of judgment or decree." 28 U.S.C. 1254(1) (emphasis added). "An application * * * for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."

28 U.S.C. 2101(e). This Court will grant certiorari before judgment "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. These cases satisfy that standard.

An immediate grant of certiorari is necessary to obtain an appropriately prompt resolution of this important dispute. 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.

Such a delay is untenable and unnecessary. This Court is already familiar with the relevant issues in light of its consideration on plenary review of *United States* v. *Texas*, 136 S. Ct. 2271 (2016) (per curiam). And as the same district court that heard the *Texas* case has recently held (and as explained below), the reasoning of the Fifth Circuit's decision in *Texas* holding DAPA and the DACA expansion unlawful equally applies to DACA itself. See *Texas* v. *United States*, No. 18-cv-68, 2018 WL 4178970, at *38 (S.D. Tex. Aug. 31, 2018). Only this Court can resolve the conflict in the lower courts and provide much-needed clarity to the government and DACA recipients alike.

More than eight months ago, this Court recognized the need for an "expeditious[]" resolution of this dispute in its order denying without prejudice the government's earlier petition. 138 S. Ct. 1182. The Court has granted certiorari before judgment to promptly resolve other important and time-sensitive disputes. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981); *United States* v. *Nixon*, 418 U.S. 683, 686-687 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584 (1952); cf. Stephen M. Shapiro et al., *Supreme Court Practice* § 4.20, at 287-288 (10th ed. 2013) (collecting cases where "[t]he public interest in a speedy determination" warranted certiorari before judgment). It should follow the same course here.

## II. THE DECISIONS BELOW ARE WRONG

Review is also warranted because the decisions below are incorrect. DHS's decision to rescind DACA—a policy of enforcement discretion—is a classic determination that is "committed to agency discretion by law," 5 U.S.C. 701(a)(2), and therefore unreviewable under the APA. Even if DHS's prospective denial of deferred action were reviewable, that could only be at the behest of an individual alien after a final order of removal was entered against the alien. See 8 U.S.C. 1252. In any event, the decision to rescind the DACA policy is not arbitrary and capricious, does not violate equal-protection or due-process principles, and is not otherwise unlawful.

### A. DACA's Rescission Is Unreviewable Under The APA

1. a. The APA precludes review of agency actions that are "committed to agency discretion by law." 5 U.S.C. 701(a)(2). "Over the years," this Court has interpreted that provision to apply to various types of

agency decisions that "traditionally" have been regarded as unsuitable for judicial review. *Lincoln* v. *Vigil*, 508 U.S. 182, 191 (1993). Section 701(a)(2) precludes review of an agency's decision not to institute enforcement actions, *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985); an agency's refusal to reconsider a prior decision based on an alleged "material error," *I.C.C.* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987) (*BLE*); and an agency's allocation of funds from a lump-sum appropriation, *Lincoln*, 508 U.S. at 192. Such exercises of discretion, the Court has explained, often require "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Chaney*, 470 U.S. at 831.

With respect to an agency's enforcement discretion in particular, an agency may "not only assess whether a violation has occurred," but "whether agency resources are best spent on this violation or another"; whether enforcement in a particular scenario "best fits the agency's overall policies"; and whether the agency "has enough resources to undertake the action at all." *Chaney*, 470 U.S. at 831. In addition, the Court has noted that when an agency declines to enforce, it "generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832. In this way and others, agency enforcement discretion "shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch." *Ibid.*

b. DHS's decision to discontinue the DACA policy falls comfortably within the types of agency decisions

that traditionally have been understood as "committed to agency discretion." 5 U.S.C. 701(a)(2). Like the decision to *adopt* a policy of selective non-enforcement, the decision whether to *retain* such a policy can "involve[] a complicated balancing" of factors that are "peculiarly within [the] expertise" of the agency, including determining how the agency's resources are best spent and how the policy fits with the agency's overall policies. *Chaney*, 470 U.S. at 831. Likewise, a decision to abandon an existing non-enforcement policy will not, in itself, bring to bear the agency's coercive power over any individual. Indeed, an agency's decision to reverse a prior policy of civil non-enforcement is akin to changes in policy as to criminal prosecutorial discretion, which regularly occur within the U.S. Department of Justice both within and between presidential administrations, and which have never been considered amenable to judicial review. See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996).

