No. 18-587

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, *et al.*,
Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION FOR THE STATES OF CALIFORNIA, MAINE, MARYLAND, AND MINNESOTA

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
MICHAEL L. NEWMAN
Senior Assistant Attorney General

MICHAEL J. MONGAN*
Deputy Solicitor General
SAMUEL P. SIEGEL
Associate Deputy Solicitor General
STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
455 Golden Gate Avenue
San Francisco, CA 94102
(415) 510-3920
Michael.Mongan@doj.ca.gov
**Counsel of Record*

(*Additional counsel on signature page*)

December 17, 2018

QUESTION PRESENTED

Whether the district court erred by (i) holding that respondents' claims are subject to judicial review, (ii) entering a preliminary injunction partially suspending petitioners' termination of the Deferred Action for Childhood Arrivals program, and (iii) denying in part petitioners' motion to dismiss.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES (continued)

STATUTES

REGULATIONS

INTRODUCTION

This case involves hundreds of thousands of young people who were brought to this country as children. Many of them have never known any other home. All of them currently receive provisional protection from removal from the United States, authorization to work legally, and other benefits through the Deferred Action for Childhood Arrivals (DACA) program. In September 2017, petitioners announced that they were terminating that program on the ground that it would be unlawful to maintain it. Respondents challenged that decision, and the district court entered a preliminary injunction partially preserving the status quo pending resolution of the litigation. The court of appeals has now affirmed the entry of that preliminary injunction. Similar litigation is pending in other circuits.

Petitioners argue that their decision to terminate DACA is not subject to judicial review at all, and in any event that they correctly concluded that the program is unlawful. As to the threshold reviewability issues, every court that has considered petitioners' arguments has rejected them. As to the merits, three district courts, and now the court of appeals in this case, have held that petitioners' decision to terminate DACA cannot be sustained on the theory of illegality that they have proffered. Petitioners identify no good reason for this Court to reach out to review those conclusions at this time—in an interlocutory posture, with no present circuit conflict, and before other courts of appeals have had the chance to consider the similar cases already pending before them.

STATEMENT

1. Deferred action is a "regular practice" under federal immigration law, involving a decision that "no action will thereafter be taken to proceed against an apparently deportable alien." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (*AADC*). It has been recognized by Congress and by this Court. *See, e.g.*, 8 U.S.C. § 1227(d)(2); *AADC*, 525 U.S. at 484. Recipients of deferred action may apply for work authorization and receive other benefits. *See, e.g.*, 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).

Established in 2012, the DACA program applies to "certain young people who were brought to this country as children and know only this country as home." Pet. App. 97a-98a; *see id.* at 98a (listing criteria). It recognizes that immigration laws are not "designed to remove productive young people to countries where they may not have lived or even speak the language." *Id.* at 99a. DACA provides a channel and framework for individualized deferred action decisions for eligible individuals, who may receive provisional protection from removal for renewable two-year periods, obtain permission for foreign travel ("advance parole"), and enjoy other benefits associated with deferred action. *Id.* at 11a-12a. In September 2017 there were nearly 700,000 active DACA beneficiaries, with an average age of just under 24 years old. *Id.* at 13a. More than 90 percent of DACA recipients are employed, and 45 percent are in school. *Id.*

In 2014, the Office of Legal Counsel at the U.S. Department of Justice memorialized its advice that a general program such as DACA was legally sound so long as immigration officials "retained discretion to

evaluate [its] application on an individualized basis." D.Ct. Dkt. 64-1 at 21 n.8.[1] Until recently, Executive Branch lawyers likewise argued consistently that DACA was "a valid exercise of the Secretary's broad authority and discretion to set policies for enforcing the immigration laws, which includes according deferred action and work authorization to certain aliens who, in light of real-world resource constraints and weighty humanitarian concerns, warrant deferral rather than removal." *E.g.*, U.S. Br. 1, *Ariz. Dream Act Coal. v. Brewer*, 9th Cir. No. 15-15307, Dkt. 62 (filed Aug. 28, 2015).

