No. 18-589

IN THE

Supreme Court of the United States

KIRSTJEN M. NIELSEN,
Secretary of Homeland Security, et al.,
Petitioners,

v.

MARTIN JONATHAN BATALLA VIDAL, et al.,
Respondents.

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

BRIEF IN OPPOSITION FOR THE STATES OF NEW YORK, MASSACHUSETTS, WASHINGTON, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, IOWA, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, AND VIRGINIA, AND THE DISTRICT OF COLUMBIA

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the extraordinary relief of certiorari before judgment is warranted to consider the reviewability and lawfulness of petitioners' September 2017 decision to end Deferred Action for Childhood Arrivals.

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INTRODUCTION

Congress and this Court have long recognized the Executive Branch's discretion to forbear enforcement against persons whom federal immigration law makes removable from the United States—a practice commonly referred to as "deferred action." Respondents are a group of sixteen States[1] and the District of Columbia that have challenged petitioners' decision to terminate Deferred Action for Childhood Arrivals (DACA), which provides a framework for the Department of Homeland Security (DHS) to receive and process requests for deferred action from law-abiding individuals who were brought to the United States as children.[2] In the proceedings below, the U.S. District Court for the Eastern District of New York entered a preliminary injunction partially enjoining DACA's termination in light of the irreparable harms that the termination threatened to respondents and the public, and the likelihood respondents would succeed on the merits of their Administrative Procedure Act (APA) claim that the termination was arbitrary and capricious. (Pet. App. 62a-129a.) Separately, the district court issued orders denying petitioners' motions to dismiss respondents' APA and equal-protection claims for lack of jurisdiction (Pet. App. 1a-58a) and failure to state a claim (Pet. App. 133a-171a).

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[1] Those States are New York, Massachusetts, Washington, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Iowa, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia.

[2] A group of individuals and organizations—the other respondents to this petition—brought a separate, similar challenge in the same district court.

The U.S. Court of Appeals for the Second Circuit has consolidated petitioners' interlocutory appeals from the district court's orders and will hear argument on those on January 25, 2019. (Case Calendaring, No. 18-485 (2d Cir. Nov. 19, 2018), ECF No. 567.) Petitioners seek to bypass the court of appeals, however, and have petitioned this Court for the extraordinary remedy of certiorari before judgment.

This Court should deny the petition because no external deadline or other urgent circumstance requires the Court to conclusively resolve this litigation on an emergency basis. Petitioners have failed to show that permitting the Second Circuit to consider their appeals in the first instance will cause any injury whatsoever to them or to the public. In addition, there is no conflict among the courts of appeals on the issues presented here. Only one circuit court has addressed those issues, but three additional circuits are now expeditiously hearing appeals, putting the benefits of appellate percolation not far off. Finally, even if there were a need for this Court to review those issues at the present time, this litigation would be a poor vehicle for that undertaking because it comes to the Court in an interlocutory posture as well as before judgment by an intermediate appellate court.

STATEMENT

1. Like other forms of deferred action, DACA reflects the reality that there are many more undocumented immigrants in the United States than federal immigration authorities have the means to remove. To focus enforcement resources, DHS and its predecessors have a long-standing practice of "giv[ing] some cases lower priority" by "grant[ing] deferred action,"

8 C.F.R. § 274a.12(c)(14). A grant of deferred action memorializes the Executive's decision not to proceed against a potentially removable person for a specified period of time. *Reno v. American-Arab Anti-Discrimination Comm.* ("*AADC*"), 525 U.S. 471, 484 (1999). Under federal regulations, the grant also makes that person eligible to apply for work authorization and to receive other benefits. 8 C.F.R. § 274a.12(c)(14) (work authorization); *id.* § 214.14(d)(3) (no accrual of "unlawful presence" for purposes of re-entry bars); 28 C.F.R. § 1100.35(b)(2) (similar). (*See* CA2 J.A. 217 (memorandum of the U.S. Department of Justice, Office of Legal Counsel ("OLC Mem.").)

Deferred action has been "a regular practice" of the Executive Branch for decades, "for humanitarian reasons or simply for its own convenience." *AADC*, 525 U.S. at 483-84. This Court has approved of the practice, *id.* at 483-84, and Congress has enacted legislation relying on the existence of both deferred action and the federal regulation that makes deferred action grantees eligible for work authorization, *see* 8 U.S.C. § 1154 (deferred action); Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (work authorization). (*See also* Pet. App. 75a.)

On various occasions since the 1970s, DHS and its predecessors have found it expedient to make deferred action "available to certain classes of aliens" (CA2 J.A. 230 (OLC Mem.)). For example, the 1977 Silva Letter-holders program stemming from executive action by the Kennedy administration provided a framework for 250,000 "nationals of certain countries" to obtain stays of removal; and the Family Fairness Program—adopted by the Reagan administration and extended under the first Bush administration—"deferred the deportation of 1.5 million family members of

noncitizens who were legalized through the Immigration Reform and Control Act." *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 968 n.2 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1279 (2018).

a. In June 2012, DHS announced DACA: a framework for processing requests for deferred action from persons who were brought to the United States as children and met several other threshold eligibility criteria. (CA2 J.A. 213-215.) DHS explained that DACA would help DHS "ensure that [its] enforcement resources" would be expended on the serious criminals that Congress directed DHS to prioritize for deportation,[3] rather than on "low priority cases." (CA2 J.A. 213.)

