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.

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

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

KIRSTJEN M. NIELSEN, SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

MARTIN JONATHAN BATALLA VIDAL, ET AL.

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

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, LOUISIANA, NEBRASKA, SOUTH CAROLINA, AND WEST VIRGINIA, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Counsel Listed on Inside Cover

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

ARI CUENIN
JOHN C. SULLIVAN
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
kyle.hawkins@oag.texas.gov
(512) 936-1700

QUESTIONS PRESENTED

1. Whether the decision of the Department of Homeland Security (DHS) to wind down the DACA policy is judicially reviewable.

2. Whether the DHS's decision to wind down the DACA policy is lawful.

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arizona, Arkansas, Florida, Louisiana, Nebraska, South Carolina, and West Virginia, and Phil Bryant, Governor of Mississippi.[1]

In these lawsuits, Plaintiffs asks courts to force the federal Executive Branch to retain a "deferred action" program (DACA) that the administration believes violates the Constitution. The administration is correct: DACA affirmatively confers "lawful presence" status and work-authorization eligibility on over half a million aliens. DACA is thus materially identical to two programs (Expanded DACA and DAPA) that were invalidated by the Fifth Circuit in a ruling affirmed by an equally divided vote of this Court. *See Texas v. United States*, 809 F.3d 134, 172, 184-86 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam) (*Texas I*). DACA is procedurally and substantively unlawful for much of the same reasons this Court affirmed in that case.

Texas led the group of States successfully challenging Expanded DACA and DAPA. Texas then led the group of States notifying the federal government that they would challenge DACA on the same grounds if

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. The parties received timely notice of filing, and consents have been provided to amici. *See* Sup. Ct. R. 37.

DACA was not wound down. A.R. 238-40.[2] It was because of the Executive's September 2017 DACA-wind-down memorandum that Texas and other States agreed to dismiss their pending lawsuit. Pls.' Stip. of Voluntary Dismissal at 1, *Texas v. United States*, No. 1:14-cv-00254 (S.D. Tex. Sept. 12, 2017), ECF No. 473. And because DACA's rescission was enjoined, the Amici States ultimately filed suit seeking a declaration that DACA was unlawful. *Texas v. United States*, 328 F. Supp. 3d 662 (S.D. Tex. 2018) (*Texas II*).

The petition thus directly implicates the States' efforts to bring about an orderly end to DACA.

[2] A.R. cites the Administrative Record, filed as Notice of Filing Administrative Record, *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. 3:17-cv-05211 (N.D. Cal. Oct. 6, 2017), ECF No. 64-1.

SUMMARY OF ARGUMENT

I.A. When a new presidential administration decides to change—or even reverse—the discretionary policies of the previous one, its decision is not subject to any special scrutiny beyond that set out in the Administrative Procedure Act (APA). The APA forbids the administration from acting in an arbitrary and capricious manner. That remains true both for the implementation of new policies and the rescission of old policies. The decision to terminate the previous administration's policy must meet that standard—and no other.

B. The plaintiffs in these three cases join a litany of litigants around the nation who seek to upend that principle. They argue that rescinding DACA was not lawful—and the Ninth Circuit has agreed. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 510 (9th Cir. 2018). But that argument seeks to impose on the administration a burden the APA does not. The Executive does not act arbitrarily or capriciously by rescinding a prior administration's policy that is not required by law and that the Executive concludes is substantively unlawful.

That is especially so here. The Executive decided to wind down DACA after a new administration reexamined its lawfulness and concluded that DACA would likely be held unlawful. Pet. App. 114a-18a.[3] Nothing in the Immigration and Nationality Act (INA) or any oth-

[3] Pet. App. cites the Appendix to the Petition for a Writ of Certiorari Before Judgment in *U.S. Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, No. 18-587 (S. Ct. filed Nov. 5, 2018).

er federal law *requires* DACA, so its cancellation contravenes no law. Moreover, in response to a lawsuit brought by Texas and a coalition of States, one district court already has concluded that DACA is likely unlawful as both a substantive and procedural matter. Under these circumstances, the Executive's decision satisfies APA review.

