No. 17-1003

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

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

Cases: Page

Statutes and rule:

Statutes and rule—Continued: Page

Miscellaneous:

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This Court's review is needed now. The district court has entered an unprecedented nationwide injunction requiring the government not simply to tolerate, but to affirmatively sanction, a continuing violation of federal law by nearly 700,000 aliens under a policy that is materially indistinguishable from one previously found unlawful by the Fifth Circuit in a decision affirmed by an equally divided Court. Another court recently heard arguments over whether to enter an injunction even broader than the first. And while no one, respondents included, contends that the legality of DACA's rescission will be finally resolved without this Court's review, the timing of the order below coupled with this Court's calendar means that, absent immediate intervention, there would be little chance the Court would resolve this dispute for at least another year.

Until then, the government will be required to litigate not only in the Ninth Circuit, but also in seven additional suits in federal courts across the country, the legality of an agency decision that is both judicially unreviewable and plainly lawful. In nearly every one of those cases, plaintiffs are seeking similar, if not broader, nationwide injunctions. Onerous, wide-ranging discovery and administrative-record orders issued in this sprawling litigation have already required this Court's supervision once and, if litigation continues, may well do so again.

None of that need occur. Since the government filed its petition for a writ of certiorari before judgment, the court of appeals has granted the parties' petitions for interlocutory appeal from the district court's order on the government's motion to dismiss the entire case, and has consolidated those appeals with the existing appeal of the preliminary injunction. 1/26/18 Order. The entire case is now "in the court[] of appeals." 28 U.S.C. 1254. And, by virtue of the *Texas* litigation (which precipitated the Acting Secretary's decision here), the Court is already familiar with the issues presented by this case, making further percolation unnecessary. The government respectfully submits that the appropriate course in these unusual circumstances is to grant certiorari before judgment and resolve this critically important dispute now.

1. Section 1254(1) confers on this Court "unqualified power," *Camreta* v. *Greene*, 563 U.S. 692, 700 (2011), to review "[c]ases in the courts of appeals * * * before * * * rendition of judgment," 28 U.S.C. 1254(1). Although this Court exercises that power only on a showing of "imperative public importance," Sup. Ct. R. 11, that standard has been met here. Pet. 12-15.

Respondents try to minimize the unprecedented injunction, describing it as "limited" (State Br. in Opp. 4) and "routine[]" (Indiv. Br. in Opp. 18). But the district court's order commands the government to maintain a discretionary policy of non-enforcement involving more than half a million individuals who concededly have no lawful immigration status and who indisputably have no right to the policy's continuation. Cf. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (*AADC*). Not only does the DACA policy tolerate these undisputed ongoing violations of federal law, it makes the recipients eligible for affirmative benefits (including work authorization). See, *e.g.*, Regents Br. in Opp. 3. Although nationwide injunctions have been entered with troubling frequency in recent years, this one in particular is anything but routine.

It is no answer that the court's injunction permits DHS to deny deferred action "on an individualized basis" and to retain its authority to remove a DACA recipient at any time. Regents Br. in Opp. 15 (citation omitted). Respondents know full well that the principal reasons for denying the affected aliens the continued benefits of DACA are not individualized at all. That is why they confidently assert that, despite these "limitations," the injunction will maintain the prior "status quo." *Ibid.*

Respondents fault (Regents Br. in Opp. 16-17) the government for not requesting a stay. But such a request would have run counter to DHS's goal of avoiding further abrupt shifts in the administration of the Nation's immigration-enforcement policies. Respondents cannot fairly deny (Indiv. Br. in Opp. 19 n.5) that a stay would present such a risk, particularly while simultaneously arguing (Regents Br. in Opp. 20) that, regardless

of the disposition of the government's petition, additional grounds exist on which respondents or others could seek to enjoin DACA's rescission again.

