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.,
Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

JOSEPH M. SELLERS
JULIE S. SELESNICK
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave., N.W.
Fifth Floor
Washington, DC 20005
(202) 408-4600

Counsel for Respondents NAACP; American Federation of Teachers, AFL-CIO; and United Food and Commercial Workers International Union, AFL-CIO, CLC

THOMAS J. PERRELLI
LINDSAY C. HARRISON
Counsel of Record
SAM HIRSCH
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001
(202) 639-6000
lharrison@jenner.com

Counsel for Respondents The Trustees of Princeton University, Microsoft Corporation, and Maria De La Cruz Perales Sanchez

(Additional Counsel Listed on Inside Cover)

RAMONA E. ROMERO
WESLEY MARKHAM
PRINCETON UNIVERSITY
New South Building
Fourth Floor
Princeton, NJ, 08544
(609) 258-2500

Counsel for Respondent The Trustees of Princeton University

CYNTHIA L. RANDALL
MICROSOFT CORPORATION
One Microsoft Way
Redmond, WA 98052
(425) 538-3176

Counsel for Respondent Microsoft Corporation

BRADFORD M. BERRY
NAACP
4805 Mount Hope Drive
Baltimore, MD 21215
(410) 580-5797

Counsel for Respondent NAACP

ISHAN BHABHA
ALEX S. TREPP
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001
(202) 639-6000

Counsel for Respondents The Trustees of Princeton University, Microsoft Corporation, and Maria De La Cruz Perales Sanchez

DAVID J. STROM
AMERICAN FEDERATION OF TEACHERS, AFL-CIO
555 New Jersey Ave. N.W.
Washington D.C.
(202) 393-7472

Counsel for Respondent American Federation of Teachers, AFL-CIO

PETER J. FORD
UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC
1775 K Street. N.W.
Washington D.C. 20006
(202) 223-3111

Counsel for Respondent United Food & Commercial Workers International Union, AFL-CIO, CLC

QUESTIONS PRESENTED

The questions presented are as follows:

1. Whether the Department of Homeland Security's rescission of the Deferred Action for Childhood Arrivals (DACA) program is immune from judicial review.

2. Whether the rescission of the DACA program is lawful under the Administrative Procedure Act.

PARTIES TO THE PROCEEDING

Respondents are The Trustees of Princeton University; Microsoft Corporation; Maria De La Cruz Perales Sanchez; the National Association for the Advancement of Colored People; American Federation of Teachers, AFL-CIO; and United Food and Commercial Workers International Union, AFL-CIO, CLC.

Petitioners are Donald J. Trump, President of the United States; Matthew Whitaker, Acting Attorney General of the United States; Kirstjen M. Nielsen, Secretary of Homeland Security; U.S. Citizenship and Immigration Services; U.S. Immigration and Customs Enforcement; the U.S. Department of Homeland Security; and the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION

The government seeks certiorari before judgment in this case based primarily on the pendency of its petition in a different case that is itself a poor candidate for review.[1] That case, *United States Department of Homeland Security v. Regents of the University of California*, No. 18-587, arrives to the Court on an interlocutory posture without a circuit split. And the government makes no credible case for interlocutory review. The DACA program has been in place since 2012. The program was essentially unchallenged through the past administration, and the current administration voluntarily maintained the program for more than eight months before rescinding it. Even upon rescission, the administration allowed many recipients to renew their status once more, effectively continuing the program into 2020. The government has not sought to stay the preliminary injunctions issued by various courts while the parties litigate the *Regents* respondents' claims. Those injunctions are limited to allowing existing DACA recipients to renew their status; they do not compel the government to consider new DACA applications, and they do not allow DACA recipients to leave the country and return using

---

[1] Although Respondents brought two separate cases, they were litigated in the district court as one, and are treated in the Petition as one. Respondents submit a single Brief in Opposition and will refer to their related cases in the singular. Respondents will likewise refer to the three related *Regents* cases in the singular, and to the two related *Batalla Vidal* cases in the singular. *See Kirstjen M. Nielsen v. Martin Jonathan Batalla Vidal*, No. 18-589.

advance parole. In short, the government's actions in this case demonstrate a *lack* of urgency in rescinding DACA that belies its current assertion that this Court should review the *Regents* decision immediately. These and other arguments are set forth in the briefs in opposition submitted by the respondents in the *Regents* case, and Respondents adopt them in full.

Stripped of the false sense of urgency created by the government's invocation of the *Regents* decision, there is nothing left of the government's petition for certiorari before judgment here, and it should be denied. This case is presently being briefed before the D.C. Circuit and will likely be argued in early 2019. Under this Court's rules, certiorari before judgment is warranted only where the petitioner establishes that "the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. It is thus the "extremely rare" case that is appropriate for such review. *Coleman v. Paccar Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers); *see* 28 U.S.C. § 2101(e). This case does not meet that standard. And even if it did, the Court should deny review because the district court correctly held that DACA's rescission was reviewable and unlawful.

STATEMENT OF THE CASE

I. DACA

Prior to 2012, millions of young people raised in this country were compelled by circumstances beyond their control to live in the shadows. Brought here as children, they attended American schools, contributed to

American communities, and strived to achieve American dreams. But because they were not lawfully present, their lives did not resemble those of their American classmates: They often could not secure government-issued identification and, accordingly, could not travel by plane to visit family or attend college far from home; they could not secure work authorization; they generally could not open bank accounts, obtain credit cards, or engage in commercial activity requiring access to credit; they could not access public benefits and, in many cases, health insurance; they could not enlist in the Armed Forces; and they lived in constant fear of law enforcement, with whom any interaction might mean deportation to a country that was foreign to them.