This presumption of nonreviewability applies with particular force when it comes to immigration. As this Court has recognized, the "broad discretion exercised by immigration officials" has become a "principal feature of the removal system." *Arizona* v. *United States*, 567 U.S. 387, 396 (2012); see 6 U.S.C. 202(5) (2012 & Supp. V 2017). And, unlike in the ordinary criminal context, a decision not to enforce tolerates not merely past misconduct but a "continuing violation of United States law." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490 (1999). Thus, in the absence of a statutory directive "otherwise circumscribing" the agency's discretion, *Chaney*, 470 U.S. at 833, the Secretary's decisions establishing DHS's enforcement priorities for the Nation's immigration laws are beyond a

court's authority to review. There is no such directive here.

c. The district courts' reasons for finding DHS's decision reviewable are unavailing.

First, it makes no difference that the rescission of the DACA policy addressed a "broad enforcement polic[y]," App. 28a, instead of an individual enforcement decision. See *Batalla Vidal* App. 29a-30a. Agency decisions about how its "resources are best spent" or how certain enforcement activity "best fits the agency's overall policies," *Chaney*, 470 U.S. at 831, are just as susceptible to implementation through broad guidance as through case-by-case enforcement decisions. See, *e.g.*, *Wayte* v. *United States*, 470 U.S. 598, 601-603 (1985). And *Chaney* itself concerned the programmatic determination whether to enforce the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.*, with respect to drugs used to administer the death penalty. See 470 U.S. at 824-825.

Nor does it matter that DHS has *eliminated* a policy of non-enforcement, rather than *adopted* one. App. 29a-30a; *Batalla Vidal* App. 30a. A decision whether to retain a non-enforcement policy implicates all of the same considerations about agency priorities and resources that inform the decision to adopt such a policy in the first instance. And because the rescission does not, by itself, initiate removal proceedings, "like the FDA's non-enforcement decision in *Chaney*, there are no agency proceedings here to provide a 'focus for judicial review,' and DACA's rescission does not itself involve the exercise of coercive power over any person." *NAACP* App. 33a (citation omitted).

Finally, DHS's decision is not reviewable simply because it rests on the agency's view of the legality of the

DACA policy, among other independent reasons. App. 30a; *Batalla Vidal* App. 30a; *NAACP* App. 42a-43a. An otherwise unreviewable agency action does not "become[] reviewable" because "the agency gives a 'reviewable' reason." *BLE*, 482 U.S. at 283. In *BLE*, the ICC's decision not to reconsider a prior decision was therefore unreviewable, even though the agency based that denial on an interpretation of its legal obligations under the Railway Labor Act, 45 U.S.C. 151 *et seq.* 482 U.S. at 276, 283. And in *Chaney*, the Food and Drug Administration's decision not to enforce the misbranding prohibition did not become reviewable even though it was based, in part, on the agency's understanding of its authority to initiate such proceedings. 470 U.S. at 824. The same is true here.

2. At a minimum, Congress has foreclosed district courts from adjudicating collateral attacks on DHS's discretionary enforcement decisions and policies in the manner pursued by respondents.

Under 8 U.S.C. 1252, judicial review of DHS enforcement decisions is generally available, if at all, only through the review procedures of removal orders set forth in that section. In particular, Section 1252(g) states that "[e]xcept as provided in this section * * * no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary of Homeland Security] to commence proceedings, adjudicate cases, or execute removal orders against any alien under this subchapter." Section 1252(g) is "designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations, providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside

the streamlined process that Congress has designed." *AADC*, 525 U.S. at 485. That design is also reflected in 8 U.S.C. 1252(b)(9), which channels into the review of final removal orders "all questions of law and fact * * * arising from any action taken * * * to remove an alien from the United States." See *AADC*, 525 U.S. at 483 (describing Section 1252(b)(9) is an "unmistakable 'zipper' clause"); see also *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 839-841 (2018) (plurality opinion); *id.* at 853-857 (Thomas, J., concurring in part and concurring in the judgment).