To be eligible for DACA, a person must have come to the United States under the age of sixteen, continuously resided here between 2007 and 2012, not yet attained the age of thirty, and satisfied specific educational or military service requirements. (CA2 J.A. 213.) The person must not have been convicted of a felony, a significant misdemeanor, or multiple misdemeanors, and must not otherwise pose a threat to national security or public safety. (CA2 J.A. 213-215.) As the DACA memorandum explained, "prosecutorial discretion" was "especially justified" with respect to such people, many of whom "have already contributed to our country in significant ways." (CA2 J.A. 214.) The memorandum emphasized, however, that no individual could receive deferred action through DACA

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[3] *See*, *e.g.*, DHS Appropriations Act, 2015, Pub. L. No. 114-4, 129 Stat. 39, 43; Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, div. F., tit. II, 128 Stat. 5, 251; DHS Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142, 2149 (2009); H.R. Rep. No. 111-157, at 8 (2009).

without first passing a background check, and that all requests for relief under DACA "are to be decided on a case by case basis." (CA2 J.A. 214.)

Individuals granted deferred action under DACA received protection from removal for renewable two-year periods, and the ability to apply for work authorization and for permission to travel outside the country ("advance parole"). (CA2 J.A. 214-215.) *See* 8 C.F.R. § 212.5.

From June 2012 until September 2017, more than 800,000 individuals relied on DACA to obtain deferred action and employment authorization, including more than 100,000 residents of the respondent States. (Pet. App. 62a-63a; CA2 J.A. 2332-2336.) DACA enabled grantees to pursue higher education, secure employment, and create and run businesses. (CA2 J.A. 2129-2213.) It also enabled States to employ grantees with special skills, tax the grantees' income and purchases, and collect tuition from grantees who enrolled at public colleges and universities based on assurances that they would be able to work upon graduation.[4] (CA2 J.A. 2239-2258, 2266-2298, 3753-3757, 3774-3794, 3956-3965.)

Prior to September 2017, several courts heard challenges to DACA, but none of the challenges succeeded.[5] In those cases, the federal government defended the legality of DACA, including through

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[4] *See also* 8 U.S.C. § 1324a(a), (e) (imposing penalties on employers of persons who lack authorization to work).

[5] *See Arizona Dream Act Coal. v. Brewer*, 818 F.3d 901, 906 (9th Cir. 2016), *amended on denial of reh'g en banc*, 855 F.3d 957 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1279 (2018); *Arpaio v. Obama*, 797 F.3d 11, 15 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 900 (2016); *Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015).

amicus curiae participation. *See*, *e.g.*, United States Br. as Amicus Curiae, *Arizona Dream Act Coal.*, No. 15-15307 (9th Cir. Aug. 28, 2015), ECF No. 62. The Office of Legal Counsel likewise explained in a lengthy public opinion that DACA was legally sound so long as immigration officials "retained discretion to evaluate each application on an individualized basis." (CA2 J.A. 233; *see also* CA2 J.A. 833 (petitioners' admission "that at least one DACA applicant who met the guidelines of the 2012 DACA memorandum was nonetheless denied DACA").)

b. In 2015, Texas and several other States challenged DHS's creation of a different deferred action framework for certain parents of citizens and permanent residents (Deferred Action for Parents of Americans and Lawful Permanent Residents, also known as DAPA), as well as particular changes that DHS made to DACA in 2014. The U.S. District Court for the Southern District of Texas entered a nationwide injunction against the implementation of DAPA and the 2014 changes to DACA, concluding that the plaintiffs were likely to succeed on their claim that DHS had failed to comply with the procedural requirements of the APA. *Texas v. United States*, 86 F. Supp. 3d 591, 677 (2015). A divided panel of the Fifth Circuit affirmed on both procedural and substantive APA grounds. *Texas v. United States*, 809 F.3d 134, 146-49 (5th Cir. 2015). This Court affirmed by an equally divided court. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

The federal government continued DACA despite the preliminary injunction against DAPA, accepting more than 400,000 new and renewal DACA applications into the new Administration. (CA2 J.A. 1756.) In

February 2017, DHS rescinded certain other immigration policies, but expressly left DAPA and DACA intact. (Pet. App. 80a.) In mid-June of 2017, DHS rescinded DAPA, which had never gone into effect due to the injunction, but again explicitly did not disturb DACA. (Pet. App. 80a-81a.) In late June 2017, the *Texas* plaintiffs informed U.S. Attorney General Jeff Sessions that they would amend the complaint in their still-pending DAPA challenge to include a challenge to DACA, unless the federal government agreed by September 5 to rescind the DACA memorandum. (CA2 J.A. 451.) The letter did not ask for existing DACA grants to be cancelled, or for the federal government to change its enforcement priorities with respect to DACA-eligible persons. (CA2 J.A. 451.)

c. On September 4, 2017, Attorney General Sessions sent a one-page letter to Acting DHS Secretary Elaine Duke advising that DHS "should rescind" DACA. (CA2 J.A. 463.) The letter stated that DACA lacked "statutory authority" and was "unconstitutional," and that DACA had been implemented "after Congress' repeated rejection of proposed legislation that would have accomplished a similar result." (CA2 J.A. 463.) The letter then opined that DACA "has the same legal and constitutional defects that the courts recognized as to DAPA," and would likely meet the same fate in the "potentially imminent litigation" threatened by the *Texas* plaintiffs. (CA2 J.A. 463.) Finally, the letter stated that "[i]n light of the costs and burdens that will be imposed on DHS" if DACA were enjoined, "DHS should consider an orderly and efficient wind-down process." (CA2 J.A. 463.) The letter did not describe the basis for any of those conclusions beyond a general citation to the *Texas* opinions, which did not consider DAPA's constitutionality and

recognized several significant distinctions between DAPA and DACA.