Despite these hardships, many of these young people triumphed. They worked hard and excelled in school, developed talents and professional skills, and contributed to their families and communities. Known as "Dreamers," they achieved these accomplishments notwithstanding their status under the immigration laws. From the perspective of immigration authorities, they were—and still are—a low priority for enforcement. AR 1; *infra* pp. 16-17.[2] From the perspective of most Americans, regardless of political affiliation, they were—and still are—individuals with the values and work ethic America cherishes, and they

---

[2] "AR" refers to the administrative record filed by the government in these proceedings. Dkt. 8-3; *see also Regents of the University of California, et al. v. DHS, et al.*, Case No. 3:17-cv-05211 (N.D. Cal.), ECF No. 64-1. All references to "Dkt." are to documents filed in the district court in No. 17-cv-2325.

deserve to live their lives in the only country many have known.[3]

In 2012, the Department of Homeland Security (DHS) sought to address the plight of the Dreamers. Consistent with its longstanding authority to establish deferred-action programs. Pet. App. 3a-4a; AR 15-23. DHS thus established the Deferred Action for Childhood Arrivals program (DACA). Pet. App. 5a.

By statute and regulation separate and distinct from the DACA program, all persons subject to deferred action—whether under DACA or any other program—may access certain benefits in recognition of their continued presence in the United States. They may seek work authorization. 8 C.F.R. § 274a.12(c)(14). They may request advance parole to travel abroad and re-enter the United States. *Id.* § 212.5(f). And they are eligible for driver's licenses, health insurance, and certain public programs. 8 U.S.C. § 1611(b)(2)-(3) (Social Security and Medicare); *id.* § 1621(d) (state benefits); 42 C.F.R. §§ 417.422(h), 422.50(a)(7) (health insurance).

Before the DACA program was instituted, the Office of Legal Counsel (OLC) advised DHS that DACA was lawful so long as "immigration officials retained discretion to evaluate each application on an individualized basis." Pet. App. 53a n.22 (quotation

---

[3] *NPR Poll: 2 in 3 Support Legal Status for DREAMers; Majority Oppose Building a Wall*, NPR: All Things Considered (Feb. 6, 2018), https://tinyurl.com/yblhrs2d; Scott Clement & David Nakamura, *Survey Finds Strong Support for 'Dreamers'*, Wash. Post (Sept. 25, 2017), https://tinyurl.com/ybqvqajx.

marks omitted). OLC later memorialized its analysis in a 33-page memorandum that primarily addressed a 2014 proposed program known as "Deferred Action for Parents of Americans and Lawful Permanent Residents" (DAPA). Pet. App. 52a-53a. In its memorandum addressing DAPA, the OLC noted, "[t]he concerns animating DACA were . . . consistent with the types of concerns that have customarily guided the exercise of immigration enforcement discretion." Pet. App. 53a n.22 (quotation marks omitted; ellipsis in original).

DACA went into force in 2012, and by all accounts, DACA has been successful in enabling hundreds of thousands of young people to pursue higher education and work legally, without the fear of deportation. Pet. App. 54a. Today, DACA recipients make substantial contributions to the U.S. economy, in addition to serving their communities and in this nation's military.

Separately, DHS sought to implement DAPA. DAPA would have extended eligibility for deferred action to approximately 4 million parents of U.S. citizens or lawful permanent residents who were themselves unlawfully present in the United States. AR 33. DAPA also purported to expand the DACA program in certain minor respects. AR 39-40 (changing from two to three-year extension terms, adjusting date-of-entry requirement, and removing age cap). DAPA never went into effect, however, because a coalition of states led by Texas secured a preliminary injunction based on the agency's failure to follow the

APA's notice-and-comment rulemaking requirements.[4] Pet. App. 6a. The Fifth Circuit affirmed, holding that the states had demonstrated a likelihood of success on the merits not only of their procedural APA claim, but also of their substantive APA claim, because DAPA appeared to conflict with the INA's "intricate process for illegal aliens to derive a lawful immigration classification from their children's immigration status." *Texas v. United States*, 809 F.3d 134, 146, 179 (5th Cir. 2015). This Court granted a petition for a writ of certiorari but divided evenly, thereby affirming the preliminary injunction. *See United States v. Texas*, 136 S. Ct. 2271 (2016). The government sought rehearing, noting that the country lacked a "definitive ruling" on DAPA's legality. Dkt. 28-16 at 2504. That petition was denied. *United States v. Texas*, 137 S. Ct. 285 (2016).

Even after President Trump took office, DHS opted to maintain DACA. In February 2017, then-Secretary of Homeland Security Kelly repealed a broad array of immigration directives but specifically exempted DACA. AR 230. As he later explained, he viewed "DACA status" as a "commitment … by the government towards the DACA person." Dkt. 28-15 at 1922. In June 2017, Secretary Kelly rescinded DAPA, but again left DACA in place. AR 235-37. Likewise, in public comments the President said "dreamers should rest easy," characterizing the "policy of [his] administration . . . to allow the dreamers to stay." Dkt. 28-15 at 1939-40.

---

[4] The states expressly declined to challenge DACA, which had already been in place for two years.

In June 2017, approximately the time Secretary Kelly made his second decision to leave DACA in place, Attorney General Sessions and other members of the Justice Department communicated with attorneys general from several of the states that had challenged DAPA in the *Texas* case. Dkt. 28-15 at 1951-52. Those conversations culminated in a letter from the state attorneys general to Attorney General Sessions on June 29, 2017. AR 238-40. Although the states had not challenged DACA in the five years since it had been implemented, the letter asserted that DACA was unlawful and asked Defendants to "phase out the DACA program"; if Defendants did not do so, the states said, they would amend their years-old complaint against DAPA to challenge DACA for the first time. AR 239.

On September 4, 2017, Attorney General Sessions announced, in a one-page letter, that DACA was "unconstitutional" and lacked "statutory authority." AR 251. The letter provided no legal analysis, but simply referenced the *Texas* DAPA litigation and the "potentially imminent litigation" over DACA. AR 251. The next day, Acting Secretary of Homeland Security Duke issued a memorandum rescinding DACA (the "Duke Memorandum"). AR 252-56. After describing the course of the *Texas* litigation and reciting the Attorney General's conclusion that DACA was unlawful, Acting Secretary Duke simply announced that it was "clear" that DACA should be terminated. AR 255.

The Duke Memorandum instructed DHS to stop accepting new initial DACA applications and approving new applications for advance parole; to accept renewal

applications from individuals whose current deferred action would expire by March 5, 2018; and to accept such renewals until October 5, 2017. AR 255.

