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 TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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When this Court declined to grant certiorari before judgment to review the district court's injunction requiring the Department of Homeland Security (DHS) to maintain the non-enforcement policy known as Deferred Action for Childhood Arrivals (DACA), the Court made clear that it expected the court of appeals to "proceed expeditiously to decide this case," at which time the government could renew its request. 2/26/18 Order (No. 17-1003). More than ten months later, the court of appeals' judgment is here and the Court is presented the opportunity it anticipated in February. The Court should now grant certiorari and resolve this important dispute this Term.

1. When the government filed this petition in November, the court of appeals had still not issued its judgment. The petition therefore explained (at 15-17) why this case met the Court's heightened standard for

certiorari before judgment. See Sup. Ct. R. 11. Respondents rely heavily on that same standard in opposition. See, *e.g.*, Indiv. Br. in Opp. 12 ("There is no reason * * * to ignore normal processes and grant review"); Regents Br. in Opp. 14 (arguing against "truncat[ing] the ordinary process"). By virtue of the intervening judgment, however, the certiorari decision is now governed by the Court's ordinary standard under Rule 10. And whether further review is warranted under *that* standard is not a close question. Respondents' arguments to the contrary lack merit.

a. Respondents contend (Indiv. Br. in Opp. 12-17) that review is unwarranted in the absence of a circuit conflict. But certiorari is appropriate when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). And the Court frequently reviews decisions, like the one below, that interfere with the implementation of federal policies and enforcement of federal law, particularly immigration law, without any conflict. See, *e.g.*, *Trump* v. *Hawaii*, 138 S. Ct. 2392 (2018); *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532 (2018); *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018). Indeed, this Court granted certiorari absent a circuit conflict in *United States* v. *Texas*, 136 S. Ct. 2271 (2016), after the Fifth Circuit affirmed a nationwide preliminary injunction preventing implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and expanded DACA policies.

The court of appeals' decision here presents at least as strong a case for this Court's review. The district court's nationwide injunction commands the government to preserve a policy that affirmatively sanctions the ongoing violation of federal law by 700,00 aliens who

have no lawful immigration status and no right to the policy's continuation. Cf. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (*AADC*). Absent this Court's intervention, the government will be required to maintain the policy nationwide for years after DHS and the Attorney General determined that it should end.

Moreover, there *is* a circuit conflict. In *Texas* v. *United States*, the Fifth Circuit held that the DAPA and expanded DACA policies were "manifestly contrary" to the Immigration and Nationality Act (INA). 809 F.3d 134, 186 (2015) (*Texas I*), aff'd by an equally divided Court, 136 S. Ct. 2271 (2016). As the district court that enjoined those policies has recognized, the Fifth Circuit's reasoning applies equally to DACA. See *Texas* v. *United States*, 328 F. Supp. 3d 662, 723 (S.D. Tex. 2018) (*Texas II*). Indeed, although the Ninth Circuit attempted to distinguish *Texas I* in some respects, it ultimately disagreed with critical portions of the Fifth Circuit's reasoning. Compare *Texas I*, 809 F.3d at 179, 186 (concluding that in identifying several "narrow classes" of aliens eligible for deferred action, Congress "foreclosed" the creation of broad new categories), with Supp. Br. App. 54a ("We think the much more reasonable conclusion is that in * * * instructing that this and that 'narrow class[]' of noncitizens should be eligible for deferred action, Congress meant to say nothing at all about the underlying power of the Executive Branch to grant the same remedy to others.") (citation omitted; brackets in original). And the Ninth Circuit did not even try to square its determination that DACA is lawful with the Fifth Circuit's determination that expanded DACA was not. See *id.* at 55a (finding "the *Texas* court's

treatment of the DACA expansion" not "to be strong persuasive authority").

b. Respondents argue (Indiv. Br. in Opp. 17-19) that the interlocutory posture of this case is reason to deny review. But the Court reviews interlocutory decisions presenting important legal issues. See, *e.g.*, *Trump* v. *Hawaii*, *supra*; *Nielsen* v. *Preap*, 138 S. Ct. 1279 (2018); *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Again, the Court granted certiorari in *Texas* to review the preliminary injunction against the DAPA and expanded DACA policies. Just as in *Texas*, even if the question were only whether to maintain the nationwide "status quo" while litigation proceeds, Regents Br. in Opp. 22, in a case of this magnitude the answer should come from this Court.