On September 5, Attorney General Sessions announced the termination of DACA at a press conference. (CA2 J.A. 3488-3489.) That same day, Acting Secretary Duke issued a memorandum formally terminating the program. (CA2 J.A. 464-468.) The memorandum quoted from Attorney General Sessions's September 4 letter and then stated that "[t]aking into consideration the Supreme Court's and the Fifth Circuit's rulings" and the letter, "it is clear" that DACA should be terminated. (CA2 J.A. 467.) Like Attorney General Sessions's letter, the memorandum did not address or acknowledge the reasons that DHS and the U.S. Department of Justice had previously given to the public for concluding that DACA was lawful, the benefits of the program, or the myriad costs and harms that terminating the program would inflict on grantees and the public. The only potential costs that the memorandum mentioned were the unspecified "administrative complexities" referenced by Attorney General Sessions's letter. (CA2 J.A. 466.) The termination memorandum announced that DHS would reject all new DACA applications "filed after the date of this memorandum," and would accept renewal applications only until October 5, and only from individuals whose current deferred action status would expire on or before March 5, 2018. (CA2 J.A. 467.) The memorandum further stated that DHS would no longer approve any "applications for advance parole under standards associated with the DACA program." (CA2 J.A. 467.)

2. The respondent States filed this suit on September 7, 2017, alleging (among other things) that the termination of DACA was driven by discriminatory

animus in violation of equal protection and the APA; failed to comply with the procedural requirements of the APA and Regulatory Flexibility Act; and was otherwise arbitrary and capricious. (CA2 J.A. 198, 200-202.) The district court ruled that (i) petitioners' attempt to rescind DACA was reviewable under the APA and Immigration and Naturalization Act (Pet. App. 24a-39a); (ii) respondents' equal protection and substantive APA claims were adequately pleaded (Pet. App. 137a-138a, 147a-157a); and (iii) respondents were entitled to a preliminary injunction on their substantive APA claim (Pet. App. 90a-129a). After delays created by petitioners' litigation conduct, petitioners' interlocutory appeals from these orders were consolidated for presentation to the Second Circuit, which is scheduled to hear argument on the appeals on January 25, 2019.

a. In October 2017, petitioners proffered an extremely limited administrative record to the district court consisting of "materials that [they] unilaterally decide[d] to present to the court, rather than the record upon which the agency made its decision." (Order at 2, No. 17-3345 (2d Cir. Dec. 27, 2017), ECF No. 171.) Respondents objected, and the district court sustained their objection. (Mem. & Order, No. 17-cv-5228 (E.D.N.Y. Oct. 19, 2017), ECF No. 66.) Petitioners then petitioned the Second Circuit for a writ of mandamus, seeking (i) vacatur of the district court's orders to complete the record and produce a privilege log identifying any record materials petitioners were withholding as privileged, and (ii) a stay of petitioners' document-production obligations pending the resolution of threshold justiciability arguments that petitioners had not yet presented to the district court in the form of a motion to dismiss. (Pet. for a Writ of

Mandamus, No. 17-3345 (2d Cir. Oct. 23, 2017), ECF No. 33.) The Second Circuit held the mandamus petition in abeyance and stayed petitioners' document-production obligations until the district court resolved those "issues of jurisdiction and justiciability." (Order, No. 17-3345 (2d Cir. Oct. 24, 2017), ECF No. 41.)

b. Within two weeks after petitioners moved to dismiss this suit, the district court entered an order largely denying the portion of petitioners' motion that sought dismissal for lack of jurisdiction.[6] (Pet. App. 58a.) Petitioners did not promptly request certification of that ruling for interlocutory appeal under 28 U.S.C. § 1292(b), which would have enabled the ruling to be considered on an expedited basis along with their mandamus petition. Petitioners instead waited seven weeks to request certification, by which time the Second Circuit had denied their mandamus petition (Pet. App. 85a-86a; *see* Notice of Mot., No. 17-cv-5228 (E.D.N.Y. Dec. 28, 2017), ECF No. 184.) Despite its "grave misgivings" about the delay that would be created by § 1292(b) certification at that stage of the proceedings, the district court granted petitioners' request and postponed the preliminary injunction proceedings scheduled for the following week. (Mem. & Order at 8, No. 17-cv-5228 (E.D.N.Y. Jan. 8, 2018), ECF No. 198.) Petitioners applied to the Second Circuit for permission to proceed with their

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[6] The district court dismissed for lack of standing the States' claims that petitioners violated due process by failing to sufficiently notify grantees of DACA's end and the limited renewal window, and by apparently ceasing to protect sensitive personal information that DACA grantees had been induced to provide. (Pet. App. 50a-56a.)

interlocutory appeal,[7] but subsequently asked the Second Circuit to hold their appeal until the district court resolved the still-pending portion of their motion to dismiss for failure to state a claim, and respondents' motion for a preliminary injunction. (Pet. App. 87a.) The Second Circuit accordingly directed that petitioners' application for leave to file an interlocutory appeal be "held in abeyance pending the district court's adjudication of the parties' pending motions." (Order at 2, No. 18-122 (2d Cir. Jan. 31, 2018), ECF No. 46.)

c. Within two weeks of the order holding the Second Circuit proceedings in abeyance, the district court held a hearing and entered a preliminary injunction. The district court concluded that respondents were likely to succeed on their claim that petitioners' decision to terminate DACA was arbitrary and capricious, and that the other preliminary injunction factors weighed strongly in respondents' favor. (Pet. App. 119a, 126a.) The court directed petitioners to allow DACA renewals "on the same terms and conditions that existed prior to the promulgation of the DACA Rescission Memo." (Pet. App. 126a.) The court declined to order petitioners to grant new applications from "individuals who have never before obtained DACA benefits" or to "continue granting 'advanced parole' to DACA beneficiaries." (Pet. App. 126a.) Petitioners noticed an appeal of the district court's preliminary injunction order (Pet. App. 130a-131a), and the Second Circuit granted petitioners' motion to expedite that appeal (Order, No. 18-485 (2d Cir. Mar. 8, 2018), ECF No. 61).