II. Proceedings Below

Respondents sued in the United States District Court for the District of Columbia to challenge the decision to rescind DACA. In April 2018, Judge John D. Bates granted Respondents' motion for summary judgment, holding the agency's decision unlawful and setting it aside. Judge Bates concluded that the rescission of DACA was reviewable and that the reasons given to support it were inadequate under the Administrative Procedure Act (APA). Pet. App. 72a-74a. In particular, Judge Bates held that the government could not overcome the "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (internal quotation marks omitted). And he held that DACA's rescission was arbitrary and capricious because the government "failed adequately to explain its conclusion that the program was unlawful." Pet. App. 2a. Judge Bates stayed the order of vacatur for ninety days to allow DHS to attempt to remedy the Duke Memorandum's inadequacies. Pet. App. 66a.

In June 2018, Secretary Kirstjen M. Nielsen issued a new memorandum "concur[ring] with and declin[ing] to disturb" the Duke Memorandum. Pet. App. 81a, 86a. The government then moved Judge Bates to revise the April 2018 order and uphold the Duke Memorandum. Pet. App. 81a.

In August 2018, Judge Bates issued an opinion denying the government's motion to revise. The opinion was narrow: "The Court did not hold in its prior opinion, and it does not hold today, that DHS lacks the statutory or constitutional authority to rescind the DACA program. Rather, the Court simply holds that if DHS wishes to rescind the program—or to take any other action, for that matter—it must give a rational explanation for its decision." Pet. App. 108a-109a (citing 5 U.S.C. § 706(2)). Judge Bates found, once again, that DHS had failed to satisfy the bare minimum of rational decisionmaking required by the APA. Pet. App. 108a-109a.

The government filed a notice of appeal to the United States Court of Appeals for the D.C. Circuit. Pet. App. 112a, 114a. The government then moved Judge Bates for a stay of the vacatur pending appeal. Judge Bates granted the government's motion in part, aligning the vacatur order with relief granted by other courts and maintaining a stable status quo: DHS did not have to begin accepting initial DACA applications or applications for advance parole, but the government had to continue processing DACA renewals. Dkt. 86 at 2. The government has not sought a stay before the D.C. Circuit.

The government's opening brief was filed in the D.C. Circuit on November 26, 2018. Briefing will be complete in the D.C. Circuit on January 22, 2019.

On November 5, 2018, the government filed a petition for a writ for certiorari before judgment in this case and two others: *Regents* No. 18-587 as well as *Nielsen v. Batalla Vidal*, No. 18-589. On November 8,

2018, the Ninth Circuit issued its opinion in the *Regents* case. Two judges affirmed the district court in full, holding that the rescission was reviewable and likely unlawful. *Regents* Supp. Pet. App. 5a-78a. One judge believed that the rescission was not reviewable under the APA, but that the *Regents* respondents were likely to prevail on their equal protection claim. *Regents* Supp. Pet. App. 79a-87a.

On November 19, 2018, the government filed a supplemental brief in this Court in the *Regents* case, seeking to convert its petition for certiorari before judgment into a petition for certiorari and arguing that the Ninth Circuit opinion strengthened the case for certiorari in all three cases. The government filed a second supplemental brief on November 27, 2018, correcting its prior supplemental brief and maintaining the same position that certiorari before judgment should be granted in this case.

REASONS FOR DENYING THE WRIT

Petitioners seek the extraordinary action of this Court granting certiorari before any court of appeals has reviewed a final judgment on the questions presented—and before this case has been fully briefed before the D.C. Circuit. Petitioners come nowhere near satisfying this Court's standards for a grant of certiorari before judgment, and thus the petition should be denied.

I. Review of the *Regents* Case Is Premature.

As the respondents in the *Regents* case explain, notwithstanding the issuance of the Ninth Circuit's decision, the petition in that case does not meet the

standard for this Court's review. That case does not involve a circuit split. Nor does the petition present an important question of federal law that should be resolved now.

The first question presented asks only whether the district court misapplied the long-settled legal standard governing when agency action is exempt from judicial review. Applying that standard, all courts that have considered the matter have concluded that the agency's rescission of DACA is reviewable.

The second question presented addresses the legality of DHS's rescission of DACA. While that question may ultimately merit this Court's review, granting certiorari at this stage would short-circuit the development of these issues in the lower courts. "[T]his is exactly the sort of issue that could benefit from further attention in the courts of appeals." *Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting). The D.C. Circuit, in particular, has valuable expertise on questions of administrative law. It, along with the Second and Fourth Circuits, will soon pass on both issues presented by the petition, and the courts of appeals will likely issue their decisions on these cases in 2019. Granting the petitions before those courts have ruled would unnecessarily deprive the Court of their analysis.

Additionally, the Ninth Circuit addressed the questions presented in an interlocutory posture, holding that the *Regents* respondents "are likely to succeed in demonstrating that the rescission must be set aside." *Regents* Supp. Pet. App. 57a; *see also Regents* Supp. Pet. App. 77a & n.31. This Court reviews

that determination solely for "abuse of discretion" and "uphold[s] the injunction" if "the underlying … question is close." *Ashcroft v. ACLU*, 542 U.S. 656, 664-65 (2004) (internal quotation marks omitted). For this very reason, ordinarily this Court awaits final judgment before granting a petition for review.[5] *See, e.g.*, *Va. Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari); *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893).

Moreover, the *Regents* respondents present a distinct equal protection claim that the Ninth Circuit found credible, but which had not been fully developed. That claim was not the basis for the district court's entry of a preliminary injunction. *Regents* Supp. Pet. App. 84a. Thus, it is not squarely presented for this Court's review. *See Brown v. Chote*, 411 U.S. 452, 457 (1973). As all three Ninth Circuit judges recognized, however, if presented to the district court, that claim may result in the entry of an identical preliminary injunction, should the existing injunction be vacated. *See Regents* Supp. Pet. App. 77a n.31, 84a-87a.