In any event, respondents are plainly wrong to assert (Regents Br. in Opp. 15) that it would be difficult for the Court to "fully resolve the litigation at this stage." This Court always has the authority, in reviewing a preliminary injunction, to "address the merits" of the litigation when appropriate. *Munaf* v. *Geren*, 553 U.S. 674, 691 (2008). Moreover, the district court also certified for interlocutory appeal its order resolving the government's motion to dismiss, in which the government sought to dismiss the entire case. And the court of appeals affirmed that order alongside the preliminary injunction. Supp. Br. App. 61a-77a. If this Court grants certiorari and agrees with the government on the merits, termination of this litigation would thus not only be "[]possible," Regents Br. in Opp. 15, but inevitable.

Respondents also err in contending (Regents Br. in Opp. 18) that the earlier dispute about the scope of the record counsels against further review. Respondents themselves recognize (*ibid.*) that the Court does not

need to resolve any record issues to review the preliminary injunction itself. The Court would also, of course, not need to resolve the scope of the record for APA review if it determines the rescission is not reviewable under the APA at all. If the Court determines that the merits of respondents' claim are reviewable under the APA, it may need to determine the scope of the record. But that subsidiary question itself is one on which the lower courts are in need of this Court's guidance. See, *e.g.*, 138 S. Ct. 443.

c. Contrary to respondents' assertions (Indiv. Br. in Opp. 21), the government's conduct has been consistent with the need for prompt resolution of this dispute. It has so advocated from the very start of this litigation, and it has made considerable effort in all of these cases to make it possible—filing briefs in advance of court-ordered deadlines, seeking expedition, and seeking certifications for interlocutory appeal of dispositive rulings. Respondents nevertheless fault (State Br. in Opp. 16) the government for not requesting stays of the injunctions here and in the related cases. But seeking such relief is not a prerequisite to seeking certiorari. And the government has taken other steps to ensure that the injunctions are not unnecessarily prolonged, including filing a petition for a writ of certiorari before judgment within days of the entry of the first injunction and filing this petition in time for the Court to hear this dispute in the ordinary course before the end of this Term.

d. Finally, a decision from this Court would not "preempt the political process." Indiv. Br. in Opp. 24. A decision concerning DHS's authority to rescind DACA would say nothing about Congress's unquestioned power to alter the immigration status of DACA recipients. And if anything, it is the preliminary injunction obtained by

respondents and the legal uncertainty surrounding the rescission that is impeding legislative efforts.

2. Review of the court of appeals' judgment is further warranted because the decision is wrong.

a. Establishing enforcement policies is a type of agency action that "traditionally" has been regarded as unsuitable for judicial review, *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985), and is therefore "committed to agency discretion by law," 5 U.S.C. 701(a)(2). Pet. 17-21. Respondents argue (State Br. in Opp. 19-22) that rule does not apply because DHS supposedly based its rescission decision solely on a legal conclusion—namely, that DACA is unlawful. But even if *Chaney* "left open" whether resting on a legal ground can render a traditionally unreviewable decision reviewable, *id.* at 19 (citation omitted), this Court's subsequent decision in *I.C.C.* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 (1987) (*BLE*), removes any doubt. See Supp. Br. App. 82a (Owens, J., concurring in the judgment). As the *BLE* Court explained, agency actions falling within a "tradition of nonreviewability" do not "become[] reviewable" any time they rest on the agency's view of the underlying legal regime. 482 U.S. at 282-283. Indeed, "a common reason for failure to prosecute an alleged criminal violation is the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction," yet it is "entirely clear" that such decisions are unreviewable. *Id.* at 283.