Moreover, a stay would do nothing to mitigate the institutional injury to the United States involved in needlessly prolonging these meritless suits. Respondents contend (Indiv. Br. in Opp. 20) that "there is no reason to believe" the government will face protracted litigation, because the Ninth Circuit has set an expedited briefing schedule and the district court has stayed discovery pending appeal. But respondents do not dispute that denying the government's petition would prevent *this Court* from hearing the case this Term and, in all likelihood, from resolving the dispute before 2019 at the earliest. And they ignore that the government is facing the same litigation before several other courts, with no guarantee that all of those courts will grant stays of discovery.

Contrary to respondents' assertions (Indiv. Br. in Opp. 12-13), the interlocutory nature of the case provides no basis to deny review. This Court reviews interlocutory decisions that present important legal issues. See, *e.g.*, *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Arizona* v. *United States*, 567 U.S. 387 (2012). Indeed, the Court granted certiorari in such a posture in *Texas* itself. Moreover, by virtue of the court of appeals' recent orders, the entire case is now presented as one consolidated appeal and may be transferred to this Court "upon the petition of *any* party." *Camreta*, 563 U.S. at 700 (quoting 28 U.S.C. 1254(1)); see Stephen M. Shapiro et al., *Supreme Court Practice* § 6.16, at 426 (10th ed. 2013). And, in any event, even if only the preliminary injunction were before this Court,

the Court's "authority to address the merits" of the entire litigation would remain "clear." *Munaf* v. *Green*, 553 U.S. 674, 691 (2008). "Review of a preliminary injunction 'is not confined to the act of granting the injunctio[n], but extends as well to determining whether there is any insuperable objection, in point of jurisdiction or merits, to the maintenance of [the] bill, and, if so, to directing a final decree dismissing it.'" *Ibid.* (citation omitted; brackets in original).*

Finally, the possibility that an Act of Congress could moot this case is not a persuasive reason to postpone review. Cf. Regents Br. in Opp. 18. Proposed legislation addressing the immigration status of individuals like those covered by DACA has been advanced for nearly two decades. See, *e.g.*, S. 1291, 107th Cong., 1st Sess. (2001) (DREAM Act). Congress's failure to pass such legislation was one of the principal reasons given for adopting DACA. See The White House, *Remarks by the President on Immigration* (June 15, 2012), https://go.usa.gov/xnZFY. It also was among the grounds on which the Fifth Circuit relied in concluding that DAPA and the expansion of DACA were unlawful. *Texas* v. *United States*, 809 F.3d 134, 185-186 (2015), aff'd, 136 S. Ct. 2271 (2016). And it was identified by the Attorney General and the Acting Secretary as among the reasons the original policy was unlawful. Pet. App. 114a. It would be passing strange for this

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* Respondents' assertion (Regents Br. in Opp. 20) that record supplementation is necessary to determine whether the Acting Secretary's reasons were pretextual is entirely backward. Respondents must make a "strong showing of bad faith or improper behavior" *before* record supplementation is appropriate, not the other way around. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971).

Court to rely on recently renewed legislative efforts (taken in light of DACA's rescission) as a reason to leave that policy in place. Congress may ultimately accept the President's invitation to provide relief that the Acting Secretary has determined the INA does not currently allow. But unless and until Congress takes that step, it is the responsibility of the Judiciary—and, ultimately, of this Court—to resolve the current dispute.

2. Review of the district court's injunction is further warranted because it is wrong in several, independent respects.

a. First, the Acting Secretary's exercise of her discretion to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. 202(5), is a classic 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. 15-21.

Respondents stake nearly their entire argument on this score (*e.g.*, State Br. in Opp. 16-18) on the fact that the enforcement priorities at issue are informed by the Acting Secretary's judgment on the lawfulness of DACA. Even if credited, that asserted basis for review would apply only to the Acting Secretary's legal judgment, not her independent litigation-risk rationale. But, in fact, this Court has already rejected respondents' argument. 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. *I.C.C.* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987). As this Court emphasized, "a common reason for failure to prosecute an al-

leged 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 not reviewable. *Ibid.* And the same is true here. The question is what *type of action* the agency took, not what *explanation*, if any, it gave.