For these reasons, and those set forth in greater detail by the *Regents* respondents, review of the

---

[5] While this Court granted *United States v. Texas* on an interlocutory posture, circumstances there were materially different. DAPA had not yet been implemented, thus there were no reliance interests to weigh in the balance of factors. *See* AR 183 ("The interest the government has identified can be effectively vindicated after a trial on the merits. The interest the states have identified cannot be, given the difficulty of restoring the *status quo ante* if DAPA were to be implemented.").

questions presented in that case is premature.

II. The Petition for Certiorari Before Judgment in this Case Should Be Denied.

Even leaving aside that the district court's decision below was correct on the merits, *see infra* pp. 18-34, the petition for certiorari before judgment should be denied for numerous reasons.

First, this case does not meet the standard for review before judgment. Sup. Ct. R. 11. It does not involve exigent circumstances remotely comparable to those at issue in cases where the standard was met, such as the legality of a military commission at a time of war, *Ex parte Quirin*, 317 U.S. 1, 20 (1942); the wartime seizure of a steel mill, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583-84 (1952); an impending deadline involving the breach of an international treaty, *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981); or grand jury proceedings involving the sitting President, *United States v. Nixon*, 418 U.S. 683, 686-87 (1974). Nor is there "disarray among the Federal District Courts" that might justify this Court's expedited review. *Mistretta v. United States*, 488 U.S. 361, 371 (1989). Each case in which certiorari before judgment has been granted involved emergent issues of national security or issues that "touch fundamentally upon the manner in which our Republic is to be governed." *Dames & Moore*, 453 U.S. at 659. Even if the questions of administrative law in this case may ultimately be appropriate for the Court's review, there is no comparable emergency here. Simply put, this is not the "extremely rare" case that justifies "deviation from normal appellate practice." *Coleman*,

424 U.S. at 1304 n.* (Rehnquist, J., in chambers); Sup. Ct. R. 11.

Second, the government's own actions belie its newly-minted claim of urgency. DACA has been in place since 2012. The current administration continued the program for more than eight months before deciding to discontinue it in response to threats from certain states. *See* Pet. App. 8a-9a. Even then, the administration allowed some DACA recipients to renew their deferred status, in effect extending the program for an additional two and a half years. Because the preliminary injunctions in other cases are limited and the vacatur in this case is partially stayed, no new applicants may receive deferred action under the DACA program. Given this status, the district court in the Southern District of Texas, *the court which invalidated DAPA*, denied the states' motion for a preliminary injunction against DACA. *Texas v. United States*, 328 F. Supp. 3d 662, 741-42 (S.D. Tex. 2018). No exigency exists necessitating immediate review of a policy that has been in place since 2012 and that the government itself opted to extend in part through March 2020.

The administration's statements provide further proof that immediate review is unwarranted. The President has indicated that it is his "policy" to "allow the dreamers to stay," Dkt. 28-15 at 1939-40, and senior officials have issued other statements in support of DACA recipients, *see*, *e.g.*, Dkt. 28-15 at 1922. Contrary to Petitioners' arguments, the President also has asserted that he "certainly [has] the right" to keep DACA in place and indicated he "might" decide to do

so. *See READ: President Trump's Full Exchange With Reporters*, CNN.com (Jan. 24, 2018), https://tinyurl.com/ydcafdtr (CNN Statement).

Third, the government's litigation conduct confirms that immediate review is unnecessary. The government has never sought to stay the preliminary injunctions issued in the Northern District of California or the Eastern District of New York. Nor did the government seek a stay of Judge Bates' decision to allow portions of the vacatur to take effect consistent with those preliminary injunctions. A stay request would require Petitioners to demonstrate irreparable harm, and to show that the balance of hardships favors a stay, something Petitioners have never attempted to articulate—and could not do, even if they tried. Petitioners' litigation choices "blunt [the government's] claim of urgency," *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317-18 (1983) (Blackmun, J., in chambers), and "vitiate[] much of the force" of its claimed harm, *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers).

Fourth, the government faces no concrete harm from allowing this case to be decided first by the D.C. Circuit. The government suggests that review is necessary because it is being required to retain a policy it believes is unlawful. Pet. 14-15. But the government need not grant any new DACA applications. And the asserted harm with respect to existing DACA recipients does not warrant premature review: courts regularly maintain the status quo while the government litigates the extent of its authority or legality of its conduct. *E.g.*, *Nat'l Ass'n of Mfrs. v. Dep't*

of Defense, 138 S. Ct. 617, 627 (2018) (noting the "nationwide stay of the [Waters of the United States] Rule pending further proceedings"); *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006) (affirming injunction against enforcement of Controlled Substances Act). Indeed, an alteration of the status quo pending final judgment is the exception, not the norm. The purported harm of maintaining in place a program that has existed since 2012, in the face of an attempt at rescission deemed unlawful by Judge Bates, does not justify circumventing the normal process for appellate review.

The alleged harm of permitting current DACA recipients to maintain their status while this litigation is pending is further discredited by Secretary Nielsen's testimony before Congress that DACA recipients would not be an enforcement priority following DACA's rescission.[6] *See Hearing on Kirstjen M. Nielsen to be Homeland Security Secretary Before the S. Comm. on Homeland Sec. and Gov't Affairs*, 115th Cong. (2017) (exchange with Senator Harris); *accord*

---

6 Even if DACA recipients are not likely to be immediately removed, without DACA they will lose their authorization to work. As described in detail in Respondents' submissions to the district court, the consequences for DACA recipients will be disastrous, effectively cutting short promising careers and educational programs and terminating DACA recipients' ability to support themselves and their families. *See* Dkts. 28-8, 28-17; *Regents* Pet. App. 62a-66a (recognizing catastrophic consequences of rescission and concluding that consequences for DACA recipients and other affected parties outweigh government's asserted interest in initiating wind-down); *Batalla Vidal* Pet. App. 123a-126a (same).

Hearing on Oversight of the United States Department of Homeland Security Before the S. Comm. on the Judiciary, 115th Cong. (2018) (exchange with Senator Harris). Moreover, the district court's order does not compel the government to "sanction" the unlawful presence of anyone. Under DACA's plain terms, each renewal application is evaluated "on a case by case basis," AR 2, and DHS can initiate removal proceedings against DACA recipients determined to present a risk to national security or public safety. AR 1-3; *see also Regents* Pet. App. 45a. As Judge Bates noted, this litigation "does not itself delay the removal of any specific alien." Pet. App. 38a.