This case thus presents an opportunity for the Court to clarify that the cancellation of DACA, like many other discretionary policy decisions, does not merit some special scrutiny beyond that set out in the APA. Applying the correct scrutiny, the plaintiffs' challenge fails.

II.A. The Executive's decision to wind down DACA is especially justified because DACA is substantively and procedurally unlawful. DACA is unlawful for the same reasons that Expanded DACA and DAPA were held unlawful in the previous *Texas I* litigation. *See* 809 F.3d at 172, 184-86. It is substantively flawed because it goes further than mere "prosecutorial discretion" not to deport individuals. DACA confers legal status on individuals, contravening congressional authority to make such determinations.

B. DACA is also procedurally unlawful. The pleadings in the DACA-rescission litigation confirm that it altered substantive rights, yet was issued without APA notice and comment. The Executive cannot be ordered to maintain such an unlawful program. Thus, even on plaintiffs' view of notice-and-comment requirements, injunctions forcing the Executive Branch to continue with DACA cannot be justified.

III. The Court should grant certiorari and reverse all orders enjoining the Executive from winding down

DACA. Although the Ninth Circuit ruled in *Regents of the University of California* after petitioners filed their petition for a writ of certiorari before judgment, 908 F.3d 476, amici agree that granting certiorari in that case is appropriate, Supp. Pet. Br. 9-10. The Ninth Circuit's ruling strengthens the case for granting certiorari before judgment in *Trump v. National Ass'n for the Advancement of Colored People*, No. 18-588 (filed Nov. 5, 2018), and *Nielsen v. Batalla Vidal*, No. 18-589 (filed Nov. 5, 2018), and consolidating the cases for consideration this Term. Only this Court can provide definitive resolution to the dispute over DACA's rescission.

Immediate review is especially warranted here because of the ongoing irreparable harm that DACA inflicts on the States. "[B]ecause DACA increases the total number of aliens in the States by disincentivizing those already present from leaving, the States must provide more . . . social services, which cost more." *Texas II*, 328 F. Supp. 3d at 700. And DACA "allow[s] its recipients to compete with legally present residents" for jobs. *Id.*

ARGUMENT

I. Review Is Needed to Correct a Fundamental Misunderstanding of APA review.

A. A new administration's decision to reverse its predecessor's discretionary policies does not merit special scrutiny.

The arguments against DACA's rescission reflect plaintiffs' fundamental misunderstanding of APA review. Under their view, a court may rely on policy differences and supposed reliance interests to second-guess an agency determination that seeks to change a

policy from a prior administration. And all this even though the agency acts in the same manner to amend the policy as the agency did to enact it in the first instance.

That is not the law. New presidential administrations bring changes in policy and agency priorities. So long as an agency acts within its realm of authority, its decision to alter a policy determination—or even reverse course—is not subject to an enhanced standard of review. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009); *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1036-37 (D.C. Cir. 2012) (describing the argument that agency reversal is subject to more searching review as "largely foreclosed" by *Fox Television Stations*). This flows from the APA's narrow scope of review that limits the judicial inquiry. *Fox Television Stations, Inc.*, 556 U.S. at 514. Critically, courts must not impose substantive judgments on the contested issue and review those policy shifts only for fidelity to APA procedures—even when reliance interests are at issue. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015).

As this Court admonished in *Mortgage Bankers*, courts have no authority to impose procedural requirements beyond those stated in the APA. *Id.* Procedural fairness does not prevent an agency from "unilaterally and unexpectedly" adopting a different interpretation of a regulation the agency is charged with implementing. *Id.* at 1209. Although agencies cannot simply ignore when the new policy "rests upon factual findings that contradict those which underlay its prior policy," they need only provide a reasoned explanation and justify

the change. *Id.* The APA sets the maximum procedural obligations for which agencies must adhere. *Id.* at 1207.