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[7] (Pet. for Permission to Appeal, No. 18-122 (2d Cir. Jan. 16, 2018), ECF No. 1.)

d. One month later, in March 2018, the district court entered an order largely denying petitioners' motion to dismiss for failure to state a claim. (Pet. App. 133a-171a.) The court held that the state respondents had adequately pleaded their equal protection and substantive APA claims, but dismissed the States' APA notice-and-comment claims and Regulatory Flexibility Act claims. (Pet. App. 137a.) At petitioners' request, the district court certified the order for interlocutory appeal.[8] (Order, No. 17-cv-5228 (E.D.N.Y. Apr. 30, 2018), ECF No. 220.)

e. In July 2018, the Second Circuit granted petitioners' applications for interlocutory appeal of the district court's November 2017 and March 2018 orders, directed that those appeals be consolidated with petitioners' pending appeal from the district court's February 2018 preliminary injunction order, and granted petitioners' request for expedited supplemental briefing.[9] (Order, No. 18-1313 (2d Cir. July 5,

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[8] Petitioners also sought a stay of their deadline to answer the complaint. (Mot. for Stay of Answer Deadlines Pending Appeal, No. 17-cv-5228 (E.D.N.Y. Apr. 10, 2018), ECF No. 216.) The district court largely denied that motion two days later, requiring petitioners to file their answer within forty-five days and explaining that it was "reasonable to require [petitioners] to take the steps necessary to avoid exacerbating the needless delays they have already caused." (Order, No. 17-cv-5228 (E.D.N.Y. Apr. 12, 2018).)

[9] Contrary to petitioners' assertions, the litigation pending before the Second Circuit does not present the question of whether petitioners' termination of DACA "should have gone through notice-and-comment rulemaking." *See* Pet. 15. Neither the state plaintiffs nor the individual plaintiffs in this litigation have appealed or cross-appealed the dismissal of their notice-and-comment claims, as petitioners have acknowledged in a

2018), ECF No. 44; Order, No. 18-122 (2d Cir. July 5, 2018), ECF No. 75; Mot. Order, No. 18-485 (2d Cir. July 25, 2018), ECF No. 499.) The parties completed supplemental briefing on October 30, 2018, and the Second Circuit has calendared the consolidated appeals for argument on January 25, 2019. (Suppl. Reply Br., No. 18-485 (2d Cir. Oct. 30, 2018), ECF No. 561; Case Calendaring Entry, No. 18-485 (2d Cir. Nov. 19, 2018), ECF No. 567.)

f. On November 5, 2018, petitioners filed petitions for certiorari before judgment in this case and in parallel DACA challenges being heard by the U.S. Courts of Appeals for the Ninth and District of Columbia Circuits: *Department of Homeland Security v. Regents of the University of California*, No. 18-587 (Nov. 5, 2018); *Trump v. NAACP*, No. 18-588 (Nov. 5, 2018). Three days later, the Ninth Circuit issued an opinion affirming the decisions of the U.S. District Court for the Northern District of California which petitioners had appealed. *Regents of Univ. of Cal. v. DHS*, 908 F.3d 476, 487, 520 (9th Cir. 2018). The *Regents* and *Trump* petitions are being briefed on the same schedule as the present petition.

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corrected supplemental brief supporting their parallel petition in *Department of Homeland Security v. Regents of the University of California*, No. 15-587, which was filed November 28, 2018.

REASONS FOR DENYING THE PETITION

A. This Litigation Presents No Emergency Warranting the Extraordinary Remedy of Certiorari Before Judgment.

This Court will grant certiorari before judgment "only upon a showing 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. This is a "very demanding standard," *Mount Soledad Mem'l Ass'n v. Trunk*, 134 S. Ct. 2658, 2658-59 (2014) (Alito, J., statement respecting denial of certiorari before judgment), and a grant of certiorari before judgment is "an extremely rare occurrence," *Coleman v. Paccar Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers).

The rare occasions on which this Court has granted certiorari before judgment demonstrate the exceptional urgency required to warrant that relief. For instance, the exigencies of war demanded immediate resolution of the challenges to executive action in *Ex parte Quirin*, 317 U.S. 1 (1942), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The former case addressed a presidential order creating a military tribunal to try German saboteurs who had come to America after America entered World War II. *Ex parte Quirin*, 317 U.S. at 6, 21-23. The latter case dealt with a presidential order seizing most of the Nation's steel plants to avert a strike during the Korean War. *Youngstown Sheet & Tube*, 343 U.S. at 582. This Court decided both cases within weeks of the challenged presidential orders. *See Ex parte Quirin*, 317 U.S. at 22 (presidential order issued July 2, 1942; case decided by this Court on July 31, 1942);

Youngstown Sheet & Tube, 343 U.S. at 582-83 (presidential order issued April 8, 1952; case decided by this Court on June 2, 1952).

Extraordinary circumstances likewise created exceptional urgency in *United States v. Nixon*, which concerned a motion to quash a subpoena that sought recordings of confidential communications concerning the Watergate scandal from the President, for use in a pending criminal prosecution. *See* 418 U.S. 683, 686-90 (1974). Similarly, in *Dames & Moore v. Regan*, this Court was presented with a challenge to executive orders implementing an international agreement to end the Iran hostage crisis, against the backdrop of a looming deadline by which "Iran could consider the United States to be in breach of" the agreement. *See* 453 U.S. 654, 660 (1981). In *Nixon* and *Dames & Moore*, this Court again acted with dispatch to resolve those exceptionally pressing matters. *See Nixon*, 418 U.S. at 687-88 (subpoena issued April 18, 1974; case decided by this Court on July 24, 1974); *Dames & Moore*, 453 U.S. at 666-67 (suit filed April 28, 1981; case decided by this Court on July 2, 1981).