Even in instances where the statutory text less clearly precludes review, this Court has held that, when it is fairly discernible that Congress intends a particular review scheme to be exclusive, a plaintiff is not permitted to circumvent that exclusive scheme by filing a preemptive district-court action, but must instead present his or her claims or defenses in the manner and to the extent permitted by that review scheme. See *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207-209 (1994). The rescission of the DACA policy is precisely the sort of "'no deferred action' decision[]," *AADC*, 525 U.S. at 485, and "part of the process by which [the alien's] removability will be determined," *Jennings*, 138 S. Ct. at 841 (plurality opinion), that Congress intended to channel through the INA's careful review scheme. Respondents cannot escape that scheme simply by filing suit before the agency has initiated an enforcement proceeding against the individual respondents. Respondents' claims, "if they are reviewable at all," must be litigated in removal proceedings, not through "separate rounds of judicial intervention" in federal district court. *AADC*, 525 U.S. at 485.

**B. DACA's Rescission Is Lawful**

Even if DHS's decision to rescind DACA is reviewable under the APA, it is plainly valid. Under the APA, the decision must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). That standard of review requires only that the "agency 'examine the relevant data and articulate a satisfactory explanation for its action.'" *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citation omitted). "[A] court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). DHS's decision to begin an orderly wind-down of an indisputably discretionary policy of non-enforcement based on serious doubts about the legality of the policy, as well as the legal and practical implications of maintaining such a policy without statutory authority, easily passes that test. The district courts' contrary conclusions are unpersuasive.

***1. The rescission is reasonable in light of DHS's serious doubts about the legality of the DACA policy***

DHS reasonably rested its decision on the legal and practical implications of maintaining a policy of non-enforcement (original DACA) that is materially indistinguishable from policies (DAPA and expanded DACA) that were struck down by the Fifth Circuit in a decision affirmed by this Court. Particularly in the face of the threat by Texas and other States to challenge DACA, that rationale alone provides a permissible reason for initiating an orderly wind-down of the policy.

a. As an initial matter, the district courts in *Regents* and *Batalla Vidal* erred in concluding that "[t]he Attorney General's letter and the Acting Secretary's memorandum can only be reasonably read as stating DACA

was illegal and that, given that DACA must, therefore, be ended." App. 56a (emphasis omitted); see *Batalla Vidal* App. 110a. As the court in *NAACP* correctly recognized, DACA's rescission is based on concerns that go beyond the ultimate legality of DACA. Such concerns are evident from the original rescission memorandum. *NAACP* App. 56a; see *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974) (courts should uphold agency action based on any ground that "may reasonably be discerned" from the decision). And any doubt on that score is eliminated by Secretary Nielsen's subsequent statement that "regardless of whether the DACA policy is ultimately illegal, it was appropriately rescinded by DHS because there are, at a minimum, serious doubts about its legality." App. 123a.

b. That rationale is eminently reasonable. In *Texas* v. *United States*, the Fifth Circuit concluded that DAPA and expanded DACA were unlawful on both procedural and substantive grounds. 809 F.3d 134, 178 (2015), aff'd, 136 S. Ct. 2271 (2016); see *id.* at 147 n.11 (including the "DACA expansions" within the opinion's references to "DAPA"). The entirety of the Fifth Circuit's reasoning applies equally to the original DACA policy. With respect to procedure, the Fifth Circuit concluded that the memorandum creating DAPA and expanding DACA was not exempt from notice-and-comment as a statement of policy based entirely on how the *original DACA policy* had been implemented. See *id.* at 171-178.

As a matter of substance, the Fifth Circuit held that DAPA and expanded DACA were contrary to the INA because (1) "[i]n specific and detailed provisions," the INA already "confers eligibility for 'discretionary re-

lief,'" including "narrow classes of aliens eligible for deferred action," *Texas*, 809 F.3d at 179 (citation omitted); (2) the INA's otherwise "broad grants of authority" could not reasonably be construed to assign to the Secretary the authority to create additional categories of aliens of "vast 'economic and political significance,'" *id.* at 183 (citation omitted); (3) DAPA and expanded DACA were inconsistent with historical deferred-action policies because they were not undertaken on a "'country-specific basis * * * in response to war, civil unrest, or natural disasters,'" nor served as a "bridge[] from one legal status to another," *id.* at 184 (citation omitted); and (4) "Congress ha[d] repeatedly declined to enact the Development, Relief, and Education for Alien Minors Act ('DREAM Act'), features of which closely resemble DACA and DAPA." *Id.* at 185 (footnote omitted). Every one of those factors also applies to the original DACA policy. Indeed, the Southern District of Texas recently determined, "guided by [that] Fifth Circuit precedent," that the INA could not "'reasonably be construed'" to authorize the maintenance of that policy. *Texas*, 2018 WL 4178970, at *38 (citation omitted); see *id.* at *45-*47 (finding no material differences between DAPA and DACA).[6]