Fundamentally, an agency's policy change need satisfy only the standard it would be held to in the first instance under the APA. *Fox Television Stations*, 556 U.S. at 515. "This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Id.* There is "no basis . . . for a requirement that all agency change be subjected to more searching review." *Id.* at 514. The Court made clear that *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856 (1983), "neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance." *Id.*

Applying the APA in a contrary manner would intrude on the President's Article II obligation to ensure "that the Laws be faithfully executed." U.S. Const. art. II, § 3; *see Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011) ("The legislative and executive departments of the Federal Government, no less than the judicial department, have a duty to defend the Constitution."). When the Executive determines that a prior unilateral executive action is unconstitutional and discontinues it, judicial review cannot involve a free-ranging inquiry beyond the specific standard written into the APA.

This is not to say an agency should act beyond the scope of its statutorily defined authority or that such actions can never be reviewed. If agency policy was "not in accordance with the law" in the first place, it is owed

no deference. Courts, however, are not permitted to apply heightened standards of review to pass on agency policy decisions. In reviewing agency action, a court is prohibited from substituting its policy judgments for those of the agency, whose change in policy must be sustained when it passes muster under the same standard it would have been held to in the first instance. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016); *Fox Television Stations*, 556 U.S. at 513-14.

B. DACA's wind-down satisfies APA review.

As explained above, DACA's wind-down may be enjoined only if Plaintiffs can overcome APA review.[4] The order winding down DACA satisfies that standard easily, for the reasons the petition describes. The Executive has correctly concluded that DACA is unlawful. No law mandates the policy choices DACA embodies. That was why several States, led by Texas, threatened to sue (and then did sue) to enjoin its continuation. The courts below were thus wrong to block DACA's rescission.

1. The administration prudently decided to wind down DACA in part because of the multi-State legal challenge to DACA's lawfulness. On June 29, 2017, the

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[4] The Executive's decisions to create and, later, to wind down DACA are reviewable agency actions under the APA. The APA contains a limited exception barring judicial review when an agency decision is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This exception is "very narrow." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Unreviewability under *Heckler* applies only to "an agency's refusal to take . . . action," such as "an agency's decision not to take enforcement action." *Id.* at 831, 832. In contrast, "when an agency *does* act," the "action itself provides a focus for judicial review" and "can be reviewed to determine whether the agency exceeded its statutory powers." *Id.* at 832.

Texas Attorney General, nine other State Attorneys General, and one Governor sent a letter to the federal Executive Branch proposing a DACA wind-down to end the *Texas I* litigation challenging the Executive's ability to unilaterally confer lawful presence and work authorization. A.R. 238-40. The coalition promised to voluntarily dismiss the lawsuit challenging unlawful deferred-action programs if the Executive Branch agreed, by September 5, 2017, to rescind DACA and not renew or issue any new DACA permits in the future. A.R. 240.[5]

The letter explained why DACA was unlawful, given that "[c]ourts blocked DAPA and Expanded DACA from going into effect, holding that the Executive Branch does not have the unilateral power to confer lawful presence and work authorization on unlawfully present aliens simply because the Executive chooses not to remove them." A.R. 238. Rather, "[i]n specific and detailed provisions, the [Immigration and Nationality Act] expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present." A.R. 238 (quoting *Texas I*, 809 F.3d at 179). "Entirely absent from those specific classes is the group of 4.3 million illegal aliens who would be eligible for lawful presence under DAPA." A.R. 238 (quoting *Texas I*, 809 F.3d at 179). Likewise, "[t]he INA also

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[5] On the same day that the Texas Attorney General sent the letter, he also issued a press release publicly announcing the letter. *AG Paxton Leads 10-State Coalition Urging Trump Administration to Phase Out Unlawful Obama-Era DACA Program*, https://www.texasattorneygeneral.gov/news/releases/ag-paxton-leads-10-state-coalition-urging-trump-administration-to-phase-out (June 29, 2017).

specifies classes of aliens eligible and ineligible for work authorization," but makes "no mention of the class of persons whom DAPA would make eligible for work authorization." A.R. 238-39 (quoting *Texas I*, 809 F.3d at 180-81). DAPA was "foreclosed by Congress's careful plan." A.R. 238-39 (quoting *Texas I*, 809 F.3d at 186).