The present litigation is not comparable. It presents no urgent issue of national defense or international relations; its pendency inhibits no crucial government action; and no external deadline, pending proceeding, or other circumstance requires its immediate and conclusive resolution. Indeed, less than a year ago, this Court *denied* a petition for certiorari before judgment in parallel litigation raising substantially the same issues as petitioners' appeals here. *See DHS v. Regents of Univ. of Cal.*, 138 S. Ct. 1182 (2018). This Court's denial of certiorari before judgment in *Regents* stands in stark contrast to its expedited consideration of the issues in *Ex parte Quirin*, *Youngstown Sheet &*

Tube, *Nixon*, and *Dames & Moore*, and underscores that the questions raised here present no emergency.

1. In a supplemental brief supporting their current parallel petition in *Regents*, petitioners observed that the Ninth Circuit's decision in *Regents* eliminates one of the main reasons they sought certiorari before judgment in this Second Circuit litigation. *See* Pets.' Suppl. Br. at 10-11, *Regents*, No. 18-587 (Nov. 28, 2018) ("*Regents* Suppl. Br."). Petitioners explained that they had sought certiorari before judgment here to enable this Court to review any issue that might be decided in their favor by the Ninth Circuit, but resolved against them by the Eastern District of New York: a concern that was obviated by the Ninth Circuit's rejection of all of petitioners' arguments on appeal. *Id.* Petitioners suggest that this Court "may still wish" to grant certiorari to allow the parties to "participate in the Court's consideration of the overlapping issues" raised here and in *Regents*. *Id.* at 11. But such a suggestion is quite different from a showing that a dispute is "of such imperative public importance as to . . . *require* immediate determination in this Court," Sup. Ct. R. 11 (emphasis added).

Petitioners seem to recognize as much when they analogize their appeals to prior cases where certiorari before judgment was granted despite the absence of any "'great public emergency'" because "similar or identical issues of importance were already pending before the Court" and the Court elected "'to review simultaneously the questions posed in the case still pending in the court of appeals.'" *Regents* Suppl. Br. at 11 (quoting Stephen M. Shapiro et al., *Supreme Court Practice* § 2.4, at 86 (10th ed. 2013)). That characterization undermines any suggestion that petitioners' appeals here present an emergency—and in any

event, certiorari before judgment would not be appropriate in the *Batalla Vidal* appeals even if this Court were to grant certiorari in *Regents* or *Trump*, for reasons we explain later (see *infra* at 26-30).

Petitioners' conduct in the proceedings below is likewise inconsistent with any claim of an emergency. Although petitioners purport to need immediate relief from the preliminary injunction entered by the district court (Pet. 14-15), they have not sought a stay of the injunction from any court during the more than nine months that the injunction has been in place. In addition, the litigation strategy they pursued below delayed rather than advanced their appeals in the Second Circuit. Petitioners waited seven weeks to ask the district court to certify for interlocutory appeal its order denying their motion to dismiss on jurisdictional grounds; had they acted earlier, the interlocutory appeal could have been presented and resolved in conjunction with petitioners' then-pending mandamus petition. Moreover, when the district court granted their request for certification, petitioners asked the Second Circuit to hold the interlocutory appeal in abeyance pending the preliminary injunction proceedings in the district court, which the district court had previously postponed in response to petitioners' declared intention to take an interlocutory appeal. See *supra* at 10-11. (*See* Order, No. 17-cv-5228 (E.D.N.Y. Jan. 12, 2018).)

2. Petitioners also cannot show any injury from allowing the Second Circuit to consider their appeals in the first instance. The Second Circuit has been willing to act expeditiously throughout this proceeding, granting every request for expedited consideration that petitioners have made. See *supra* at 11-12. And that court is scheduled to hear oral argument on

petitioners' fully briefed appeals on January 25, 2019. The circuit's awareness of the need to "proceed expeditiously to decide this case," *United States v. Clinton*, 524 U.S. 912, 912 (1998)—when coupled with petitioners' failure to show any need for an immediate, conclusive resolution—refutes any claim of prejudice and provides a further factor in favor of denying certiorari before judgment. *See Aaron v. Cooper*, 357 U.S. 566, 567 (1958); *see also Regents*, 138 S. Ct. at 1182.

Indeed, the courts below have consistently granted petitioners' requests to stay completion of the administrative record and discovery, suspending petitioners' evidentiary obligations nearly continuously since October 20, 2017.[10] See *supra* at 9-10. (Mot. Order, No. 17-3345 (2d Cir. Oct. 20, 2017), ECF No. 23.) The current stay will remain in place pending the Second Circuit's decision in petitioners' appeals, and petitioners may seek an additional stay from the lower courts or this Court if they can demonstrate that one is needed. The Second Circuit's consideration of these appeals therefore will not burden petitioners with discovery obligations of the type that they complained about in their earlier, unsuccessful petition for certiorari before judgment in *Regents*. *See* Pet. 13, *Regents*, No. 17-1003 (U.S. Jan. 18, 2018).

3. Petitioners' suggestion that their appeals require immediate resolution by this Court is also belied by the absence of any harm to the public from permitting these appeals to go forward in the Second Circuit. Although petitioners complain that the preliminary

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[10] Accordingly, petitioners have yet to produce any of the missing administrative record documents. (Pet. App. 123a.) *See In re United States*, 138 S. Ct. 443, 445 (2017).

injunction will remain in place while the Second Circuit considers their appeals, that injunction did no more than maintain the status quo by preventing the termination of DACA, a form of deferred action that DHS has granted since 2012 to law-abiding individuals who have lived in the United States since at least 2007. Petitioners do not and cannot explain how DACA's existence *now* poses a problem too urgent to allow the Second Circuit to consider their appeals. Indeed, for the first seven months of the current Administration, petitioners deliberately left DACA in place, publicly and expressly reaffirming their commitment to DACA grantees until their abrupt about-face in September 2017. (CA2 J.A. 141-142.)