In light of these similarities, DHS could permissibly rescind the DACA policy based on the agency's doubts about the legality of the policy and its likely fate in the courts. As Secretary Nielsen explained, "[a] central aspect of the exercise of a discretionary enforcement pol-

[6] The Southern District of Texas nevertheless declined to issue a preliminary injunction enjoining the DACA policy in light of, among other things, Texas's delay in seeking injunctive relief. See *Texas*, 2018 WL 4178970, at *57-*62.

icy is a judgment concerning whether DHS has sufficient confidence in the legality of such policy." App. 123a. The "sound reasons" to insist upon such confidence "include the risk that [legally questionable] policies may undermine public confidence in and reliance on the agency and the rule of law, and the threat of burdensome litigation that distracts from the agency's work." *Ibid.* The arbitrary-and-capricious standard does not allow a court "to substitute its judgment" for such a "rational" explanation by a law-enforcement agency. *State Farm*, 463 U.S. at 42-43.

c. Contrary to the district courts' conclusions, DHS did not fail to sufficiently consider the reliance interests of DACA recipients. See App. 58a; *Batalla Vidal* App. 113a-114a; *NAACP* App. 106a-108a. When President Obama announced DACA in 2012, he explained that it was a "temporary stopgap measure," not a "permanent fix." The White House, *Remarks by the President on Immigration* (June 15, 2012), https://go.usa.gov/xnZFY. And, by its own terms, DACA made deferred action available for only two-year periods, which could "be terminated at any time at the agency's discretion." App. 104a. By choosing a gradual and orderly administrative wind-down of the policy rather than risk an immediate disruptive court-imposed one, DHS ensured that existing DACA grants would be permitted to expire according to their stated two-year terms and even permitted a limited window for additional renewals. In any event, as Secretary Nielsen explained, although the agency was "keenly aware that DACA recipients have availed themselves of the policy in continuing their presence in this country and pursuing their lives," it reasonably found that any asserted reliance interests did not "outweigh the questionable legality of the DACA policy" or

the other factors the agency considered. App. 125a. As she observed, "[t]hat is especially so because issues of reliance would best be considered by Congress, which can assess and weigh a range of options." *Ibid.* The APA provides no basis to second-guess that judgment.

***2. The rescission is reasonable in light of DHS's additional and independent policy concerns***

DHS's decision to rescind DACA is independently supported by several additional enforcement-policy concerns. Secretary Nielsen explained that "regardless of whether * * * the DACA policy [is] illegal or legally questionable, there are sound reasons of enforcement policy to rescind the DACA policy." App. 123a. Those reasons include the agency's determination that (1) "DHS should enforce the policies reflected in the laws adopted by Congress and should not adopt public policies of non-enforcement of those laws for broad classes and categories of aliens under the guise of prosecutorial discretion"; (2) "DHS should only exercise its prosecutorial discretion not to enforce the immigration laws on a truly individualized, case-by-case basis"; and (3) "it is critically important for DHS to project a message that leaves no doubt regarding the clear, consistent, and transparent enforcement of the immigration laws against all classes and categories of aliens," especially given that "tens of thousands of minor aliens have illegally crossed or been smuggled across our border in recent years." App. 123a-124a. Respondents may disagree with these assessments, but they cannot be dismissed as irrational.

The *NAACP* court criticized these reasons as nothing more than the Secretary's "attempt to disguise * * * objection[s] to DACA's legality as * * * policy justification[s] for its rescission," *NAACP* App. 100a, and too

"cursory" to serve as an independent basis for DHS's decision, *id.* at 102a-103a. That description, however, runs directly counter to the Secretary's explanation that her policy concerns provided a "separate and independently sufficient" reason for her conclusion that the DACA policy "properly was—and should be—rescinded." App. 122a. The presumption of regularity (and principles of inter-Branch comity) require courts to presume that executive officials—and certainly Cabinet officials—are acting in good faith "in the absence of clear evidence to the contrary." *Armstrong*, 517 U.S. at 464 (citation omitted); cf. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982). Neither the fact that the Secretary's policy concerns may also inform her view on DACA's legality, nor the succinctness of her explanation, provides remotely sufficient evidence to overcome that presumption.[7]