Thus,

> For these same reasons that DAPA and Expanded DACA's unilateral Executive Branch conferral of eligibility for lawful presence and work authorization was unlawful, the original June 15, 2012 DACA memorandum is also unlawful. The original 2012 DACA program covers over one million otherwise unlawfully present aliens. *Id.* at 147. And just like DAPA, DACA unilaterally confers eligibility for work authorization, *id.*, and lawful presence without any statutory authorization from Congress.

A.R. 238-39.

This letter thus threatened litigation over DACA and provided legal arguments, based on precedent, explaining why DACA was unlawful. Even if this letter were the *only* cited reason for the challenged Executive action, it would provide a non-arbitrary, non-capricious, and valid basis for ending DACA.

2. Texas has explained for years how DACA is unlawful. The June 2017 letter's explanation of DACA's illegality was based on Texas's victory, leading a 27-State coalition, in challenging the materially identical Expanded DACA and DAPA programs. *See, e.g.*, *Texas I*, 809 F.3d at 174 n.139 ("DACA is an apt comparator to DAPA."). In that litigation, counsel of record told the

Fifth Circuit that DACA was required to go through APA notice-and-comment procedure. Oral Arg. at 1:16:01-10, *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015) (No. 15-40238), http://www.ca5.uscourts.gov/OralArgRecordings/15/15-40238_4-17-2015.mp3. DACA was instituted without that procedure.

Texas also filed a brief for a 14-State coalition urging the Court to grant certiorari in *Brewer v. Arizona Dream Act Coalition*, No. 16-1180 (U.S. May 1, 2017). *See* Br. for the States of Texas et al., *Brewer v. Ariz. Dream Act Coalition*, No. 16-1180, 2017 WL 1629324 (U.S. May 1, 2017) ("Texas *Brewer* Br."). Those amici States explained that DACA was unlawful—based on the same substantive and procedural arguments successfully made by the 27-State coalition in *Texas I* regarding Expanded DACA and DAPA. *See* Br. for the State Respondents at 44-70, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674), 2016 WL 1213267 ("Texas DAPA Br.").

The *Brewer* amici explained that DACA is unlawful because "[d]eferred action under DACA is much more than just a decision not to pursue removal of the alien." Texas *Brewer* Br. at 3. The Executive deems deferred action under DACA to confer "lawful presence." *Id.* Conferring that legal status is more than mere inaction. As the States highlighted, Congress used "lawful presence" status (or "unlawful presence") as the predicate for numerous results, such as removability, *id.* at 9; a 3-year or 10-year reentry bar, *id.* at 10-11; eligibility for "advance parole," *id.* at 11; and eligibility for numerous federal benefits, *id.* at 12-13. Those consequences turn on the "lawful presence" status conferred unilaterally

by the Executive under DACA and DAPA. And that conferral contravenes federal law. *See id.*

Similarly, the States explained that DACA violated statutes governing which aliens are authorized to work in this country:

> [W]hen Congress wanted to provide work-authorization eligibility to four narrow classes of deferred-action recipients, it did so by statute. Otherwise, the 1986 IRCA "prohibit[s] the employment of aliens who are unauthorized to work in the United States because they either *entered the country illegally*, or are in an immigration status which does not permit employment." H.R. Rep. No. 99-682(I), at 46, 51-52 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650, 5655-56 (emphasis added).

Id. at 15-16 (footnote omitted). And the States surveyed various historical practices, explaining how they could not support DACA's unilateral conferral of lawful presence and work authorization. *Id.* at 18-20.

At a minimum, this substantial background merited legitimate doubts that DACA was lawful. The Executive properly deemed it "likely that potentially imminent litigation would yield similar results with respect to DACA" as with respect to Expanded DACA and DAPA, which were already enjoined. Pet. App. 116a.

3. Ultimately, after their warnings went unheeded, Texas and several other States filed suit on May 1, 2018, seeking a declaration that DACA was unlawful and a preliminary injunction. *See Texas II*, 328 F. Supp. 3d 707.