In *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), the Fifth Circuit affirmed a preliminary injunction that forestalled the implementation of a different program, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), along with some intended expansions of the DACA program. This Court affirmed that decision by an equally divided vote. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam). But the preliminary injunction at issue in *Texas* did not affect the original DACA program.

After the change in federal administrations in January 2017, the new administration initially preserved the DACA program and continued to solicit and accept new and renewal applications for DACA status. *See* Pet. App. 16a. The President indicated that the "policy of [his] administration [was] to allow the dreamers [*i.e.*, DACA recipients] to stay." D.Ct. Dkt. 121-1 at 285. In June 2017, Attorneys General from Texas and other States threatened to amend their complaint in

[1] Citations to "D.Ct. Dkt." are to the docket in N.D. Cal. Case No. 17-cv-5211.

the still-pending DAPA litigation to include a challenge to the DACA program. Supp. App. 18a. On September 4, 2017, then-Attorney General Jefferson Sessions sent a one-page letter advising then-Acting Secretary of Homeland Security Elaine Duke that her Department should terminate DACA because it "was an unconstitutional exercise of authority by the Executive Branch." D.Ct. Dkt. 64-1 at 251. The letter stated summarily that DACA "has the same legal and constitutional defects that . . . courts recognized as to" DAPA, and asserted that "it is likely that potentially imminent litigation would yield similar results with respect to DACA." *Id.*

The next day, the Acting Secretary issued a memorandum formally rescinding the program. Pet. App. 111a-119a. Her stated reason was that "[t]aking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing [DAPA] litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated." *Id.* at 117a. She instructed her Department to stop accepting new DACA applications immediately, and to stop accepting all renewal applications on October 5, 2017. *See id.* at 117a-118a.

2. The complaints in the five cases addressed together in the decision below allege, among other things, that petitioners' termination of DACA was arbitrary, capricious, or otherwise not in accordance with law and thus invalid under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). On January 9, 2018, the district court largely denied petitioners'

motion to dismiss on threshold grounds and granted a limited preliminary injunction. Pet. App. 1a-70a.[2]

The court first considered petitioners' threshold reviewability defenses. Pet. App. 26a-33a. It rejected the argument that the decision to terminate DACA was "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2), *id.* at 26a-30a, and held that 8 U.S.C. § 1252(g) did not strip it of jurisdiction to hear the case, *id.* at 30a-33a. It certified both rulings for interlocutory appeal. *Id.* at 70a.[3]

Turning to the motion for a preliminary injunction, the district court held that respondents were likely to succeed on their APA claim that petitioners' September 2017 decision to rescind DACA must be set aside. Pet. App. 41a-62a. It found no support for petitioners' assertion that maintaining the program was beyond the authority of the Department of Homeland Security or the Executive Branch. *Id.* at 47a. In response to petitioners' reliance on decisions in the *Texas* litigation over the DAPA program (*id.* at 50a), the district court noted significant differences between the two programs (*id.* at 51a-54a) and concluded that the "DAPA litigation was not a death knell for DACA" (*id.* at 54a).

---

[2] As the Court is aware from prior proceedings, the parties have vigorously disputed both the adequacy of the putative administrative record proffered by petitioners and certain discovery issues. *See In re United States*, 138 S. Ct. 443 (2017) (per curiam). Currently, the district court has stayed discovery and postponed petitioners' obligation to complete the administrative record pending appellate review of petitioners' threshold defenses.

[3] The district court likewise rejected most of petitioners' arguments regarding Article III and prudential standing. Pet. App. 33a-41a. Petitioners do not renew those arguments here.

The court rejected petitioners' alternative argument that the decision to end DACA was "a reasonable judgment call involving management of litigation risk and agency resources," Pet. App. 55a, as a post hoc justification proffered by counsel, *id.* at 56a-57a. In any event, the court concluded that any such reasoning was unlikely to withstand APA review. *See id.* at 57a-62a. Among other things, the rescission memorandum and the administrative record revealed no consideration of "the *differences* between DAPA and DACA that might have led to a different result" (*id.* at 57a); no consideration of possible defenses to a suit challenging DACA (*id.* at 57a-58a); and no comparative assessment of the human and other costs of terminating or maintaining DACA (*id.* at 60a).