Fifth, for similar reasons, the continuation of DACA causes no harm to the public. DACA recipients were subjected to rigorous background checks and heavy scrutiny to ensure they did not pose a "threat to national security or public safety," had not "been convicted of certain criminal offenses," and fulfilled educational and work-related criteria. Pet. App. 4a. Under the terms of the DACA program itself, the government can terminate deferred action if, for example, a DACA recipient is convicted of a disqualifying crime. Sensibly, the government does not even contend that the public might somehow be harmed by the continued lawful presence of DACA recipients during this litigation.

Sixth, the government is incorrect that the pendency of this litigation may stymie legislative resolutions to these issues. Pet. at 15. As the government concedes, the challenge of achieving legislative compromise long predates this litigation.

Pet. at 4, 15. And with a new Congress set to convene, there is a renewed possibility of a legislative solution. Congressional action could render the matter moot. This possibility counsels against premature consideration by this Court. *See, e.g.*, *Volpe v. D.C. Fed'n of Civic Ass'ns*, 405 U.S. 1030, 1030 (1972) (Burger, C.J., concurring in denial of certiorari).

Finally, denying certiorari will not preclude consideration of the questions presented. The government's demand that the Court abandon the ordinary, time-tested appellate process is simply a means to rush the case to the Court this Term—all in a context where the government has never identified any concrete harms caused by addressing this case in the normal course. It is virtually certain that the D.C. Circuit will issue a decision in plenty of time for a petition to be considered next Term. *See Aaron v. Cooper*, 357 U.S. 566, 566-67 (1958) (per curiam) (denying petition for certiorari before judgment). If the Court believes the questions merit review at that time, it will have the benefit of additional circuit opinions. It will also have the option of deciding these issues through a vehicle that is not interlocutory.

III. The District Court's Decision Is Correct.

The Court should also deny certiorari because Judge Bates' decision is correct on the merits.

A. The Rescission of DACA Is Subject to Judicial Review.

As every court to consider the first question presented has agreed, DACA's rescission is neither "committed to agency discretion by law," 5 U.S.C.

§ 701(a)(2), nor an action "to commence proceedings, adjudicate cases, or executive removal orders," 8 U.S.C. § 1252(g). *See* Pet. App. 25a-43a; *Regents* Pet. App. 26a-30a; *Batalla Vidal* Pet. App. at 25a-31a; *see also Casa De Maryland v. U.S. Homeland Sec.*, 284 F. Supp. 3d 758, 770 (D. Md. 2018), *appeal docketed*, No. 18-1522 (4th Cir. May 8, 2018).

1. There is a "strong presumption favoring judicial review of administrative action," that the government "bears a heavy burden" to overcome. *Mach Mining*, 135 S. Ct. at 1651 (internal quotation marks omitted); *see also Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 369-70 (2018) (slip op. at 11). Section 701(a)(2) offers a "very narrow exception" to that strong presumption, triggered only when "in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). That is not the case here.

a. The government's lead argument is that "Section 701(a)(2) precludes review of an agency's decision not to institute enforcement actions" under *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). *Regents* Pet. 18. But the government does not even contend that DACA's rescission is such a decision; rather, it seeks to expand *Chaney* to make unreviewable *all* agency decisions about whether and how to enforce federal statutes—no matter the scope and formality of the agency's decision, no matter whether the decision reflects an erroneous view of the agency's legal authority, and no matter whether the agency action at issue is a *non*-enforcement decision at all. Such an expansion—which

would encourage politically unaccountable agencies to make policy in the guise of unreviewable legal determinations—is unwarranted, unwise, and without basis in law.

In *Chaney*, death-row inmates filed a petition asking the FDA to initiate enforcement proceedings to stop two states from using certain drugs in their executions. *See* 470 U.S. at 823-24. The FDA responded by letter, explaining that the agency's enforcement authority in the area was "generally unclear" and that, in any event, the agency had decided that the particular facts alleged did not meet the agency's criteria for initiating enforcement. *See id.* at 824-25. The inmates sought judicial review, arguing that the FDA *did* have authority to act and that it had misapplied its own enforcement criteria. *Id.* at 825-26.

This Court held that "an agency's decision not to take enforcement action should be presumed immune from judicial review." *Id.* at 832. But the Court's decision was limited in two critical respects. *First*, the Court was careful to note that "[w]e do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction." *Id.* at 833 n.4. In such a case, "the statute conferring authority on the agency" might suffice to indicate that the agency's decision to tie its own hands was not "committed to agency discretion." *Id.* (internal quotation marks omitted). *Second*, the Court addressed only an agency's refusal to undertake a "particular enforcement action" in a given instance. *Id.* at 831. The Court referred throughout its opinion to an individual "refusal to institute proceedings," which it analogized

to an individual prosecutor's decision "not to indict" a given offender. *Id.* at 832; *see id.* at 827-38.

i. The government seeks to expand *Chaney*'s narrow presumption of unreviewability from individual non-enforcement decisions to "broad enforcement polic[ies]." *Regents* Pet. 20 (quotation marks omitted). But *Chaney* does not apply to general enforcement policies *at all*. This Court has previously declined to extend *Chaney* to decisions not to institute a rulemaking. *See Massachusetts v. EPA*, 549 U.S. 497, 527 (2007). The Court noted as "key differences" the fact that "agency refusals to initiate rulemaking 'are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.'" *Id.* (quoting *Am. Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987)). There are similar "ample reasons for distinguishing" between broad enforcement policies and "single-shot" nonenforcement decisions like in *Chaney*. *See Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676-77 (D.C. Cir. 1994).[7]

To be clear, Respondents do not suggest that all challenges to broad enforcement policies are necessarily amenable to review, but simply that they are, as a class, outside *Chaney*'s narrow reversal of the presumption of reviewability. In some cases, there may