Following extensive discovery and an extended hearing on the State's motion for injunctive relief, the district court found that DACA was unlawful for substantially the same reasons as described above. "DACA prevents the removal of its recipients—whom Congress has deemed removable." *Id.* at 714. The court, "guided by Fifth Circuit precedent," held that "none of the claimed statutory provisions [in the INA] give the DHS the authority to implement DACA." *Id.* at 715. "Ultimately, 'the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present,' and Congress has not granted the Executive Branch free rein to grant lawful presence to such a large class of persons outside the ambit of the statutory scheme." *Id.* at 716.

Regarding work authorization, the court also found that the INA "describes specific groups of aliens for whom Congress intended work authorization to be available," but "make[s] no mention of the group of aliens described by DACA." *Id.* at 716-17 (citation omitted). "Congress has in other places specified groups of aliens to be *ineligible* for work authorization," yet DACA "contradicts Congress's intent, as it enables those aliens to apply for work authorizations." *Id.* at 717 (citation omitted). Thus, "[p]ermitting the [Executive] to allow 1.5 million aliens to receive work authorization contradicts the clear congressional purpose of preserving employment opportunities for those persons legally residing in the United States." *Id.* at 718.

The court also noted the path to citizenship that DACA facilitates. DACA, through advance parole, "enable[s] certain individuals to change their inadmissible status (due to unlawful entry) into an admitted/paroled

category and in some cases provide a clearer pathway to citizenship." *Id.* at 720. DACA thus "directly undermines the intent and deterrent effect intended by Congress, and contradicts the express wording of the DACA program's instituting memorandum." *Id.*

Moreover, the court rejected various grounds on which DACA's supporters have attempted to justify it. DACA, like DAPA, "is far from any program conducted in the past." *Id.* at 721. "DACA is 'manifestly contrary' to the statutory scheme promulgated by Congress," and "usurps the power of Congress to dictate a national scheme of immigration laws, and it is therefore contrary to the INA and unreasonable." *Id.* at 722-23. "As were DAPA and Expanded DACA, DACA is 'foreclosed by Congress's careful plan.' The fact that DAPA was three times the size of DACA is of no *legal* significance." *Id.* at 724 (citation omitted). Ultimately, DACA

> contradicts statutory law and violates the APA because the INA directly addresses the issues of lawful presence and work authorization for aliens in this country but does not include those designated by DACA. Furthermore, the award of lawful presence and an entire array of federal, state, and local rights and benefits to aliens Congress has deemed inadmissible flies in the face of the INA's goals of deciding who comes to and stays in the United States, who works in the United States, and who qualifies for government-funded benefits.

Id. at 735.

The court also explained that DACA was procedurally invalid under the APA. It rejected the premise that

DACA was a procedural rule based on the same reasoning in *Texas I*. *Id.* at 728. "An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply." *Id.* (quoting *Texas I,* 809 F.3d at 176). DACA failed that test because

> [o]ver 800,000 individuals have already received the benefit of lawful presence. Most have received work authorization, and over half a million more individuals are or will be eligible to apply. . . . No matter which party's briefs and exhibits one reviews, each stresses the impact of the DACA program. . . . Although the DACA program has conferred lawful presence on a smaller number of people than DAPA would have, it has nonetheless impacted the Plaintiff States and affected individuals in an equally important manner.

Id. at 728.

Just as with DAPA and Expanded DACA in *Texas I*, DACA was not a procedural rule because DACA "established 'the substantive standards by which the [agency] evaluate[d] applications which [sought] a benefit that the agency [purportedly] ha[d] the power to provide.'" *Id.* at 728-79 (quoting *Texas I*, 809 F.3d at 177). The "five criteria by which DACA applicants are evaluated are clearly substantive standards and are no different than the DAPA criteria at issue in *Texas I*." *Id.* at 729.