The court held that the remaining factors of the preliminary injunction test also favored provisional relief. Pet. App. 62a-66a. Respondents were "likely to suffer serious irreparable harm absent an injunction," with individual respondents losing their work authorization and suffering other hardships and the States losing "valuable students and employees in whom they have invested." *Id.* at 62a. For similar reasons, a preliminary injunction would serve the public interest. *Id.* at 65a. The court reasoned that the threatened harms to respondents and the public substantially outweighed the only hardship asserted by petitioners, which was "interference with the agency's judgment" on whether to keep DACA in place while the issues were litigated to final judgment. *Id.*

Accordingly, the district court entered a preliminary injunction partially preserving the status quo for individuals who had already received deferred action. As to those existing recipients, the court required petitioners "to maintain the DACA program on a

nationwide basis on the same terms and conditions as were in effect before the rescission on September 5, 2017, including allowing DACA enrollees to renew their enrollments." Pet. App. 66a. It made clear, however, that pending the completion of litigation and entry of final judgment petitioners were not required to process new applications from individuals who had never before received deferred action; that the "advance parole" feature of DACA "need not be continued for the time being for anyone"; and that petitioners could "take administrative steps to make sure fair discretion is exercised on an individualized basis for each renewal application." *Id.* at 66a. It also emphasized that the Department of Homeland Security may "proceed[] to remove any individual, including any DACA enrollee, who it determines poses a risk to national security or public safety, or otherwise deserves, in its judgment, to be removed." *Id.*

In a separate order, the district court ruled on petitioners' motion to dismiss various claims under Rule 12(b)(6). Pet. App. 71a-90a. The court dismissed claims that the rescission of DACA should have been accomplished through notice-and-comment rulemaking and related claims under the Regulatory Flexibility Act (*id.* at 72a-75a); due process claims regarding the rescission of DACA (*id.* at 75a-79a); claims based on equitable estoppel (*id.* at 81a-83a); and certain equal protection claims (*id.* at 87a). It denied the motion to dismiss with respect to the claims that the rescission was arbitrary, capricious, or otherwise unlawful (*id.* at 72a); due process claims based on changes in DHS's policies regarding the sharing of information provided by DACA recipients (*id.* at 79a-81a); and equal protection claims alleging discriminatory animus (*id.* at 83a-87a). The court again certified

several of its rulings for interlocutory appeal. *See id.* at 89a.

Petitioners did not seek a stay of any of these orders. They did file a petition for certiorari before judgment in this Court at the same time that they filed their regular appeals. This Court denied that petition on February 26, 2018. *See* 138 S. Ct. 1182 (No. 17-1003).

3. The court of appeals affirmed. Supp. App. 1a-78a. It first addressed whether petitioners' decision to terminate DACA was unreviewable as a matter "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). *See* Supp. App. 23a-42a. The court carefully considered this Court's decision in *Heckler v. Chaney*, 470 U.S. 821 (1985), which applied Section 701(a)(2) to create a presumption of unreviewability for "'agency refusals to institute investigative or enforcement proceedings.'" *Id.* at 25a (quoting *Chaney*, 470 U.S. at 838). Although the court noted that "a literal reading of *Chaney*'s language" relating to decisions not to undertake specific enforcement proceedings "would not even encompass the decision to rescind DACA," for purposes of this case it assumed that *Chaney* could be read more broadly. *Id.* at 34a-35a n.13. It concluded, however, that "an agency's nonenforcement decision is outside the scope of the *Chaney* presumption—and is therefore presumptively reviewable—if it is based solely on a belief that the agency lacked the lawful authority to do otherwise." *Id.* at 29a; *see id.* at 23a-34a. The court further agreed with the district court that, in light of the record in this case, "the Acting Secretary based the rescission of DACA solely on a belief that DACA was beyond the authority of DHS." *Id.* at 41a. That proffered basis for

the decision "brings [it] within the realm of agency actions reviewable under the APA." *Id.* at 42a.