---

[7] For similar reasons, the lump sum appropriation held unreviewable in *Lincoln v. Vigil*, 508 U.S. 182 (1993), is distinguishable from a broad enforcement policy. Like a single-shot enforcement decision, the decision not to fund a program for handicapped Indian children in the Southwest is not as amenable to judicial review as a broad enforcement policy. *Id.* at 192-93.

be no "law to apply." *See infra* pp. 24-26. And in many cases, review of agency policies will be highly deferential. *See Massachusetts*, 549 U.S. at 527 (holding that review of a refusal to initiate rulemaking should be deferential). But broad discretion is not the same as unreviewable discretion, and neither *Chaney* nor any of this Court's other cases suggest that a general enforcement policy is presumptively immune from review under the APA.

ii. At a minimum, a general enforcement policy predicated on a misconception of an agency's legal authority is presumptively reviewable. Agency interpretations of law, by definition, are not "committed to agency discretion," as it is ultimately the role of the courts to determine what the law is. DACA's rescission was predicated entirely—or, at a minimum, overwhelmingly—on a legal judgment about the scope of the Secretary's authority. *Supra* p. 7. The district court held that "*Chaney*'s presumption of unreviewability" did not apply "to a legal interpretation phrased as a general enforcement policy," including an interpretation that "concerns the scope of the agency's lawful enforcement authority." Pet. App. 39a. This holding is correct.

An agency action premised on the belief that it is compelled by law does not involve "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Chaney*, 470 U.S. at 831. Indeed, the premise of Petitioners' rescission is that they *lacked* discretion to maintain DACA, so there were no factors to balance. And for that reason, no legitimate interest is served by insulating the agency's

legal judgment from review. Barring review of an agency policy based on the value of "enforcement discretion" is nonsensical when the very legal error at issue is the agency's too-narrow definition of its own enforcement discretion. As the district court put it, "an official cannot claim that the law ties her hands while at the same time denying the courts' power to unbind her." Pet. App. 73a.

This rule also draws powerful support from the core purposes of the APA. If an agency's narrow assessment of its legal authority were immune from review, an agency could avoid political accountability for a major policy choice by insisting that the law forced its hand—just as the government has repeatedly claimed here—while also evading any review of the legal judgment As the district court underscored, approving that result would thwart the APA's commitment to ensuring that agencies are subject to meaningful checks—"in the court of public opinion" or, if not, in a court of law. Pet. App. 72a-73a. *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), is not to the contrary. There, the denial of a petition to reconsider certain labor conditions was exactly the sort of single-shot decision not to act that was held unreviewable in *Chaney*. *Id.* at 282. And the agency did not contend it was without authority to act—it simply did not believe the petition had merit. The Court's statement that an agency action is not reviewable simply where "the agency gives a 'reviewable' reason for otherwise unreviewable action," *id.* at 283, is beside the point where, as here, the agency action is reviewable.

iii. *Chaney* is also inapposite because the rescission

of DACA is not "an agency's *refusal* to take requested enforcement action." 470 U.S. at 831 (emphasis added). Rather, the agency has *affirmatively terminated* a significant program that provided a form of protection against removal to hundreds of thousands of people and offered them the opportunity to work, go to school, obtain driver's licenses, and seek other benefits. *Supra* p. 4. Indeed, *Chaney* expressly distinguished *non*-enforcement decisions from affirmative government actions:

> [W]hen an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner.

470 U.S. at 832 (emphasis in original).

Termination of a substantial program providing access to important benefits undoubtedly addresses an "area that courts often are called upon to protect." Because *Chaney* does not apply to affirmative actions of that sort, DACA's rescission is subject to the ordinary presumption of reviewability, and the government bears the burden to show that there is "no law to apply."

b. There are judicially manageable standards to apply in resolving Respondents' claims, and the government makes little effort to contend otherwise.

First, the basis for the agency's decision was a determination that DHS lacks the statutory authority to continue DACA. That is a purely legal judgment, and, of course, legal standards exist to resolve legal questions. *See Int'l Union, UAW v. Brock*, 783 F.2d 237, 246 (D.C. Cir. 1986) (noting that it is "almost ludicrous to suggest that there is 'no *law* to apply' in reviewing whether an agency has reasonably interpreted a *law*").

Second, in many cases, this Court has invalidated agency action because it failed to "cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983). In *Judulang v. Holder*, 565 U.S. 42 (2011), for example, the Court unanimously rejected the government's policy for determining eligibility for discretionary immigration relief as arbitrary and capricious, explaining that the agency's chosen approach was not "tied, even … loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system." *Id.* at 55. Because the agency did not "exercise its discretion in a reasoned manner," its policy could not "pass muster under ordinary principles of administrative law." *Id.* at 53, 64. The Court had no difficulty making that judgment, even without a statutory definition of the "appropriate operation of the immigration system," because the agency's rationale failed on its own terms. *Id.* at 55. The district court undertook the equivalent inquiry in this case, ruling not based on the wisdom of the particular immigration policy at issue, but on the irrationality of the agency's

decisionmaking and the lack of explanation. Pet. App. 48a-60a.

2. The government also argues that 8 U.S.C. § 1252(g) strips the courts of jurisdiction to hear this case. Section 1252(g) states that "[e]xcept as provided in this section [i.e., through the removal process] … no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA]." That provision does not apply here.

As the district court explained, the government's argument "contradicts not only the plain language of § 1252(g) but also the Court's interpretation of that language in *Reno v. American–Arab Anti-Discrimination Committee ("AAADC")*, where the Court specifically rejected the argument that 'the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings.'" Pet. App. 20a (quoting *AAADC*, 525 U.S. 471, 482 (1999)). As this Court explained, § 1252(g) applies "only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Id.* (quoting 525 U.S. at 482). By contrast, it does not apply to other "part[s] of the deportation process," such as "decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse

reconsideration of that order." *Id.* (quoting 525 U.S. at 482). Here, as the district court explained, "there are no pending removal proceedings with which plaintiffs' challenge might interfere." Pet. App. 21a.[8] Accordingly, § 1252(g) does not bar review of Respondents' claims.