In any event, DACA's rescission is also based on concerns about the implications of maintaining a nonenforcement policy of questionable legality and other policy concerns. See Pet. 23-28. In other words, it reflects the sort of "complicated balancing of a number of

factors which are peculiarly within [the agency's] expertise" that makes enforcement discretion traditionally unreviewable. *Chaney*, 470 U.S. at 831. Particularly in light of Secretary Nielsen's official memorandum clearly stating that these concerns justify rescinding DACA "whether the courts would ultimately uphold [the policy] or not," Pet. App. 123a, judicial review of such a decision is not required to "ensur[e] clear public accountability for government actions." State Br. in Opp. 21.

Respondents also briefly repeat (State Br. in Opp. 19) the district court's theory that programmatic determinations of enforcement priorities are "different from day-to-day agency nonenforcement decisions." Pet. App. 28a (citation omitted). The court of appeals declined to endorse that theory for good reason: it is flatly contrary to *Chaney*, which itself concerned the programmatic determination whether to enforce the Federal Food, Drug, and Cosmetics Act with respect to drugs used to administer the death penalty. See 470 U.S. at 824-825.

b. Even if the decision were reviewable, it was eminently reasonable for DHS to rescind DACA based on three independent rationales.

First, the rescission is supported by DHS's serious doubts about the legality of the policy. Pet. 23-27. Contrary to respondents' assertions (Regents Br. in Opp. 32), that rationale is readily discernible from the Duke memorandum—which explained that, in light of the *Texas* decisions and the Attorney General's letter, the DACA policy "*should* be terminated," not that it *must*. Pet. App. 117a (emphasis added). Acting Secretary Duke rescinded the policy "[i]n the exercise of [her] authority in establishing national immigration policies and priorities," not as compelled by law. *Ibid.* And in any

event, the Nielsen memorandum removes any doubt whether the rescission rests on concerns about maintaining an enforcement policy of questionable legality, independent of its ultimate legality. See *id.* at 123a.

Respondents contend (Indiv. Br. in Opp. 31-32) that the government did not adequately consider either potential non-merits defenses to a lawsuit by the *Texas* plaintiffs or DACA recipients' reliance interests. But there are "sound reasons for a law enforcement agency to avoid discretionary policies that are legally questionable," wholly apart from whether those policies will ultimately be invalidated by courts, including "the risk that such policies may undermine public confidence in and reliance on the agency and the rule of law." Pet. App. 123a. Respondents also provide no basis for second-guessing DHS's conclusion that these concerns "outweigh" any reliance interests that DACA recipients may assert in the maintenance of such a policy. *Id.* at 125a.

Second, the rescission is justified by independent policy concerns that Secretary Nielsen explained would support rescission "[e]ven if a policy such as DACA could be implemented lawfully." Pet. App. 124a; see Pet. 27-28. Respondents insist that the Court ignore these concerns because the Nielsen memorandum was not a "'fresh agency action' (a Rescission 2.0)." Indiv. Br. in Opp. 33 (citation omitted). Respondents would apparently require DHS to reset this protracted litigation by issuing a "new" independent agency decision on DACA before the current Secretary could offer any further explanation of the rescission. But where, as in *NAACP*, a court determines that an agency's initial explanation is insufficient and requests further explanation, "it is incumbent upon the court to consider that explanation when it arrives." *Alpharma, Inc.* v. *Leavitt*,

460 F.3d 1, 6 (D.C. Cir. 2006). That is particularly appropriate here, given that every court to have addressed the question has agreed that the rescission did not require notice-and-comment rulemaking and therefore the Nielsen memorandum itself satisfies the procedural requirements for a new agency action.

Third, the rescission is supported by DHS's correct determination that the DACA policy is unlawful. Pet. 28-30. Although respondents criticize (State Br. in Opp. 23-25) DHS for failing to sufficiently explain its legal reasoning, it was utterly reasonable for DHS to rely on the Fifth Circuit's detailed analysis of the closely related DAPA and expanded DACA policies. See Pet. App. 122a ("Any arguable distinctions between the DAPA and DACA policies are not sufficiently material to convince me that the DACA policy is lawful.").