The court also rejected petitioners' second threshold argument, that 8 U.S.C. § 1252(g) stripped the district court of jurisdiction to hear this case. Supp. App. 42a-45a. It relied on this Court's holding in *AADC* that Section 1252(g) "applies only to three discrete actions that the Secretary may take: her decision or action to *commence* proceedings, *adjudicate* cases, or *execute* removal orders." *Id.* at 42a (internal quotation marks and alteration omitted). Petitioners' rescission of DACA does not fit into any of these categories of discrete actions. *Id.* at 43a-44a. Moreover, nothing in *AADC* suggests that Section 1252(g) would apply to a "programmatic shift" in a deferred-action policy, such as the DACA rescission. *Id.* at 43a.

Turning to the preliminary injunction, the court of appeals noted that petitioners "take[] issue with the district court's conclusion on only one of the preliminary injunction factors: the likelihood of success on the merits." Supp. App. 46a. Because an agency action "based solely on an erroneous legal premise . . . must be set aside," *id.* at 47a (discussing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) (*Chenery I*)), the court examined petitioners' stated conclusion that DACA is unlawful. In view of the Executive Branch's broad authority over immigration enforcement policy and priorities and the longstanding practice of using deferred action on a programmatic basis, the court concluded "that DACA was a permissible exercise of executive discretion." *Id.* at 56a; *see id.* at 47a-57a.

The court acknowledged petitioners' heavy reliance on the Fifth Circuit's preliminary assessment of the legality of DAPA in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015). *See* Supp. App. 49a. Exploring

the reasoning in that case, however, the court concluded that "the analysis that seemingly compelled the result in *Texas*" was "inapposite" here. *Id.* at 57a. The court emphasized that it was "not hold[ing] that DACA *could not* be rescinded as an exercise of Executive Branch discretion." *Id.* But petitioners' decision to rescind it "based on an erroneous view of what the law required" was "arbitrary and capricious under settled law." *Id.*

The court also held that the district court did not abuse its discretion by entering a nationwide injunction in the circumstances of this case. Supp. App. 60a. In particular, nationwide "relief is commonplace in APA cases, promotes uniformity in immigration enforcement, and is necessary to provide the plaintiffs here with complete redress." *Id.*

Finally, the court of appeals affirmed the district court's ruling on petitioners' motion to dismiss. Supp. App. 61a-77a. As relevant here, the court agreed that respondents had plausibly stated a due process claim with respect to petitioners' changes to their policies governing the use of the sensitive information provided by DACA recipients, *id.* at 68a-73a, and an equal protection claim alleging that the rescission of DACA "disproportionately affected Latinos and individuals of Mexican descent and was motivated by discriminatory animus," *id.* at 73a.

Judge Owens concurred in the judgment. Supp. App. 79a-87a. He would have held that petitioners' decision to terminate DACA was the sort of discretionary non-enforcement decision that is insulated from normal APA review under 5 U.S.C. § 702(a)(1) and *Chaney*. *Id.* at 79a-84a. But he agreed that the preliminary injunction should be affirmed, at least pending further proceedings in the district court, because

the equal protection claim based on discriminatory animus had "some 'likelihood of success on the merits,'" *id.* at 79a, and "the balance of equities here weighs heavily in favor of" provisional relief, *id.* at 86a.

4. As this litigation has proceeded, courts in other jurisdictions have also considered the legality of petitioners' decision to terminate DACA or the legality of the underlying program.

a. In the Eastern District of New York, the district court entered a preliminary injunction that is co-extensive with the one affirmed below. *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401 (2018). The court reasoned that the asserted basis for the decision to terminate DACA was inadequately explained and rested on a premise that was legally and factually flawed. *See* 18-589 Pet. App. 62a, 67a-69a, 90a-119a (*Batalla Vidal* App.). Petitioners did not seek a stay of that order, which is currently on appeal before the Second Circuit, with oral argument scheduled for January 2019. Petitioners seek certiorari before judgment in that case in No. 18-589.

b. In the District of Columbia, the district court entered a final judgment vacating the decision to terminate DACA. *NAACP v. Trump*, 298 F. Supp. 3d 209 (2018); *see* 18-588 Pet. App. 1a-74a (*NAACP* App.). It reasoned that the termination decision "was predicated primarily on [a] legal judgment that the program was unlawful." *NAACP* App. 73a. But that legal judgment could not support the agency's action because it was "virtually unexplained." *Id.* The district court temporarily stayed its final judgment to afford the agency an opportunity to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority." *Id.* at 66a.