Nor could DACA be defended as a general policy statement exempt from notice and comment. "[W]hile labels are not unimportant, the true test is how the pro-

gram is actually administered and whether it affects rights and obligations." *Id.* Just as in *Texas I*, "[a] general statement of policy 'genuinely leaves the agency and its decision-makers free to exercise discretion,'" and "does not impose any rights and obligations," which cannot be said of DACA. *Id.* at 730 (quoting *Texas I,* 809 F.3d at 171).

The court found it "clear" that "the DACA program confers rights and imposes obligations." *Id.* at 731. DACA recipients receive "lawful presence, the right to apply for work authorization, Social Security, Medicare, access to advance parole, and an array of other federal and state benefits." *Id.* "DACA also impacts the obligations of the individual States" by forcing them "to spend money on various social services." *Id.* And DACA "obligates the Government to forebear from implementing immigration enforcement proceedings." *Id.* "These are certainly the kinds of rights and obligations that give a program 'binding effect' such that the notice-and-comment procedures are required." *Id.*

Nor could APA notice and comment be avoided by purported discretion in conferring DACA benefits. There was "overwhelming evidence concerning the rights conferred and the obligations imposed." *Id.* at 735. As with *Texas I*, "'this case is about the [DHS] Secretary's decision to change the immigration classification of millions of illegal aliens on a class-wide basis.'" *Id.* at 735 (quoting *Texas I,* 809 F.3d at 170). As Executive action, DACA "must at least undergo the formalities of notice and comment." *Id.* at 736.

* * *

In short, the Southern District of Texas, has confirmed that DACA is unlawful. That is further reason to conclude that the administration did not violate the APA by ending a discretionary—and unconstitutional—program.

II. DACA's Obvious Unlawfulness Is Further Reason to Grant Review.

A. DACA contravenes federal law.

DACA is substantively unlawful for the reasons that the Fifth Circuit held Expanded DACA and DAPA unlawful. *See supra* Part I. Purported differences between DAPA and DACA cannot justify the latter.

First, the fact that DACA applies to a smaller number of aliens than DAPA does not make DACA lawful. DAPA and DACA's unlawfulness turns on those programs unilaterally conferring lawful presence and access to work authorization—not on their comparative size. *Texas*, 809 F.3d at 178-86. Moreover, even were it relevant, DACA and DAPA both far exceed the size of any prior deferred-action program. *See* Texas DAPA Br. 53-59.

Nor can DACA be defended on the basis that Congress has provided a (demanding) path to lawful presence for some aliens covered by DAPA, while not providing any path at all for the aliens covered by DACA. That argument only undermines the position of DACA's supporters. It means that DACA has even fewer arguments to support it than did DAPA. *See* Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 Geo. L.J. Online 96, 116 (2015). Whereas past instances of deferred action had been defended on the ground that

they were stop-gap measures to ultimate lawful status theoretically obtainable under existing law, *see Texas*, 809 F.3d at 184-85 & n.197, DACA flouts Congress's scheme for conferring lawful presence and cannot possibly be defended on that basis.

B. DACA is procedurally unlawful because it was promulgated contrary to the APA's requirements.

Plaintiffs' own pleadings in the various challenges to DACA's rescission confirm that DACA is procedurally unlawful (even assuming *arguendo* executive power to create it) because DACA was a substantive rule subject to APA notice-and-comment procedure.

DACA is indisputably a "rule" for APA purposes. 5 U.S.C. § 551(4). Accordingly, DACA had to be issued through notice-and-comment procedure if it was a substantive rule rather than a mere "general statement[] of policy." *Texas*, 809 F.3d at 171 (alteration in original). The key distinction between policy statements and substantive rules is that policy statements cannot be "binding." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *see* Texas DAPA Br. at 61-62.

A rule is binding if it creates or modifies "rights and obligations." *E.g.*, *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995), *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988). In *Morton v. Ruiz*, 415 U.S. 199 (1974), this Court held that a vastly more modest rule concerning benefits eligibility "affect[ed] individual rights and obligations" and therefore had to be treated as a substantive rule. *Id.* at 232. The same is true of DACA, under plaintiffs' own pleadings.

