IN THE SUPREME COURT OF THE UNITED STATES

No. 18A-

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

v.

CASA DE MARYLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION TO EXPEDITE CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI AND TO EXPEDITE CONSIDERATION OF THIS MOTION

The Solicitor General, on behalf of the U.S. Department of Homeland Security (DHS) and the other federal parties, hereby moves, pursuant to Supreme Court Rule 21, for expedited consideration of the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit filed in this case. The petition for a writ of certiorari is being filed simultaneously with this motion. Because of the importance of the questions presented for review and the urgent need for their prompt resolution, the government moves for expedited consideration of the petition so that the petition may be resolved before the

Court's summer recess. The government also moves for expedited consideration of this motion and for this Court to order respondents to respond to this motion by Wednesday, May 29, 2019. Respondents have agreed to respond to this motion by close of business on that date.

1. a. This case is one of several pending before this Court concerning the policy of immigration enforcement discretion known as Deferred Action for Childhood Arrivals (DACA). See App. at 97a-101a, DHS v. Regents of the Univ. of Cal., No. 18-587 (Nov. 5, 2018) (Regents App.) (June 15, 2012 memorandum). As discussed in the government's petition for a writ of certiorari, deferred action is a practice in which the Secretary of Homeland Security exercises enforcement discretion to notify an alien of the decision to forbear from seeking the alien's removal for a designated period. See Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 483-484 (1999). DACA made deferred action available for a period of two years, subject to renewal, to "certain young people who were brought to this country as children." Regents App. 97a; see id. at 99a-100a. The DACA policy made clear, however, that it "confer[red] no substantive right, immigration status or pathway to citizenship," because "[o]nly the Congress, acting through its legislative authority, can confer these rights." Id. at 101a. Since its inception in 2012, approximately 793,000 individuals have received deferred action under the DACA policy. Id. at 12a-

13a. As of September 2017, there remained approximately 689,000 active DACA recipients. Id. at 13a.

In 2016, this Court affirmed, by an equally divided Court, a decision of the United States Court of Appeals for the Fifth Circuit holding that two related DHS deferred-action policies -- including an expansion of the DACA policy -- likely violated the Administrative Procedure Act (APA) and were contrary to the Immigration and Nationality Act (INA), and therefore should be enjoined. See United States v. Texas, 136 S. Ct. 2271 (per curiam). In September 2017, the former Acting Secretary of Homeland Security determined that the original DACA policy would likely be struck down by the courts on the same grounds and that the policy was unlawful. Accordingly, she instituted an orderly wind-down of the DACA policy. Regents App. 111a-119a.

Respondents brought this suit in the United States District Court for the District of Maryland challenging the rescission of DACA. 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; 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 Pet. App. 12a. Similar challenges have been brought in district courts in California, New York, and the District of Columbia.

b. The district court granted the government's motion for summary judgment in relevant part. Pet. App. 62a-98a. Although the court concluded that respondents' claims were justiciable, id. at 75a-79a, it rejected on the merits each of respondents' challenges to DACA's rescission, id. at 81a-97a. The court reasoned that the rescission was exempt from APA's notice-and-comment requirements because it represents the agency's guidance on the "exercise of discretion," not "a rule with the force of law." Id. at 82a. It rejected respondents' arbitrary-and-capricious challenge, observing that "[r]egardless of whether DACA is, in fact, lawful or unlawful," the agency's "belief that it was unlawful and subject to serious legal challenge is completely rational." Id. at 83a. And it concluded that respondents' allegation of discriminatory intent was "unsupported by the record," and that they otherwise failed to establish a violation of equal-protection, due-process, or estoppel principles. Id. at 93a; see id. at 84a-95a.*

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* The district court also concluded that it was "theoretically possible" that the government might use information obtained from DACA requestors in a manner inconsistent with estoppel principles, and therefore enjoined DHS to comply with the information-sharing policy as "first announced in 2012" pending further order from the court. Pet. App. 95a; 3/15/18 Am. Order 1; see Pet. App. 95a-97a. The court of appeals, however, vacated that injunction, and it is not at issue in the government's petition. Pet. App. 33a-35a.

c. On May 17, 2019, a divided panel of the court of appeals affirmed in part, reversed in part, vacated in part, dismissed in part, and remanded. Pet. App. 1a-37a. The court first determined that respondents' claims were justiciable. Id. at 14a-25a. It acknowledged that, under Heckler v. Chaney, 470 U.S. 821 (1985), an agency's decision whether "to enforce the substantive law" was presumptively "committed to agency discretion by law," 5 U.S.C. 701(a)(2). Pet. App. 19a; see id. at 18a-19a. But the court concluded that the presumption was inapplicable here, because DACA's rescission was a "[m]ajor agency policy decision[]," rather than an exercise of enforcement discretion "in an individual case." Id. at 20a. The court also concluded that the INA did not require that challenges to DACA's rescission await a final order of removal on the grounds that (1) the rescission of DACA was not a "'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders'" within the meaning of 8 U.S.C. 1252(g) and (2) another judicial review provision in Section 1252, which requires "all questions of law and fact * * * arising from any action taken * * * to remove an alien" be resolved through "judicial review of a final [removal] order," 8 U.S.C. 1252(b)(9), "'applies only with respect to review of an order of removal.'" Pet. App. 14a, 16a (citations omitted).