Two months later, petitioners submitted a new memorandum from the current Secretary of Homeland Security, Kirstjen Nielsen. Pet. App. 120a-126a. The Nielsen memorandum "decline[s] to disturb the Duke memorandum's rescission of the DACA policy," but offers Secretary Nielsen's "understanding of the Duke memorandum and why the decision to rescind the DACA policy was, and remains, sound." *Id.* at 121a; *see* Pet. 13. After reviewing the Nielsen memorandum, the D.C. district court held that the memorandum "fails to elaborate meaningfully on the agency's primary rationale for its decision." *NAACP* App. 81a. As to "several additional 'policy' grounds for DACA's rescission," the court concluded that most "simply repackage legal arguments previously made," while one was "articulated nowhere in DHS's prior explanation for its decision, and therefore cannot support that decision now." *Id.* at 81a-82a; *see id.* at 95a-103a.

The D.C. district court accordingly adhered to its original final judgment. *NAACP* App. 108a-109a. But it partially stayed its order vacating the rescission of DACA pending appeal, to the extent that the order would provide relief beyond that granted by the preliminary injunctions in place in this case and in *Batalla Vidal*. *See NAACP* Pet. 13. Petitioners' appeal is pending in the D.C. Circuit and briefing is scheduled to be completed in January 2019. Petitioners seek certiorari before judgment in that case in No. 18-588.

c. In the District of Maryland, the district court held that a similar challenge to the termination of DACA was reviewable (rejecting petitioners' threshold arguments to the contrary), but dismissed the claims in substantial part on the merits. *Casa de Md. v. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758 (2018). The

plaintiffs' appeal of that decision was argued before the Fourth Circuit on December 11. Petitioners have not sought certiorari before judgment in that case.

d. In the Southern District of Texas, Texas and other States have challenged the legality of the DACA program. The district court denied the plaintiff States' motion for a preliminary injunction. *Texas v. United States*, 328 F. Supp. 3d 662, 743 (2018). It reasoned that the plaintiff States were likely to succeed on the merits, but that they could not establish a right to preliminary equitable relief under the circumstances of the case. *Id*. at 712-742. The plaintiff States did not appeal the denial of preliminary relief. The district court recently set a November 2019 deadline for dispositive motions and scheduled a two-week trial for May 2020.

ARGUMENT

Petitioners filed their second petition for certiorari before judgment in this case on November 5. They have since proposed that the Court treat that petition as one seeking review of the decision entered by the court of appeals on November 8. *See* Supp. Br. 9. The State respondents have no objection to that proposal. There is, however, no reason for review at this time.

I. THERE IS NO NEED FOR "PROMPT INTERVENTION" BY THIS COURT

The preliminary injunction in this case partially preserves the status quo for a carefully defined group of young people who were brought to this country as children, are law-abiding and productive residents, and in many cases know no other home. *See generally* Supp. App. 14a-15a. The case is in an interlocutory posture; there is no present conflict on the questions petitioners seek to present; and three other courts of

appeals are already poised to consider the same questions, including in one case on an appeal from a final judgment. In any ordinary case these circumstances would counsel strongly in favor of denying certiorari at this time.

Petitioners argue that this case instead demands "prompt intervention" (Pet. 15), but they cannot explain why that is so. They do not need this Court to enable them to take any urgent action to protect the public. By its terms, the preliminary injunction here allows them to initiate removal proceedings against any individual DACA recipient in the unlikely event that they perceive a need to do so. Pet. App. 66a. And they have never identified any other pressing action that they are barred from taking while this litigation proceeds. For that matter, the President has expressed disbelief that "anybody [would] really want to throw out good, educated and accomplished young people who have jobs, some serving in the military[.]" *Id.* at 64a-65a.