Respondents repeat (State Br. in Opp. 17) the district court's observation that *Chaney* concerned a decision "not to initiate enforcement proceedings" against a particular class of regulated parties, while the Acting Secretary's decision rescinded such a policy. But like the district court, they fail to explain why a decision whether to *retain* such a policy does not involve all of the same considerations as a decision whether to *adopt* one. It would defy reason after *Chaney*, for example, to conclude that a subsequent FDA decision to rescind its unreviewable policy of non-enforcement and to evaluate each complaint on a case-by-case basis would be any more susceptible to judicial review. Yet that is precisely analogous to the situation here.

Respondents also echo the district court's theory that "programmatic determinations" of enforcement priorities are "'quite different from day-to-day agency nonenforcement decisions.'" Regents Br. in Opp. 28-29 (citation omitted). But that is flatly contrary to *Chaney*, which 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. Moreover, respondents, like the district court, do not explain why agency decisions about how its "resources are best spent" or how enforcement activities would "best fit[] the agency's overall policies," *id.* at 831, are not just as susceptible, if not more so, to implementation through

broad guidance as through case-by-case enforcement, and thus fail to provide any reason why such decisions should be reviewable.

b. Second, at a minimum, respondents' challenges to the Acting Secretary's decision must be channeled through the INA's exclusive scheme for judicial review of final removal orders. Pet. 21-24; see 8 U.S.C. 1252. Congress's intent to establish a comprehensive scheme for administrative and judicial review is "fairly discernible," *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1992) (citation omitted), from Section 1252(g)'s jurisdictional bar on independent suits arising from "action[s]" by the Secretary to "commence proceedings," which this Court explained in *AADC* is intended to channel challenges to "'no deferred action' decisions" through "the streamlined process that Congress has designed," 525 U.S. at 485. And that intent is manifest in Section 1252(b)(9), which channels into the review of final removal orders *all* questions of fact or law arising from any action taken to remove an alien from the United States. See *id.* at 483.

Respondents assert (Indiv. Br. in Opp. 26) that Section 1252(g) is limited to "three specific types of decisions or actions" and urge that this case "involves none of them." But the rescission of the DACA policy *is* an "action" in furtherance of the agency's "commence-[ment] [of] proceedings" against aliens who are unlawfully in the country. 8 U.S.C. 1252(g). In any event, respondents fail to engage with the government's explanation (Pet. 22-24) that even if Section 1252(g) alone did not expressly preclude this suit, Section 1252 as a whole demonstrates Congress's intent to foreclose collateral attacks like respondents' here.

Adherence to these principles would not produce a "sweeping bar to judicial review." Regents Br. in Opp. 24 n.6. It would simply channel respondents' claims through the review process set forth in Section 1252. See *Thunder Basin*, 510 U.S. at 207 n.8 (where claims are merely channeled through administrative and judicial review, the presumption of reviewability is not implicated); see also *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 19 (2000).

c. Third, even if the Rescission Memo were reviewable, it was eminently reasonable for the Acting Secretary to begin an orderly wind-down of a discretionary policy, based on grave concerns about its legality and her understanding that impending litigation would almost certainly have brought the policy to an immediate and disruptive end. Pet. 24-32.

Contrary to respondents' assertions (Regents Br. in Opp. 32), there is no need to look "between the lines" of the Rescission Memo to see the Acting Secretary's concern. In fact, the decision spends several pages describing the litigation challenging DAPA and expanded DACA; Secretary Kelly's decision to rescind those policies based on the plaintiffs' "likelihood of success on the merits of [that] ongoing litigation"; Texas's subsequent announcement that it planned to amend its complaint to challenge the original DACA policy; and the Attorney General's advice to the Acting Secretary that "it is likely that potentially imminent litigation would yield similar results" to the previous challenges. Pet. App. 111a-114a. That extended discussion would have been unnecessary if the Acting Secretary had been concerned solely with the legality of the DACA policy *vel non*, and not also its likely fate in the courts.