As multiple courts have concluded based on fact-intensive records, DACA's continuation during the pendency of these appeals serves rather than harms the public interest. By protecting grantees who have come out of the shadows and are undertaking higher education and skilled employment, the continuation of DACA safeguards the interests of hundreds of thousands of grantees, their families and employers, the institutions with which they are associated, and the communities and States in which they reside.

Two district courts have thus concluded that the balance of equities and the public interest favor *maintaining* DACA, not terminating it, while challenges to petitioners' September 2017 rescission efforts are litigated. (Pet. App. 123a-126a.) *Regents of Univ. of Cal. v. DHS*, 279 F. Supp. 3d 1011, 1047-48 (N.D. Cal.), *aff'd*, 908 F.3d 476 (9th Cir. 2018). As both courts found, ending DACA would injure not only grantees, but also many States and the District of Columbia in their capacities as employers, providers

of health services, and proprietors of public universities; terminating DACA would also cost these entities many millions of dollars in tax revenue. (Pet. App. 122a-123a, 128a (sixteen States and District of Columbia).) *Regents*, 279 F. Supp. 3d at 1033-34, 1046-47 (four States). Based on similar considerations, a third district court required petitioners to continue processing DACA renewal requests pending petitioners' appeal of an order vacating the September 2017 rescission decision as arbitrary and capricious. *NAACP v. Trump*, 321 F. Supp. 3d 143, 148-49 (D.D.C. 2018) (partly declining to stay vacatur order pending appeal). And a fourth district court, although concluding that DACA was likely unlawful, declined to enjoin DACA's operation because doing so would "not make sense nor serve the best interests of the country" given that "DACA recipients and others nationwide have relied upon it for the last six years." *Texas v. United States*, 328 F. Supp. 3d 662, 742 (S.D. Tex. 2018).

In sum, petitioners cannot show any urgent need for a definitive resolution of these appeals, or any injury to themselves or to the public from allowing these appeals to proceed in the Second Circuit. Petitioners thus fall well short of meeting the demanding standard for the extraordinary relief of certiorari before judgment.

B. The Courts of Appeals Are Not Divided on Any Issues Presented in This Litigation, Nor Do Other Factors Warrant Denying This Court the Benefit of Additional Percolation of Those Issues.

Only the Ninth Circuit has ruled on the reviewability and legality of the termination of DACA, and thus there is no split in the federal courts of appeals that requires this Court's swift intervention to resolve. Nor is there any significant level of disagreement on these issues among the district courts, or any other compelling need to bypass the review of these issues that is currently underway in the Second Circuit, the Fourth Circuit, and the D.C. Circuit.[11]

1. Every court to reach the issue (the Ninth Circuit and four district courts) has held that respondents' APA claims are judicially reviewable. *See* 5 U.S.C. § 705(a)(2). Each has explained why, under this Court's precedents, petitioners' termination of DACA for purported illegality falls outside the "very narrow" class of agency actions that present no "meaningful standard against which to judge the agency's exercise of discretion." *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Heckler v. Chaney*, 470 U.S. 821, 839 (1985). And all of those courts—except for the district court in Maryland, whose decision is now under review by the Fourth Circuit—have agreed that the manner in which petitioners terminated DACA was inconsistent with

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[11] Petitioners have not sought this Court's intervention in the Fourth Circuit litigation, *Casa De Maryland v. DHS*, No. 18-1521 (4th Cir.), where the district court ruled largely in petitioners' favor.

petitioners' legal obligations. Each of these courts reasoned that petitioners' bare-bones, internally inconsistent, and legally flawed explanations for their decision failed to satisfy their APA obligation to adequately present a reasoned basis for their action.[12] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42-43 (1983).

Moreover, the outlier district court decision upholding the merits of petitioners' actions has not resulted in widespread institutional confusion or subjected any party to conflicting obligations. This case

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[12] In defending the rationality of petitioners' legal analysis, petitioners' amici misplace their reliance on statements about the incidental benefits of DACA that respondents made in the district court. *See* Amicus Br. for States of Texas et al. 22-23. The notice-and-comment violation found by the *Texas* courts hinged on the premise—now proven to be incorrect (see *infra* at 29)—that "DACA decisions were not truly discretionary." (CA2 J.A. 465.) Amici now pose an alternative theory that DACA was required to go through notice and comment regardless of whether DHS exercised discretion because DACA purportedly amounted to a substantive rule that conferred benefits and affected individual rights and obligations. Texas Amicus Br. at 18-22. This alternative theory, however, is not germane to the legality of petitioners' conduct under the APA. Petitioners' actions must be judged on the grounds they asserted at the time of decision, not post hoc rationales asserted by third parties. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943). In any event, amici misconstrue respondents' statements. Terminating DACA affected individuals' rights and obligations because it deprived DHS officers of discretion to grant DACA requests and renewals, thereby stripping existing grantees of deferred action's attendant benefits without an individualized assessment. In contrast, the creation of DACA established only a framework for accepting deferred action requests. The ancillary benefits of deferred action are not attributable to the DACA memorandum, but to longstanding regulations that apply to deferred-action recipients generally. *See, e.g.*, 8 C.F.R. §§ 1.3(a)(4)(vi), 274a.12(c)(14).

is thus unlike *United States v. Mistretta*, where the Court granted certiorari before judgment because lower courts were in "disarray" on the legality of federal criminal sentencing guidelines, and the lack of a uniform approach by the courts had chaotic implications for the functioning of the federal criminal justice system. 488 U.S. 361, 371 & n.6 (1989); *see also Dames & Moore*, 453 U.S. at 660 (noting the "conflicting conclusions" of lower courts on the legality of Executive actions that were imminently necessary to avoid breaching an international agreement).

