No. 18-588

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. In September 2017, the Department of Homeland Security (DHS) determined, in accordance with the views of the Attorney General, that the non-enforcement policy known as Deferred Action for Childhood Arrivals (DACA) was likely unlawful and should be wound down in an orderly fashion. Such a quintessential exercise of the Secretary of Homeland Security's authority to establish "national immigration enforcement policies and priorities," 6 U.S.C. 202(5) (2012 & Supp. V 2017), is not judicially reviewable and was eminently reasonable in any event. See Pet. 17-31, *United States DHS* v. *Regents of the Univ. of Cal.*, No. 18-587 (Nov. 5, 2018); Reply Br. 6-11, *Regents*, *supra* (No. 18-587). Yet DHS has been compelled by two nationwide preliminary injunctions to retain the unlawful policy and thereby sanction the continuing violation of federal immigration law by nearly 700,000 aliens.

Last February, this Court declined to review the first of those injunctions before the court of appeals could pass on its validity. See *DHS* v. *Regents of the Univ. of Cal.*, 138 S. Ct. 1182 (2018) (No. 17-1003). The Court made clear its expectation, however, that the court of appeals "w[ould] proceed expeditiously to decide th[e] case," at which time the government could renew its request. *Id.* at 1182. More than ten months later, the court of appeals' judgment is here and the Court is presented the opportunity it anticipated in February. For the reasons stated in the government's reply brief filed today in *Regents*, *supra* (No. 18-587), the Court should now grant the government's *Regents* petition, and resolve this important dispute this Term.

2. In addition to granting certiorari in *Regents*, the Court should also grant certiorari before judgment in this case. Such an order would be consistent with this Court's past practices in similar circumstances. And it would ensure that the Court both receives a comprehensive presentation of the relevant issues and has an adequate vehicle for the timely and definitive resolution of this dispute. See Pet. 16-17; Supp. Br. 11, *Regents*, *supra* (No. 18-587). Respondents' arguments to the contrary are unpersuasive.

a. Respondents argue at length (Br. in Opp. 13) that this case "does not involve exigent circumstances" that would justify granting certiorari before judgment. But that is not the right standard. When the government filed its petitions in these cases, no court of appeals had addressed the questions presented. The government therefore explained that this dispute met the Court's heightened standard for certiorari before judgment because the issues here are of such "imperative public importance as to * * * require immediate determination

in this Court." Sup. Ct. R. 11; see Pet. 14-15; *Regents* Pet. 15-17. By virtue of the Ninth Circuit's intervening judgment, however, the certiorari decision in these cases is no longer governed by that standard—and thus the bulk of respondent's opposition is moot.

Most obviously, the certiorari decision in the *Regents* cases is now governed by the Court's ordinary standard under Rule 10. As explained more fully in the briefing in those cases, further review is plainly warranted under the Rule 10 standard. See *Regents* Reply Br. 1-11. The Ninth Circuit's judgment, however, also affects the standard for determining whether certiorari before judgment is appropriate here. As the government explained in its supplemental briefing, this Court has granted certiorari before judgment "not only in cases of great public emergency but also in situations where similar or identical issues of importance were already pending before the Court and where it was 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 *Regents* Supp. Br. 11 (citing *United States* v. *Fanfan*, 542 U.S. 956 (2004) (No. 04-105) (granting certiorari before judgment in companion case to *United States* v. *Booker*, 543 U.S. 220 (2005) (No. 04-104)); *Gratz* v. *Bollinger*, 537 U.S. 1044 (2002) (No. 02-516) (granting certiorari before judgment in companion case to *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) (No. 02-241))).

Respondents ignore these precedents, but similar considerations strongly counsel in favor of granting the government's petition here. Specifically, in granting certiorari in this case alongside the *Regents* petition, the Court would eliminate any argument that Secretary

Nielsen's June 22 memorandum is not part of the record before this Court and would bring directly before the Court the district court's consideration of the impact of that memorandum on the resolution of this dispute. See Pet. 15-17. The Ninth Circuit's refusal to undertake that analysis and the *Regents* respondents' refusal to address the contents of the Nielsen memorandum in their briefs in opposition only underscores the wisdom of that approach.

b. Contrary to respondents' assertion (Br. in Opp. 30-33), moreover, the entire Nielsen memorandum is relevant to the Court's consideration of the questions presented. Respondents insist that the Court ignore the bulk of that memorandum because they claim it was not a "separate administrative action." *Id.* at 30 n.12; cf. *Regents* Indiv. Br. in Opp. 33 (arguing that the Nielsen memorandum is irrelevant because it was not a "'fresh agency action' (a Rescission 2.0)") (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 here, 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 in any event.

To be sure, unlike the respondents in *Regents*, respondents here now concede (Br. in Opp. 32) that the

Court can and should consider certain aspects of the Nielsen memorandum. They nevertheless contend that only "amplifi[cations]" of previously offered rationales may be considered after remand, not "new reason[s] for why the agency *could* have taken the action"—which they argue means that only Secretary Nielsen's "legal analysis may be considered." *Id.* at 31-32 (citation and internal quotation marks omitted). On a remand for insufficient explanation, however, an agency is free to engage in and offer to the reviewing court "*additional* investigation or explanation" for its action. *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985) (emphasis added).

Camp v. *Pitts*, 411 U.S. 138 (1973) (per curiam), is not to the contrary. In the passage on which respondents rely, the Court discussed the appropriate scope of "affidavits or testimony" that could be offered directly to the reviewing court to allow it to properly assess agency action. *Id.* at 143. The Court placed no limitations on the explanation an agency might offer if the court found that the reasons offered at the time of the decision were insufficient and the decision was remanded to the agency for further consideration. *Ibid.* And the Court's ambiguous dicta in *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633 (1990), about the scope of any remand is similarly inapposite. See *id.* at 654 (noting that, where an agency's initial explanation is insufficient, "the preferred course" "'except in rare circumstances, is to remand to the agency for additional investigation or explanation'") (quoting *Florida Power & Light Co.*, 470 U.S. at 744).

The rule against post hoc rationalizations generally "forbids judges to uphold agency action on the basis of rationales offered by anyone other than the proper

decisionmakers." *Alpharma*, 460 F.3d at 6. It "applies to rationalizations offered for the first time in litigation affidavits and arguments of counsel." *Ibid.* An official memorandum offered by the Secretary of Homeland Security explaining why DHS's decision to rescind DACA "was, and remains, sound," *Regents* Pet. App. 121a, is neither. For that reason, the Court should grant the government's petition in this case alongside the *Regents* petition to eliminate any argument that it may not consider the implications of Secretary Nielsen's memorandum on the resolution of this dispute.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari before judgment should be granted and the case consolidated with *United States DHS* v. *Regents of the University of California*, No. 18-587 (filed Nov. 5, 2018), for the Court's consideration this Term.

Respectfully submitted.

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