Nor is it remotely accurate to characterize her decision as simply "trad[ing] one lawsuit for another." Indiv. Br. in Opp. 30 (citation omitted). By the time of that decision, pending litigation had already resulted in a nationwide injunction of the materially indistinguishable DAPA and expanded DACA policies. That injunction had been affirmed by the court of appeals and by this Court. And the same litigants were threatening to amend their suit to challenge DACA before the very same district court. The question before the Acting Secretary was whether an end to DACA would be imposed abruptly by a federal court or gradually through an orderly administrative wind-down. For similar reasons, even assuming anyone could assert any reliance interests in continuing the policy, those interests would *support*, not undermine, the Acting Secretary's decision.

Although respondents all criticize the Acting Secretary for failing to sufficiently consider allegedly material differences between DAPA and DACA, they devote a single footnote among their three briefs to describing what those differences might be. See Indiv. Br. in Opp. 29 n.6. As the government has explained (Pet. 26-28), those distinctions were either expressly rejected by the Fifth Circuit, irrelevant to its analysis, or both. Moreover, respondents entirely fail to grapple with the fact that the *Texas* decision—which four Justices of this Court voted to affirm—flatly declared the expansion of DACA itself to be substantively unlawful. See 809 F.3d at 147 n.11, 186. Neither the district court nor respondents have attempted to explain why the modest differences between DACA and expanded DACA, Pet. App. 104a-105a, could even conceivably make any difference to the Fifth Circuit's analysis.

In any event, the Acting Secretary's reasonable determination, informed by the Attorney General's advice, that the DACA policy was unlawful provides an independent basis for upholding the rescission of that policy. Pet. 31-32. Respondents make no serious effort to contest that rationale on its terms. Instead, they principally complain (State Br. in Opp. 20) that the government did not explain why it "changed [its] mind[]" about DACA's legality. But the Rescission Memo fully recounted the litigation history of DAPA and expanded DACA, and the definitive rejection of those materially indistinguishable policies by the courts was obviously reason enough for the government to revisit its prior legal analysis.

The individual respondents also strangely suggest (Indiv. Br. in Opp. 28) that the government somehow forfeited this argument when it argued to the district court, as it has to this Court, that it need not pass on the ultimate legality of DACA to uphold the Rescission Memo. Our argument before the district court was the same as it is here: there is no need for any court to independently determine the legality of the DACA policy, because it is enough that the Acting Secretary acted reasonably in rescinding that policy based on a nationwide decision of the Fifth Circuit, affirmed by an equally divided vote of this Court. Respondents have not identified a single case from this Court or any other concluding that an agency may not rescind a wholly discretionary policy in similar circumstances.

d. Finally, the district court's preliminary injunction could not be supported on any alternative ground. Respondents advert to their "notice-and-comment claim" (Regents Br. in Opp. 20), but the district court properly dismissed that claim. Pet. App. 77a-80a. If reviewable

at all, the Rescission Memo was a "general statement[] of policy," exempt from notice-and-comment requirements. 5 U.S.C. 553(b)(A). And respondents' "equal protection claims based on discriminatory purpose" (State Br. in Opp. 9) are also doomed to fail, because respondents cannot remotely satisfy the demanding standard applicable to discrimination claims in the immigration-enforcement context. See *AADC*, 525 U.S. at 487-492.

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For the foregoing reasons and those stated in the petition for a writ of certiorari before judgment, the petition should be granted. Unless the Court is prepared to rule summarily on the petition, expedited briefing should be ordered, and the case should be set for argument on the April 2018 calendar.

Respectfully submitted.

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