Nos. 18-587, 18-588, 18-589

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.,
Respondents.

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

v.

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

KEVIN K. MCALEENAN, ACTING SECRETARY OF HOMELAND SECURITY, ET AL.,
Petitioners,

v.

MARTIN JONATHAN BATALLA VIDAL, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit And Writs of Certiorari Before Judgment To The United States Courts Of Appeals For The District Of Columbia And Second Circuits

JOINT MOTION OF RESPONDENTS FOR ENLARGEMENT OF ARGUMENT TIME AND DIVIDED ARGUMENT AND RESPONSE TO MOTION BY STATE OF TEXAS FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT

In accordance with Supreme Court Rules 21, 28.3, and 28.4, the forty-five respondents in these consolidated proceedings respectfully move to enlarge the total time for oral argument and to divide oral argument time. Respondents ask the Court to extend the total time for oral argument to eighty minutes, and to divide the forty minutes for respondents evenly between Theodore Olson, who would speak on behalf of the individual and other non-state respondents, and California Solicitor General Michael Mongan, who would speak on behalf of the twenty state respondents and the District of Columbia. The State of Texas, amicus curiae supporting petitioners, has also moved to participate in oral argument. Respondents do not oppose that motion, provided that any time allocated to Texas comes out of the time allotted to petitioners, allowing for an equal division of time on both sides.

Counsel for respondents have conferred with the Office of the Solicitor General, and the position of petitioners is as follows: "The government takes no position on respondents' requests to expand oral argument to 40 minutes per side or to divide the time allotted to respondents between state and non-state respondents. The government opposes respondents' suggestion that, if the State of Texas is granted argument time, that time should be taken exclusively from the government's allotted argument time. Texas has not requested that and Texas supports respondents on one of the two questions presented. Accordingly, as previously stated, the government opposes any change in the allotted argument time that would result either in the government's receiving less than the currently allotted 30 minutes of argument time or in the government's receiving less time than respondents."

STATEMENT

1. These consolidated proceedings arise out of nine separate lawsuits filed by respondents in district courts in California, New York, and the District of Columbia. Each suit challenged petitioners' decision to terminate the Deferred Action for Childhood Arrivals (DACA) policy and alleged, among other things, that the decision was arbitrary, capricious, or otherwise not in accordance with law under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

In No. 18-587, the respondents are individual DACA recipients, States, a public university system, a county, a city, and a labor union, who collectively filed five separate suits in the Northern District of California. The district court granted a partial preliminary injunction on the grounds that respondents were likely to succeed on the merits of their APA claim, *Regents* Pet. App. 1a-70a, and denied in part petitioners' motion to dismiss, *see id.* at 71a-90a. The Ninth Circuit affirmed the district court's decision. *Regents* Supp. App. 1a-78a.

In No. 18-588, the respondents are an individual DACA recipient, a company, a private university, a civil rights organization, and labor unions who filed two separate suits in the District Court for the District of Columbia. The district court entered a final judgment vacating the decision to terminate DACA based on its conclusion that the agency's decision was arbitrary and capricious. *NAACP* Pet. App. 1a-74a.

In No. 18-589, the respondents are individual DACA recipients, a nonprofit serving and employing DACA recipients, and States, who filed two separate suits in the Eastern District of New York. The district court entered a preliminary injunction

co-extensive with the Northern District of California's on that basis of respondents' APA claim. *Batalla Vidal* Pet. App. 62a-129a. It also denied in part petitioners' motion to dismiss. *Id.* at 147a-157a.

2. On June 28, 2019, this Court granted certiorari in No. 18-587, granted certiorari before judgment in Nos. 18-588 and 18-589, consolidated the cases, and allotted a total of one hour for oral argument.

3. The State of Texas has filed an amicus curiae brief in support of petitioners on behalf of itself and certain other States. On September 20, 2019, the State of Texas moved for leave to participate in oral argument. Texas requests 10 minutes of argument time.

ARGUMENT

1. These consolidated cases present the important questions whether petitioners' decision to terminate the DACA policy is subject to judicial review and whether that decision was lawful, in particular whether it was arbitrary, capricious, or otherwise not in accordance with law, 5 U.S.C. § 706(2)(A).

Respondents have a range of distinct interests and perspectives. The individual respondents are all DACA recipients who have structured their lives around the DACA policy and stand to lose their deferred action, along with work authorization and other benefits, if the decision to terminate the policy stands. The private entity respondents are, among other things, employers and universities who have made substantial investments in recruiting, hiring, training, and educating DACA recipients.