B. The District Court Correctly Held that the Rescission of DACA Was Arbitrary and Capricious.

1. The district court held that DHS failed to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Pet. App. 48a. (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016)); *see also* Pet. App. 59a-60a. That narrow holding, which does not rest on DACA's legality, is well grounded in this Court's APA decisions.

First, the district court found the agency's "scant legal reasoning" contrary to this Court's clear articulation in *Encino Motorcars* of what the APA requires. Pet. App. 49a-51a. The agency's assertion that DACA violated the INA was "based only on an incongruous reference to the Fifth Circuit's decision on DAPA," Pet. App. 52a, while its "analysis of DACA's

---

[8] In addition, § 1252(g) could not bar the claims brought by Respondents Microsoft and Princeton, neither of whom is an alien or suing solely "on behalf of" an alien. Rather, each has alleged that the rescission of DACA will hamper its *own* operations—in Princeton's case as a university, in Microsoft's case as a corporation. *See* Dkt. 1, ¶¶ 61, 62; *see also Batalla Vidal* Pet. App. 38a-39a.

constitutionality was so barebones that the Court cannot 'discern[]' the 'path' that the agency followed," Pet. App. 53a-54a (quoting *Encino Motorcars*, 136 S. Ct. at 2125). Those failures were "particularly egregious here in light of the reliance interests involved." Pet. App. 54a (citing *Encino Motorcars*, 136 S. Ct. at 2126); *see also id.* ("DACA had been in place for five years and had engendered the reliance of hundreds of thousands of beneficiaries, many of whom had structured their education, employment, and other life activities on the assumption that they would be able to renew their DACA benefits."). The district court noted that this Court "has set aside changes in agency policy for failure to consider reliance interests that pale in comparison to the ones at stake here." Pet. App. 54a-55a (citing, e.g., *Encino Motorcars*, 136 S. Ct. at 2126).[9]

Second, the district court correctly found inadequate the government's explanation for its "litigation risk" basis to rescind DACA. Pet. App. 55a-59a. In the district court, the government argued that if DACA were challenged in litigation brought by Texas, "the district court there would enter a 'nationwide injunction' that 'would have prompted an immediate—and chaotic—end to the policy.'" Pet. App. 55a (quoting Defs.' Reply at 15). The district court appropriately

---

[9] The government suggests that it did consider these interests in that it allowed DACA recipients to maintain their status until it expired. *Regents* Pet. 26-27. But the Duke Memo belies that argument: It does not so much as mention the interests of DACA recipients, instead linking the choice to "wind [DACA] down in an efficient and orderly fashion" to the "administrative complexities" *for the agency* in ending the program. AR 254.

held this rationale "so implausible that it fails even under the deferential arbitrary and capricious standard." Pet. App. 60a. In light of the discretion available to a district court in Texas, "it strains credulity" that such a court "would have enjoined DACA immediately and completely without allowing DHS any opportunity to wind the program down."[10] Pet. App. 58a. Because the agency failed even to acknowledge the range of options available to a district court, much less analyze and weigh them against the benefits of maintaining the DACA program, the court found this rationale arbitrary and capricious. Pet. App. 58a-59a.[11]

2. Relying on the Nielsen Memo, the government seeks to morph its rationale for rescinding DACA into an argument that it did so based on "serious doubts" about DACA's legality. To the extent that rationale

---

[10] As expected, the Southern District of Texas denied Texas's motion for a preliminary injunction. *Texas*, 328 F. Supp. 3d at 741-42.

[11] For the exact reasons given by the district court, *amici*'s argument that "threatened litigation" alone provided a "valid basis for ending DACA,"—even absent any analysis of the likely outcome of the litigation or of the costs of rescinding DACA—is baseless. Texas, Amicus Br. at 10. Moreover, Respondents identified additional failures of explanation, but the district court did not reach them in light of its central ruling that the rationales provided for rescission were themselves inadequate. Nevertheless, DACA's rescission could equally be invalidated for failing to consider alternatives, such as enhancements to the individualized review of DACA applications, or failing to explain the reasoning underlying the agency's idiosyncratic and haphazard "wind-down" process. *See State Farm*, 463 U.S. at 50-51.

differs in substance from the rationale in the Duke Memo, it may not be used to justify, retroactively, Acting Secretary Duke's rescission of DACA. And, in any event, it too fails arbitrary and capricious review.

a. The Duke Memo articulates only one independent rationale for DACA's rescission: the claim that DACA is illegal. Both Attorney General Sessions' letter and the Duke Memo are framed in purely legal terms. AR 251-256. Indeed, after declaring DACA "unconstitutional" and lacking in "proper statutory authority," Attorney General Sessions invoked the "duty to defend the Constitution and faithfully execute the laws passed by Congress" and touted the "restoration of the rule of law" that DACA's rescission would purportedly bring about. AR 251. In this context, the Attorney General's passing assertion that a court would "likely" agree with him about DACA, AR 251, cannot plausibly be viewed as a freestanding basis for rescission. And the Duke Memo that followed the next day added nothing of substance to the Attorney General's analysis, and certainly nothing resembling a policy assessment.

The new justifications for the rescission of DACA contained in the Nielsen Memo cannot retroactively bolster the prior decision. *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006) (citing *Overton Park*, 401 U.S. at 420).[12] As the district court put it, there is a

---

[12] As the district court observed: "[H]ad Secretary Nielsen opted to issue a new decision rescinding DACA, the explanations offered in her memorandum would be contemporaneous and, consequently, not *post hoc*. She did not do this, however." Pet. App. 94a n.7. Moreover, if Secretary Nielsen had taken a separate

critical distinction between "an 'amplified articulation' of the agency's prior reasoning (which must be considered)," and "'a new reason for why the agency *could* have' taken the action (which must be disregarded)." Pet. App. 92a (citations omitted).