1. This case involves orders entered in multiple actions and, therefore, multiple plaintiffs. The University of California plaintiffs, for example, contend that the DACA-wind-down memorandum "constitutes a substantive rule subject to APA's notice-and-comment requirements." Complaint at 14 ¶ 61, *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. 3:17-cv-05211 (N.D. Cal. Sept. 8, 2017), ECF No. 1.

But that could be true only if the creation of DACA was itself a substantive rule—one "affecting individual rights and obligations." *Ruiz*, 415 U.S. at 232. If DACA were not a substantive rule that changed the rights of recipients, then winding down this program also could not be a substantive rule changing rights. Plaintiffs, however, allege that DACA is just such a substantive rule. First, plaintiffs admit that DACA purports to unilaterally confer lawful presence:

> Individuals with DACA status were "not considered to be unlawfully present during the period in which deferred action [was] in effect." USCIS FAQs.

Complaint at 8 ¶ 31, *Regents of Univ. of Cal.*, No. 3:17-cv-05211, ECF No. 1. And plaintiffs admit that aliens with DACA status would not have been able—but for DACA—to lawfully "obtain jobs and access to certain Social Security and Medicare benefits." *Id.* at 2. The necessary implication of those pleadings is that DACA was unlawful all along, as it issued without notice and comment.

There is no requirement that the government must use notice-and-comment procedure to rescind a policy whose issuance needed but did not receive that proce-

dure. If the APA somehow required the federal Executive Branch to continue enforcing an unlawful policy while notice-and-comment procedure was used for the first time to rescind the policy, then the APA would be unconstitutional as applied to that unlawful policy.

2. The State of California plaintiffs likewise essentially plead that DACA's attributes meet the test for a substantive rule requiring APA notice-and-comment procedure. For instance, these plaintiffs plead that "DACA Provides Numerous Benefits":

> 82. DACA grantees are provided with numerous *benefits*. Most importantly, they are granted the *right* not to be arrested or detained based solely on their immigration status during the designated period of their deferred action.
>
> 83. DACA grantees are granted eligibility to receive *employment authorization*.
>
> 84. DACA also opened the door to *allow travel* for DACA grantees. For example, DACA grantees were allowed to briefly depart the U.S. and legally return . . . .
>
> 85. Unlike other undocumented immigrants, DACA grantees are not disqualified on the basis of their immigration status from receiving certain public benefits. These include *federal Social Security, retirement, and disability benefits*. *See* 8 U.S.C. §§ 1611(b)(2)-(3), 1621(d). . . .
>
> 86. DACA grantees are able to secure equal access to other *benefits* and opportunities . . . .

Complaint at 17-18, *California v. U.S. Dep't of Home-*

land Sec., No. 3:17-cv-05235-WHA (N.D. Cal. Sept. 11, 2017), ECF No. 1 (emphases added; citations omitted). The *Garcia* plaintiffs here admit the same thing. Complaint at 9 ¶ 27, *Garcia v. United States*, No. 3:17-cv-5380 (N.D. Cal. Sept. 18, 2017), ECF No. 1 ("DACA *confers* numerous important *benefits* on those who apply for and are granted DACA status.") (emphases added).[6]

3. In addition to the five challenges pending in the Northern District of California, several other lawsuits, pending in the Second and D.C. Circuits challenge the DACA-wind-down memorandum. Complaint, *Trs. of Princeton Univ. v. United States*, No. 1:17-cv-2325 (D.D.C. Nov. 3, 2017), ECF No. 1; Complaint, *NAACP v. Trump*, No. 1:17-cv-1907 (D.D.C. Sept. 18, 2017), ECF No. 1; 3d Am. Complaint, *Batalla Vidal v. Nielsen*, No. 1:16-cv-4756 (E.D.N.Y. Dec. 11, 2017), ECF No. 113; Complaint, *New York v. Trump*, No. 1:17-cv-5228 (E.D.N.Y. Sept. 6, 2017), ECF. No. 1. Plaintiffs in those cases similarly have pleaded, in substance, that DACA was unlawful from the outset because it confers substantive rights yet was issued without notice-and-comment procedure.