And the respondent States, their institutions, and their political subdivisions currently have more than 350,000 residents who are DACA recipients; directly employ DACA recipients; have enrolled DACA recipients in their public schools, colleges, and universities; and stand to lose billions of dollars in tax revenue and suffer other harms if DACA is rescinded.

The proposed equal division of argument time will ensure that the various respondents have their interests fully represented, and that the Court receives a full understanding of the perspectives and arguments of all respondents. Theodore Olson, counsel for certain individual respondents, would represent the interests of the individual and other non-State respondents. Michael Mongan, the California Solicitor General, would represent the interests of the States. Both are members in good standing of the bar of this Court and experienced counsel.

This proposed division is particularly appropriate here because respondents include individual DACA recipients, who are most directly affected by the challenged government action (along with entities that work closely with them), as well as States, which as sovereign governments have unique interests that private parties cannot adequately represent. For that reason, the States have filed their own briefs in the courts of appeals and this Court in the two proceedings in which they are respondents; and in both of those proceedings they presented their own oral arguments in the courts of appeals, alongside counsel for the non-state respondents. This Court has regularly divided argument when States and private parties appear on the same side of the case. *See, e.g.*, *Dep't of Commerce v. New York*, 139 S. Ct. 1543 (2019)

(mem.) (State of New York and private respondents); *American Legion v. American Humanist Ass'n*, 139 S. Ct. 951 (2019) (mem.) (Maryland-National Capital Park and Planning Commission and private petitioners); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 466 (2017) (mem.) (State of Colorado and private respondents); *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 566 (2015) (mem.) (State of California and union respondents). *See also* Stephen M. Shapiro, *et al.*, *Supreme Court Practice* 777 (10th ed. 2013) ("Having more than one lawyer argue on a side is justifiable . . . when they represent different parties with different interests or positions.").

2. Additional argument time for respondents and petitioners is also warranted here. These cases present important questions of administrative law, including about the reviewability of agency action. The underlying dispute over petitioners' termination of the DACA policy is also one of great national importance. That policy has allowed nearly 800,000 young people—who arrived in this country as children and are productive and law-abiding residents—to receive deferred action. Petitioners' termination of DACA, which each of the lower courts held to be unlawful (or likely unlawful), would deprive these individuals of deferred action and would harm their families, schools, employers, and communities. This case is also unusually complex, in the sense that it involves a number of different issues and arguments; the California, New York, and D.C. proceedings are each in different procedural postures; and the courts below took distinct analytical approaches to resolving the questions presented here.

This Court has routinely enlarged argument time in cases addressing matters of similar importance and complexity, including when it allowed ninety minutes of total argument time in an earlier challenge to the related Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) policy. *United States v. Texas*, 136 S. Ct. 1539 (2016) (mem.); *see also Dep't of Commerce*, 139 S. Ct. 1543; *American Legion*, 139 S. Ct. 951; *Michigan v. EPA*, 135 S. Ct. 1541 (2015) (mem.); *Obergefell v. Hodges*, 135 S. Ct. 1039 (2016) (mem.); *Friedrichs*, 136 S. Ct. 566; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 565 U.S. 1193 (2012) (mem.).

3. Respondents do not oppose Texas's motion to participate in oral argument, provided that any time given to Texas comes out of the total time allocated to petitioners. As its motion makes clear, Texas's "interests are parallel to" those of petitioners, Motion at 1; the amicus brief it filed in these proceedings is styled as a brief in support of petitioners and argues (like petitioners) that the challenged DHS action rescinding DACA was lawful, and indeed Texas is pursuing separate litigation challenging the legality of the DACA policy that the government rescinded here. Although Texas disagrees with petitioners' arguments on reviewability, that issue is not the focus of the arguments it has made in this Court; indeed, its amicus brief offers just four paragraphs on that subject. *See* Br. at 30-32. Moreover, respondents will fully present the arguments for reviewability, including from the perspective of the states.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Court enlarge the total time for oral argument to eighty minutes, with forty minutes allocated to petitioners (and Texas if allowed to participate) and forty to respondents. Respondents further request that the Court divide the time allocated to respondents equally between Theodore Olson, who would speak on behalf of the individual and other non-state respondents, and California Solicitor General Michael Mongan, who would speak on behalf of the state respondents.

Respectfully submitted,

September 26, 2019

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