Camp v. Pitts, 411 U.S. 138 (1973), is instructive. There, an agency declined to approve a bank charter, and the court of appeals held that the agency's explanation for that decision was deficient. This Court held that under *Overton Park*, the court could obtain "such additional explanation of the reasons for the agency decision as may prove necessary." 411 U.S. at 143. But the Court stressed a "caveat": "Unlike *Overton Park*, in the present case there was contemporaneous explanation of the agency decision" to deny the bank charter; and while that explanation "may have been curt," it "surely indicated the determinative reason for the final action taken." *Id.* Accordingly, the Court said, the validity of the agency's action "must … stand or fall on the propriety of that finding." *Id.* If the pivotal finding could not be sustained even with the benefit of further explanation from the relevant personnel, the agency would need to make a fresh decision on remand. *Id.* (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)); *see also Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (reaffirming that *Overton Park* authorizes "a remand to the agency for a fuller explanation of the

---

administrative action, Respondents would be entitled to review the administrative record to assess whether Secretary Nielsen weighed all of the relevant interests, "look[ing] at the costs as well as the benefits." *State Farm*, 463 U.S. at 52, 54.

agency's reasoning *at the time of the agency action*" (emphasis added)); Pet. App. 82a.

Thus, while the Nielsen Memo's legal analysis may be considered, its other arguments—and certainly its "policy" arguments, to the extent they exist—may not be used to uphold the rescission.

b. Even if a court could consider the Nielsen Memo's "serious doubts about DACA's legality," that justification is arbitrary and capricious.

First, the Nielsen Memo no more explains its "doubts" about DACA's legality than did the Duke Memo explain its conclusion. Pet. App. 106a. Secretary Nielsen asserts that DACA "was contrary to law" without specifying *which* law,[13] saying only that the Fifth Circuit's DAPA decision turned on the "incompatibility of such a major non-enforcement policy with the INA's comprehensive scheme." *Regents* Pet. App. 122a. But she does not articulate when a non-enforcement policy becomes sufficiently "major" that it is incompatible with the INA. For example, Secretary Nielsen does not say which of the myriad past deferred action programs would pass muster under this novel,

---

[13] To the extent the government contends that DACA was improper because it would have required notice and comment, that itself would not be sufficient to uphold the rescission because the government would have needed notice and comment to undo the program. *See Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982) ("[T]he APA expressly contemplates that notice and an opportunity to comment will be provided prior to agency decisions to repeal a rule."), *aff'd sub nom. Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983).

barely-articulated standard. Dkt. 28-16 at 2158-60. And even though her analysis appears to turn on whether a non-enforcement policy is sufficiently "major," Secretary Nielsen does not address the significant differences between DACA and DAPA as to scope and size: both that DAPA, unlike DACA, was an "open-ended" policy "with no established end-date," AR 251, and that there were almost four persons eligible for DAPA for each person eligible for DACA. Even combining the efforts of the Duke and Nielsen Memos, it remains true that "[w]hatever potential reasons [Defendants] might have given, [they] in fact gave almost no reasons at all." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016).

The Nielsen Memo's discussion of reliance interests also remains inadequate. Secretary Nielsen notes her awareness "that DACA recipients have availed themselves of the policy" and states that the "asserted reliance interests" do not "outweigh the questionable legality of the DACA policy and [the] other reasons for ending the policy discussed above." *Regents* Pet. App. 125a. But acknowledging that DACA has existed is not the same thing as weighing the real effects of its rescission. Thus, like the Duke Memo, the Nielsen Memo "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

Second, even if Secretary Nielsen had provided an adequate explanation, it would be incorrect. DACA is a lawful exercise of DHS's broad statutory authority to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), and to carry out the "administration and enforcement of [the INA] and all

other laws relating to the immigration and naturalization of aliens," 8 U.S.C. § 1103(a)(1), including by providing for work authorization, 8 U.S.C. § 1324a(h)(2). As the United States itself has previously argued, the government has long used deferred action to effectuate its enforcement priorities. *See* Dkt. 28-16 at 2152-74.[14] Because the government is incorrect about DACA's legality, rescission based on that rationale is arbitrary and capricious. *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[A]n order may not stand if the agency has misconceived the law.").

Accordingly, Secretary Duke's rescission of DACA remains arbitrary and capricious and cannot be saved by the Nielsen Memo. Because the district court's narrow and well-reasoned decision is correct, the petition should be denied.

---

[14] In arguing that DACA is illegal, *amici* entirely ignore not only the well-established history of deferred action programs, but also the 2014 OLC Memorandum explicitly determining that DACA was a lawful exercise of executive discretion. *See* Texas, Amicus Br. 12. But failing to acknowledge evidence contrary to its position does not render that evidence invalid.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted,

JOSEPH M. SELLERS
JULIE S. SELESNICK
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave., N.W.
Fifth Floor
Washington, DC 20005
(202) 408-4600

Counsel for Respondents NAACP; American Federation of Teachers, AFL-CIO; United Food and Commercial International Union, AFL-CIO

THOMAS J. PERRELLI
LINDSAY C. HARRISON
Counsel of Record
SAM HIRSCH
ISHAN BHABHA
ALEX S. TREPP
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001
(202) 639-6000
lharrison@jenner.com

Counsel for Respondents The Trustees of Princeton University, Microsoft Corporation, and Maria De La Cruz Perales Sanchez

RAMONA E. ROMERO
WESLEY MARKHAM
Princeton University
New South Building
Fourth Floor
Princeton, NJ, 08544
(609) 258-2500

Counsel for Respondent The Trustees of Princeton University

DAVID J. STROM
AMERICAN FEDERATION OF TEACHERS, AFL-CIO
555 New Jersey Ave. N.W.
Washington D.C.
(202) 393-7472

Counsel for Respondent American Federation of Teachers, AFL-CIO

CYNTHIA L. RANDALL
MICROSOFT CORPORATION
One Microsoft Way
Redmond, WA 98052
(425) 538-3176

Counsel for Respondent Microsoft Corporation

BRADFORD M. BERRY
NAACP
4805 Mount Hope Drive
Baltimore, MD 21215
(410) 580-5797

Counsel for Respondent NAACP

PETER J. FORD
UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC
1775 K Street. N.W.
Washington D.C. 20006
(202) 223-3111

Counsel for Respondent United Food & Commercial Workers International Union, AFL-CIO, CLC