Plaintiffs in *New York*, for example, plead that DACA affirmatively confers benefits:

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[6] Furthermore, the *California* plaintiffs state that the APA does not allow policies to remain in effect when they are "predicated on an incorrect legal premise." Complaint at 22 ¶ 106, *California*, No. 3:17-cv-5235, ECF No. 1. Since DACA rests on an incorrect legal premise in that it issued without notice-and-comment procedure, plaintiffs cannot obtain the relief they seek of DACA's continued operation.

> [¶] 218. DACA *confers* numerous *benefits* on DACA grantees. Notably, DACA grantees are *granted the right* not to be arrested or detained based solely on their immigration status . . . .
>
> [¶] 220. DACA grantees are eligible to receive certain *public benefits*. These include *Social Security, retirement, and disability benefits*, and, in certain states, benefits such as driver's licenses or unemployment insurance. *See* 8 U.S.C. §§ 1611(b)(2)-(3), 1621(d).

Complaint at 41, *New York*, No. 1:17-cv-5228, ECF No. 1 (emphases added; citations omitted).

Accordingly, these plaintiffs essentially admit that DACA needed to go through APA notice-and-comment procedure because it was a substantive rule:

> [¶] 289. In implementing the DHS Memorandum, federal agencies have changed the *substantive criteria* by which individual DACA grantees *work, live, attend school, obtain credit, and travel* in the United States. Federal agencies did not follow the procedures required by the APA before taking action impacting these *substantive rights*.

Id. at 54 (emphases added).

If DACA's rescission "affect[ed] individual rights and obligations," *Ruiz*, 415 U.S. at 232, then DACA's creation did so, too, and was always unlawful.

III. Granting Certiorari to Allow Resolution of All Three DACA-Rescission Challenges This Term Is Warranted.

Without this Court's prompt intervention, the orders enjoining the Executive from winding down DACA could last more than another year—frustrating the purpose of the Executive's decision to promptly terminate disputes about DACA's legality. Indeed, because the litigation challenging the DACA wind-down memorandum has persisted, Texas was forced to sue to challenge the June 15, 2012 memorandum creating DACA and its continued implementation.

The district court in *Texas II* found that Texas continues to suffer ongoing and irreparable harm from DACA. The States "bear the costs of providing [healthcare, education, and law-enforcement] social services required by federal law, and the DACA program increases the volume of individuals to whom they must provide these services." 328 F. Supp. 3d at 700. Even the expert for parties defending DACA in *Texas II* opined that Texas alone "incurs more than $250,000,000 in total direct costs from DACA recipients per year." *Id.* at 700-01. And DACA "increases the total number of individuals using Texas's social services." *Id.* at 701. Additionally, DACA harms the States' interests in protecting the economic well-being of their citizens through increased competition "with legally present individuals for available jobs, which can result in DACA recipients being hired for jobs for which legally present individuals have applied and otherwise would have been hired." *Id.* at 693.

Granting certiorari to allow for prompt resolution of all the disputed aspects of DACA's rescission would reduce the present burdens to the courts from the existing litigation. Moreover, the *Texas II* litigation could result in a ruling abruptly ending DACA, rather than winding it down as directed by the Executive in the memorandum challenged here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

STEVE MARSHALL
Attorney General of Alabama

MARK BRNOVICH
Attorney General of Arizona

LESLIE RUTLEDGE
Attorney General of Arkansas

KYLE D. HAWKINS
Solicitor General
Counsel of Record

ARI CUENIN
JOHN C. SULLIVAN
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
kyle.hawkins@oag.texas.gov
(512) 936-1700

PAMELA JO BONDI
Attorney General of
Florida

JEFF LANDRY
Attorney General of
Louisiana

PHIL BRYANT
Governor of
Mississippi

DOUG PETERSON
Attorney General of
Nebraska

ALAN WILSON
Attorney General of
South Carolina

PATRICK MORRISEY
Attorney General of
West Virginia

DECEMBER 2018