2. At present, three circuits are considering challenges to petitioners' termination of DACA: the Second Circuit, the Fourth Circuit, and the D.C. Circuit. Allowing these courts to first deliberate on the questions of administrative law presented by the termination of DACA would likely "yield a better informed and more enduring final pronouncement" on those issues if this Court does ultimately undertake review at some point. *See Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995). And if all of these courts reach the same conclusion as the Ninth Circuit regarding DACA's reviewability and legality, this Court may decide that its own intervention is unnecessary. The Court will not need to wait long to obtain the benefits of appellate percolation: the Fourth Circuit heard argument on December 11, 2018; the Second Circuit has scheduled oral argument in this action for January 25, 2019; and the D.C. Circuit has set a briefing schedule that concludes on January 22, 2019. *Batalla Vidal*, No. 18-485 (2d Cir.), ECF No. 567; *Casa De Maryland v. DHS*, No. 18-1521 (4th Cir.), ECF No. 44; *NAACP v. Trump*, No. 18-5243 (D.C. Cir.), Clerk's Order (Oct. 22, 2018).

Although petitioners would now disregard the benefits of additional appellate review, their brief to

the Second Circuit decried the "detrimental effect" of "foreclosing adjudication by a number of courts and judges." (Defs.-Appellants' Opening Br. at 47, No. 18-485 (2d Cir.), ECF No. 59 (quotation marks omitted).) Similarly, in other recent litigation, the Justice Department has vigorously proclaimed the importance of allowing important issues to percolate through the circuit courts. In defending the legality of conditions imposed on certain law-enforcement grants, the Department urged that the scope of relief should not foreclose parallel review because "the Supreme Court 'benefits from permitting several courts of appeals' to consider 'important questions of law.'" (Suppl. Br. for Appellant 23, *City of Chicago v. Sessions*, No. 17-2991 (7th Cir. July 20, 2018), ECF No. 142 (alteration marks omitted) (quoting *United States v. Mendoza*, 464 U.S. 154, 164 (1984))). The Justice Department further asserted that "percolation is more valuable, not less, for pure legal questions"—like some of the issues here—because "appellate courts exercising de novo review of a pure legal question can gain insights by comparing differing analyses of a common question, whereas appellate comparison of decisions arising in fact-heavy contexts is less useful precisely because of the varying factual record in each case." *Id.*

3. Petitioners' central argument here against appellate percolation is baseless. Petitioners and their amici claim that, absent immediate review and corrective action by this Court, petitioners would be required to retain DACA through an additional term of this Court, even though they now regard DACA as unlawful and objectionable. (Pet. 15; Amicus Br. for Citizens United et al. 18.) That argument hinges on a false premise. The lower courts that have found petitioners' September 2017 termination of DACA to be reviewable

and illegal have not bound petitioners' discretion to end DACA in a lawful manner, but instead have recognized that petitioners could end DACA by issuing a new agency decision on a new agency record. (*E.g.*, Pet. App. 66a.) One court expressly invited petitioners to do just that. *See NAACP v. Trump*, 298 F. Supp. 3d 209, 249 (D.D.C. 2018).[13] Petitioners declined that invitation, electing instead to stand on the existing, flawed rationales of illegality set forth in the Sessions letter and the Duke memorandum.

Petitioners' request for certiorari before judgment thus flows from their desire to avoid accountability for their policy choices, rather than from any need to enable the exercise of discretion. Such circumstances present no cause for intervention by this Court, and certainly no cause for intervention in a manner that would redound to this Court's detriment by short-circuiting the traditional appellate processes that should inform the Court's review.

C. In Light of the Procedural Posture of This Litigation, Petitioners' *Batalla Vidal* Appeals Present an Especially Poor Vehicle for Certiorari Before Judgment.

Whether or not the termination of DACA raises issues that may ultimately warrant this Court's review, this litigation is an especially poor vehicle to address those issues.

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[13] (*See also* Order at 2, *NAACP*, No. 17-cv-2325 (D.D.C. Apr. 24, 2018), ECF No. 69 (directing parties to inform the court "whether DHS has issued a new decision rescinding DACA and whether the parties contemplate the need for further proceedings in this case").)

1. First, there is no intermediate appellate decision. Further review by the Second Circuit would offer the Court "the substantial value inherent in an intermediate consideration of the issue by the Court of Appeals," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937, 938 (1952) (Burton, J., dissenting from grant of certiorari before judgment). By contrast, granting certiorari here would prematurely cut off that beneficial avenue of additional consideration.

Second, the district court has not issued a final judgment. Petitioners instead seek review of three interlocutory orders in which the district court declined to dismiss respondents' equal protection and substantive APA claims, and entered a preliminary injunction on the latter claim. Accordingly, this litigation may yet require additional proceedings in the district court. Granting certiorari now would therefore depart from the "strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals," *Nixon*, 418 U.S. at 690; *see United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (noting the longstanding principles "inimical to piecemeal appellate review of trial court decisions which do not terminate the litigation"); *see also Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (writ of certiorari will not issue before final judgment except in "extraordinary cases").

2. Petitioners and their amici are simply incorrect to argue that granting this petition would ensure a "definitive resolution" of the entire action. (Pet. 16; Texas Amicus Br. 5.) For example, litigation of respondents' equal-protection claims remains at an early stage: the district court did not grant any relief based on equal-protection grounds, determining only that

the two complaints have adequately stated a claim. And under this Court's settled precedents, there are no threshold challenges that would bar judicial review of respondents' equal-protection claims. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 603 (1988) (decisions committed to agency discretion by law are still subject to judicial review for constitutional violations).