***3. The rescission is reasonable in light of DHS's correct determination that DACA is unlawful***

Finally, DHS's decision is also independently supported by its conclusion, informed by the Attorney General's advice, that indefinitely continuing the DACA policy would itself have been unlawful. As detailed above, the Fifth Circuit had already concluded that the DAPA and expanded DACA policies were invalid in a decision

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[7] The *NAACP* court also reasoned that the Secretary's "messaging" rationale (the third enforcement-policy reason) was an impermissible "*post hoc* rationalization." See *NAACP* App. 94a-95a. But the court itself acknowledged that the purpose of that proposition of administrative law is "simply to prevent courts from considering 'rationales offered by anyone other than the proper decisionmakers.'" *Id.* at 92a (citation omitted). There is no dispute that Secretary Nielsen is a "proper decisionmaker[]" for matters of immigration enforcement policies and priorities. *Ibid.*; see 6 U.S.C. 202(5) (2012 & Supp. V 2017).

that four Justices of this Court voted to affirm. See pp. 24-25, *supra*. And the Attorney General expressed his agreement with the conclusion reached by the Fifth Circuit in a decision that applies equally to the original DACA policy. See App. 116a. DHS's conclusion is correct: DACA is unlawful. Regardless, it cannot be that DHS's decision to rescind DACA on the basis of the Fifth Circuit's decision, this Court's equally divided affirmance, and the Attorney General's opinion was the type of "clear error of judgment," *State Farm*, 463 U.S. at 43 (citation omitted), that would make it arbitrary and capricious under the APA.

In *Regents* and *Batalla Vidal*, the district courts concluded that DHS could not rely on an assessment of DACA's legality unless it is correct as a matter of law. See App. 42a; *Batalla Vidal* App. 91a-92a. Relying on the Secretary's broad discretion in "[e]stablishing national immigration enforcement policies and priorities," 6 U.S.C. 202(5) (2012 & Supp. V 2017), and DHS's "long and recognized practice" of granting deferred action on a programmatic basis, those courts concluded that DACA is lawful. App. 45a; see App. 42a-48a; *Batalla Vidal* App. 102a-104a. But the Fifth Circuit rejected those precise considerations when offered in support of the DAPA and expanded DACA policies. See *Texas*, 809 F.3d at 183.

In *NAACP*, the district court declined to pass on the legality of DACA, but concluded that DHS did not adequately explain its own view. *NAACP* App. 49a-52a. But, as explained above, the Fifth Circuit's *Texas* decision provides a robust analysis of the legality of DAPA and expanded DACA in a manner that applies with full force to the original DACA policy. See pp. 24-25, *supra*. The Duke and Nielsen memoranda make clear that

DHS agrees with the Fifth Circuit's conclusion that the DAPA and expanded DACA policies were unlawful under the INA and sees no meaningful distinctions. See App. 122a ("Any arguable distinctions between the DAPA and DACA policies are not sufficiently material to convince me that the DACA policy is lawful."); App. 117a. The law requires nothing more.

#### *4. The rescission does not violate equal protection or due process*

The district courts also erred in failing to dismiss respondents' claims that DHS's actions violate equal-protection or due-process principles.

a. In *Regents* and *Batalla Vidal*, the district courts declined to dismiss respondents' claim that the rescission violates equal-protection principles incorporated in the Due Process Clause of the Fifth Amendment. See App. 83a-87a; *Batalla Vidal* App. 147a-157a.[8] But that claim is foreclosed by this Court's decision in *AADC*, which imposed a general bar on discriminatory-motive claims in the immigration-enforcement context. Such claims, the Court explained, "invade a special province of the Executive—its prosecutorial discretion." 525 U.S. at 489; see *Armstrong*, 517 U.S. at 463-465. And in the immigration context, this concern is "greatly magnified" because such claims "permit and prolong a continuing violation of United States law," and also potentially implicate foreign-policy concerns. *AADC*, 525 U.S. at 490. Although the district courts relied heavily on then-candidate Trump's "campaign rhetoric" unconnected to DACA or DACA recipients, App. 85a; *Batalla Vidal*

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[8] The *NAACP* court declined to reach the equal-protection challenge to the rescission in light of its statutory holding. See *NAACP* App. 67a.