On the merits, the court of appeals held that the APA's notice-and-comment requirements did not apply to DACA's rescission

because the rescission memorandum made a "general statement[] of policy," Pet. App. 26a (quoting 5 U.S.C. 553(b)(A)), rather than creating a "new binding rule of substantive law," id. at 28a (citation omitted). But it held that the rescission was substantively arbitrary and capricious on the ground that DHS "failed to give a reasoned explanation for the change in policy." Id. at 31a. The court rejected DHS's reliance on the Texas litigation as justifying the change because DACA and the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) policy, one of the two policies enjoined in the Texas litigation, "are not identical." Id. at 32a (citation omitted). And it criticized DHS for not "adequately account[ing] for the reliance interests" of individuals who would be affected by the rescission of the DACA policy. Id. at 33a.

Accordingly, the court of appeals reversed the district court's arbitrary-and-capricious ruling, vacated DACA's rescission in its entirety, and remanded the matter for "further proceedings consistent with this opinion." Pet. App. 36a. In light of that disposition, the court of appeals "decline[d] to decide whether DACA's rescission violates the Fifth Amendment's due process and equal protection guarantees." Id. at 35a. Rather, the court "vacate[d] the district court's judgment on th[o]se issues and dismiss[ed] those claims." Id. at 37a.

Judge Richardson concurred in part and dissented in part, concluding that "the rescission of DACA is judicially unreviewable under the APA." Pet. App. 42a; see id. at 38a-61a. He rejected the majority's new "general enforcement policies" exception to the justiciability principles recognized in Chaney and other cases. Id. at 49a. Judge Richardson noted that such an exception was irreconcilable with Chaney itself, which concerned "the FDA's categorical decision not to take enforcement action against a class of actors (drug manufacturers, prison administrators, and others in the drug distribution chain)" for the use of certain lethal-injection drugs. Id. at 50a. He also reasoned that such an exception was "untenable" as a logical matter, observing that "[s]tandardizing (i.e., generalizing) how agents use their prosecutorial discretion does not alter its character." Id. at 51a.

Judge Richardson determined that respondents' constitutional claims were reviewable, Pet. App. 56a n.6, but he had "little trouble" agreeing with the district court that they failed on the merits, id. at 56a. He reasoned that respondents' due-process claim was meritless because they "fail[ed] to articulate a constitutionally protected life, liberty, or property interest impacted by the rescission." Ibid. And he concluded that respondents' equal-protection claim faltered because they failed to create a "plausible inference" of invidious animus on the part

of the Attorney General or Acting Secretary in "tak[ing] the official government actions at issue," much less the showing of "outrageous discrimination" that would be required to establish what in essence is a selective-prosecution claim. Id. at 58a-59a.

2. For the reasons explained in the government's petition for a writ of certiorari, expedited consideration of the government's petition is warranted. Twenty months ago, DHS determined, in accordance with the views of the Attorney General, that DACA, a discretionary policy of immigration non-enforcement, was unlawful, ill-advised, and should be discontinued. That policy is materially indistinguishable from the DAPA and expanded DACA policies that the Fifth Circuit held were contrary to federal immigration law in a decision that four Justices of this Court voted to affirm. Yet, as a result of two nationwide preliminary injunctions, the government has been required to sanction indefinitely an ongoing violation of federal law being committed by nearly 700,000 aliens pursuant to the DACA policy. And the very existence of this pending litigation (and lingering uncertainty) continues to impede efforts to enact legislation addressing these issues.

There is little question that these conditions, combined with the sheer importance of the questions presented, would ordinarily warrant this Court's prompt review. And, indeed, in February 2018, this Court recognized the need for an "expeditious[]" resolution

of this dispute. DHS v. Regents of the Univ. of Cal., 138 S. Ct. 1182. Since November 2018, however, the government's petitions for writs of certiorari to the Second, Ninth, and D.C. Circuits to review this dispute have been pending before this Court. See DHS v. Regents of the Univ. of Cal., No. 18-587 (filed Nov. 5, 2018); Trump v. NAACP, No. 18-588 (filed Nov. 5, 2018); McAleenan v. Batalla Vidal, No. 18-589 (filed Nov. 5, 2018). Briefing was completed on those petitions in early January 2019. And although the petitions were all filed as petitions for writs of certiorari before judgment, all parties agree that given the Ninth Circuit's intervening decision, the Regents petition is properly treated as an ordinary petition for a writ of certiorari after judgment.

With yet another court of appeals to have now fully considered these issues, the government respectfully submits that further percolation is unnecessary and the time for the Court to act is now. Resolution of the pending petitions in Regents, NAACP, and Batalla Vidal before the summer recess is critical, if the petitions are granted, to afford the government and the multiple private and state parties involved sufficient time to coordinate on a briefing schedule and to allow appropriate time for each side to address, and for the Court to consider and resolve, the many important issues presented by these cases. To be sure, the Court could allow briefing on this petition to proceed on the ordinary schedule, with a view to holding this petition while the Court

resolves any of the other pending cases in which it grants plenary review. But expedited consideration of this petition would permit the Court to consider it alongside the others at the Court's final June Conference and to determine whether, as the government's petition contends, it should be granted and consolidated with the cases in Regents and NAACP.

3. For the foregoing reasons, the government moves that the Court adopt a briefing schedule that would require respondents to file a response to the government's petition for a writ of certiorari by June 4, 2019 -- 4 days longer than the government took to file the petition -- in order to allow the Court to consider the government's petition at its scheduled June 20, 2019 Conference for resolution of the petition before the summer recess. Through this motion, the government waives the 14-day period provided for in this Court's Rule 15.5 between the filing of a brief in opposition and the distribution of the petition and other materials to the Court.

4. Finally, the government also respectfully requests expedited consideration of this motion. To allow for such expedited consideration, respondents have agreed to respond to this motion by close of business on Wednesday, May 29, 2019.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

MAY 2019