Respondents remarkably contend that the *Texas I* decision is "inapposite." Indiv. Br. in Opp. 30 (citation omitted). They observe (Regents Br. in Opp. 32) that the Fifth Circuit cited INA provisions that create a mechanism for aliens to derive lawful immigration status from the status of their U.S. citizen children. Because no parallel pathway to lawful status allegedly exists for DACA recipients, respondents contend that no direct conflict with the INA exists here. *Ibid.*; see Supp. Br. App. 52a. But the pathway to lawful status in *Texas I* is available to only *some* of the aliens who would have qualified for DAPA, see 809 F.3d at 179-180 (not for parents of lawful permanent residents), and to *none* of the aliens who would have qualified for expanded DACA, see *Texas II*, 328 F. Supp. 3d at 724. A direct conflict with those particular provisions therefore could not have been necessary to the Fifth Circuit's judgment. They are simply part of the "INA's specific and intricate

provisions" that preclude DHS from creating vast new deferred-action policies. *Texas I*, 809 F.3d at 186.

Respondents also observe (Regents Br. in Opp. 32) that DAPA would have been available to approximately 4.3 million aliens, while DACA has been granted to "only" around three quarters of a million aliens. But that difference cannot be ascribed "legal significance." *Texas II*, 328 F. Supp. 3d at 724 (emphasis omitted). At the outset, the right comparator is not the number of aliens *granted* DACA, but the number qualified to *request* it: approximately 1.5 million. See *id.* at 676. In either case, a non-enforcement policy affecting 700,000 or 1.5 million aliens is plainly a policy of "vast 'economic and political significance'" to which the Fifth Circuit's analysis applies. *Texas I*, 809 F.3d at 183 (citation omitted).

c. Finally, the court of appeals erred in affirming the denial of the government's motion to dismiss the other ancillary claims. Pet. 30-31. No respondent defends the court's due-process ruling. Cf. State Br. in Opp. 31-32 (urging only that the Court decline to review it). As for equal protection, respondents make the puzzling contention that this Court's decision in *AADC* does not apply because this case purportedly does not implicate *AADC*'s concerns about "inhibiting prosecutorial discretion, allowing continuing violations of immigration law, and impacting foreign relations." *Id.* at 32 (citation omitted). But respondents assert an equal-protection claim in an effort to prevent DHS from rescinding a discretionary *non-enforcement policy* sanctioning the *ongoing violation* of federal immigration law by 700,000 aliens based, at least in part, on their assertion that the primary beneficiaries of that policy are nationals of certain *foreign countries*. That claim, of course, directly implicates the *AADC* Court's concerns.

In any event, respondents have not adequately pleaded an equal-protection claim even if *AADC* does not apply. See Pet. 31.

3. The Court should also grant the government's petition in *Trump* v. *NAACP*, No. 18-588 (filed Nov. 5, 2018). Granting certiorari before judgment in *NAACP* would eliminate any argument that the Nielsen memorandum is not squarely before the Court—a course that seems particularly prudent given respondents' failure to offer any response to the content of that memorandum here. The Court may also wish to grant the petition in *Nielsen* v. *Batalla Vidal*, No. 18-589 (filed Nov. 5, 2018), despite the overlapping claims, to ensure the fullest presentation of the issues. Supp. Br. 11.

Respondents in those cases also oppose certiorari by arguing that the government has not demonstrated "exigent circumstances" justifying certiorari under Rule 11. *NAACP* Br. in Opp. 13. But the Court grants certiorari before judgment "not only in cases of great public emergency but also in situations where similar or identical issues of importance [are] already pending before the Court and where it [i]s considered desirable to review simultaneously the questions posed in the case still pending in the court of appeals." Stephen M. Shapiro et al., *Supreme Court Practice* § 2.4, at 86 (10th ed. 2013); see Supp. Br. 11. That rationale applies here.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari and supplemental brief, the petition should be granted. The petition in *Trump* v. *NAACP*, No. 18-588 (filed Nov. 5, 2018), should also be granted and the case consolidated with this one. The petition in *Nielsen* v. *Batalla Vidal*, No. 18-589 (filed Nov. 5, 2018), should either be granted and consolidated or, at a minimum, be held pending resolution of the other petitions and any further proceedings in this Court.

Respectfully submitted.

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