App. 152a-153a, neither court suggested that such statements trigger *AADC*'s sole potential exception, reserved for "a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome." 525 U.S. at 491. Indeed, even apart from *AADC*, the President's statements are wholly insufficient to suggest that Secretaries Duke and Nielsen were motivated by racial animus in deciding to rescind a policy sanctioning the ongoing violation of federal immigration law by 700,000 aliens, especially given the serious questions about its legality.

b. The *Regents* court also found that the respondents adequately stated a claim under substantive due process based on DHS's alleged change in its information-sharing policy for personal information gathered from DACA requestors. App. 79a-81a. But there has been no such change and respondents have failed to plausibly allege otherwise. See DHS Information-Sharing Guidance; see also *Batalla Vidal* App. 159a-160a (dismissing a similar claim on that basis); *NAACP* App. 71a-72a (same). Nor would any change to the scope of exceptions to the information-sharing policy violate substantive due process, especially given DHS's express reservation of rights to do so. See pp. 4-5, s*upra*.[9]

[9] The district courts also erred in enjoining the rescission of DACA on a nationwide basis. For the reasons given by Justice Thomas in his concurrence in *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2424-2429 (2018), such relief exceeded the Article III power of the court to remedy the concrete and particular injuries of the parties before it; is inconsistent with longstanding equitable principles; and undermines the sound administration of the federal court system.

## III. THE COURT SHOULD GRANT CERTIORARI BEFORE JUDGMENT IN ALL THREE CASES

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

A. This petition in *Regents* presents both of the questions presented and all of the relevant claims, including that the rescission of DACA is arbitrary and capricious; denies respondents equal protection and due process; and violates the APA's requirement for notice-and-comment rulemaking. Although the district court's preliminary injunction rests only on respondents' arbitrary-and-capricious claim, the district court addressed the remaining claims in its orders denying the government's motion to dismiss all of respondents' claims on reviewability and merits grounds. By virtue of the Ninth Circuit's acceptance of the interlocutory appeals of those orders and consolidation, a grant of certiorari before judgment would bring before the Court the entire case. Accordingly, this petition should be granted.

B. As fully explained in the *NAACP* petition, the related cases before the D.C. Circuit also raise both questions presented. Respondents in those cases likewise claim that the rescission is arbitrary and capricious; denies respondents equal protection and due process; and violates the APA's procedures concerning notice-and-comment rulemaking. In *NAACP*, however, respondents do not present some of the more tangential claims against the rescission, including, for example, that the rescission violates principles of equitable estoppel. The district court, moreover, did not pass on any constitutional

challenges to the rescission. Nevertheless, the Court should also grant certiorari in *NAACP* because that court invited Secretary Nielsen's supplemental memorandum, and it is the only district court to have passed on the effect of that memorandum on the questions presented.

C. Finally, as fully explained in the *Batalla Vidal* petition, the consolidated cases before the Second Circuit at issue in *Batalla Vidal* in many ways replicate the consolidated cases before the Ninth Circuit at issue here. The respondents in each set of cases present essentially the same challenges to the rescission of DACA, and the district courts entered identical nationwide preliminary injunctions based exclusively on respondents' arbitrary-and-capricious claims. Because an order vacating the injunction issued in *Regents* would have no practical consequence unless the injunction in *Batalla Vidal* was similarly vacated, the Court should at least hold the *Batalla Vidal* petition pending resolution of the other petitions. But to ensure that no developments in the lower courts between the filing of this petition and the Court's resolution of the case undermine the Court's ability to provide a definitive resolution of this overall dispute, the government respectfully submits that the Court should also issue a writ of certiorari to the Second Circuit.

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In 2012, DHS adopted a temporary, stop-gap policy of enforcement discretion, allowing some 700,000 aliens to remain in the United States even though existing laws provided them no ability to do so. After a change in administrations, DHS announced that it was ending that policy based on serious doubts about its legality and the practical implications of maintaining it. Secretary Nielsen has since made clear that DHS's decision also rests on policy considerations wholly apart from any legality concerns. It

is plainly within DHS's authority to set the Nation's immigration enforcement priorities and to end the discretionary DACA policy. By order of two district courts, however, DHS has been required to maintain that policy on a nationwide basis for over a year, even while efforts by the President and others to provide a sound legal basis for the policy through the legislative process have failed. More than eight months ago, this Court recognized that this dispute called for an expeditious resolution. That is even more evident today. The Court should grant review in these cases and ensure that it can provide a timely and definitive resolution of the dispute this Term.

## CONCLUSION

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

Respectfully submitted.

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