Immediate interlocutory review also would not guarantee a definitive resolution of respondents' APA claims. Petitioners argue that this Court could finally dispose of those claims (1) by ruling that the termination of DACA is not subject to APA review, or (2) by determining that the termination survives APA review on the merits. *See Regents* Pet. at 23-30. But petitioners are wrong in asserting that, if this Court were to find the challenged action reviewable, the Court could then rule in petitioners' favor on the ultimate merits of the APA claims. Under the APA, judicial "review is to be based on the full administrative record that was before" the agency decision-maker "at the time he made his decision." *Overton Park*, 401 U.S. at 420; *see* 5 U.S.C. § 706 (APA review proceeds on basis of the "whole record"). And in this action, the Second Circuit already has held—in a decision on which petitioners have not now sought this Court's review[14]—that "there is a strong suggestion that the record before the [district] Court was not

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[14] The three interlocutory orders of the district court that petitioners have appealed, and on which they have sought certiorari before judgment, do not encompass the district court's rulings on any record or discovery issues. Those separate record and discovery issues are thus outside of this Court's potential review upon a grant of certiorari before judgment. *See United States v. Stanley*, 483 U.S. 669, 676-77 (1987) (interlocutory appeals are "confined to the particular order[s] appealed from").

complete," and that "some limited discovery" is still necessary to ensure the district court has the whole record when it finally adjudicates the merits of respondents' APA claims. (Order, No. 17-3345 (2d Cir. Dec. 27, 2017), ECF No. 171 (quotation marks omitted)). Accordingly, any evaluation of the merits of respondents' APA claims would, at this juncture, be limited to reviewing whether the district court abused its discretion in granting preliminary relief on a partial record.[15]

Recent proceedings in the U.S. District Court for the Southern District of Texas illustrate the difficulties inherent in interlocutory review, and caution against a premature grant of certiorari. In 2015, that court preliminarily enjoined related types of deferred action (DAPA and DHS's 2014 changes to DACA) based on a preliminary record suggesting that DHS

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[15] Although certain challenges to administrative action—such as claims that a rule is facially inconsistent with a statute—may be resolved before production of the full record on a motion under Federal Rule of Civil Procedure 12(b)(6), courts have uniformly held that claims that challenge an agency's reasons or its rule-making process cannot be dismissed before the agency presents the complete administrative record against which such claims are evaluated. *See, e.g.*, *District Hosp. Partners, L.P. v. Sebelius*, 794 F. Supp. 2d 162, 171-73 (D.D.C. 2011) (elaborating on this distinction and collecting cases). Indeed, to permit dismissal upon review of "less than the full administrative record might allow a party to withhold evidence unfavorable to its case, and so the APA requires review of 'the whole record.'" *See Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) (quoting § 706). Here, for example, agency materials not yet produced, but that were before the Attorney General and Acting Secretary at the time of the termination decision, may well "fairly detract[]" from petitioners' stated justifications and thus provide further support for respondents' APA claims. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951).

was not exercising discretion in evaluating DACA applications. *Texas*, 86 F. Supp. 3d at 677. That preliminary injunction was affirmed by the Fifth Circuit, 809 F.3d 134 (5th Cir. 2015), and by a per curiam opinion of this Court, which was equally divided, 136 S. Ct. 2271 (2016). In ending DACA, Attorney General Sessions and Acting Secretary Duke relied on the *Texas* district court's finding: both decision-makers cited to the *Texas* opinion, and the Acting Secretary expressly relied on the *Texas* courts' conclusion that "DACA decisions were not truly discretionary." (CA2 J.A. 465.)

But evidence recently adduced in a separate challenge to the legality of DACA (see *supra* at 20) conclusively refutes the *Texas* district court's view that DHS was not exercising discretion when evaluating DACA applications. Based on a fuller record that incorporates a number of materials not presented in 2015, the *Texas* district court has reversed course, rejecting a claim brought by Texas and other States that "those processing DACA applications are not free to exercise discretion." *Texas*, 328 F. Supp. 3d at 734. That court has now concluded, based on a more complete record, that the evidence supporting Texas's claim is "not convincing, either in its quantity or quality." *Id.*

3. In light of the posture of this case, a grant of the instant petition is not warranted regardless of how this Court addresses the pending petitions in *Regents* and *NAACP*. Petitioners argue most forcefully for review in *Regents*; indeed, they fully present the merits of their claims in that petition only. But if this Court were to grant review in *Regents*—despite the current lack of a circuit split and at a time when three appeals courts are actively deliberating on the same

issues—there would be little reason to simultaneously grant this petition. *Regents* is adequately postured to present for review the same categories of claims and issues raised here. Petitioners fail to explain why granting review before judgment in this separate case—and prematurely foreclosing Second Circuit review—would also be necessary to protect their interests.[16]

This Court should also reject petitioners' alternative request (Pet. 17) to hold their petition in abeyance. Petitioners would suffer no harm from having to refile a petition once the Second Circuit completes its expeditious consideration of this appeal. And this Court would benefit from a petition that addresses the Second Circuit's reasoning. Thus, the better course is to await the Second Circuit's ruling, and to allow any aggrieved party to seek review as necessary by filing a new petition (or cross-petition) tailored to the issues and circumstances at that time. In any event, if this Court does choose to hold the petition, it should expressly direct the Second Circuit to continue with its expeditious consideration of the appeal, because such deliberations can only better inform this Court's ultimate review.

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[16] If this Court grants certiorari nonetheless, it should not accept the request of petitioners' amici to review additional questions beyond those presented by petitioners. Citizens United Amicus Br. 14, 23, 26. Petitioners' amici have identified no basis for this Court to deviate from its general practice of disregarding claims that have been raised solely by an amicus and have not been pursued in the petition for certiorari. *See, e.g.*, *Decker v. Northwest Envt'l Def. Ctr.*, 568 U.S. 597, 614 (2013) (Roberts, C.J., concurring); *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226 n.4 (2013).

CONCLUSION

The petition for certiorari before judgment should be denied.

Respectfully submitted,

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