Although petitioners show no need to take any particular blocked action, they allege a sort of dignitary injury in being temporarily forced to continue in part a program that they characterize as "sanctioning an ongoing violation of federal immigration law by nearly 700,000 aliens." Pet. 14; *see id.* at 33. They suggest that they need immediate review by this Court to protect their ability to exercise discretion in "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5); *see, e.g.*, Pet. I, 3, 18-20. But these are curious arguments in the context of this case.

For all their rhetorical emphasis on Executive Branch discretion, *see, e.g.*, Pet. I, 14, 16-17, 19, 23, 33-

34, petitioners did not explain their decision to terminate DACA by saying that they had concluded, as a matter of policy discretion, that the program is a bad idea.[4] Their memorandum rescinding DACA instead declared that petitioners could not continue the program because it was *unlawful*. Much of the decision below hinges on that point, both as to reviewability and on the merits. The court of appeals emphasized, for example, that it "d[id] not hold that DACA *could not* be rescinded as an exercise of Executive Branch discretion." Supp. App. 57a. It held only that the rescission could not be sustained on the illegality theory that petitioners proffered to support it. *Id.* Despite some hedging for purposes of litigation, the same assertion of illegality remains the core of petitioners' position in this Court. *See, e.g.*, Pet. I, 14, 16, 24-26, 28-30.

Thus, petitioners do not actually seek a ruling from this Court to protect their ability to exercise discretion. What they seek is judicial endorsement of their argument that they *lack* discretion to continue the DACA program. It is not clear how that argument serves any long-term interest of the Executive Branch. What is clear is that there is no real need for "prompt intervention" (Pet. 15) by this Court to address it.

---

[4] On the contrary, even their present petition comes close to endorsing the policy underlying the program. *See* Pet. 16 (professing concern that this litigation will "impede efforts to enact legislation addressing the legitimate policy concerns underlying the DACA policy"); *id.* at 34 (complaining that petitioners have been required to maintain DACA during this litigation, "even while efforts by the President and others to provide a sound legal basis for the policy through the legislative process have failed").

Indeed, petitioners' own actions help make that point. They have never tried to make a case for emergency relief from the preliminary injunctions in this or related cases, as they have in some other litigation. *See, e.g.*, *East Bay Sanctuary Covenant v. Trump*, ___ F.3d. ____, 2018 WL 6428204 (9th Cir. Dec. 7, 2018) (denying motion for stay). Nor have they withdrawn their termination of DACA based on the program's purported illegality and then sought to take the same action on different grounds. *Compare Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2083 (2017) (*IRAP*). Indeed, when one district court expressly invited petitioners to revisit the matter and at least "better explain [their] view that DACA is unlawful," *NAACP* App. 74a, after 60 days they merely "decline[d] to disturb" their original decision, Pet. App. 121a, while offering "almost no meaningful elaboration," *NAACP* App. 104a.

Under these circumstances, there is no reason for this Court to grant immediate review to address the questions that petitioners seek to present. The status quo under the decision below continues to provide limited but important protection to individual young people as they pursue their lives in this country. The only result of a "timely and definitive" ruling by this Court (Pet. 34) would be either vindication or rejection of petitioners' legal positions on reviewability and on their putative lack of discretion to continue DACA. The State respondents are, of course, prepared to continue litigating those questions if the Court wishes to address them now. But in the absence of any real urgency or any present conflict, the better course would be to allow further consideration of the issues by the lower courts.

II. PETITIONERS' MERITS ARGUMENTS PROVIDE NO REASON FOR REVIEW

Nothing in petitioners' lengthy discussion of the merits (*see* Pet. 17-32) establishes any reason for review in this case at this time.

A. Reviewability

Petitioners first argue (Pet. 17-22) that their decision to terminate DACA is not subject to judicial review in this case at all, citing the channeling rule for individual removal challenges under 8 U.S.C. § 1252(g) and the "committed to agency discretion by law" provision of 5 U.S.C. § 701(a)(2). Five federal courts, including the court of appeals below, have now rejected these arguments in this precise context. Supp. App. 23a-45a (decision below); Pet. App. 26a-33a (district court below); *Batalla Vidal* App. 24a-39a (E.D.N.Y); *NAACP* App. 19a-21a, 25a-43a (D.D.C.); *Casa de Md. v. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 769-770 (D. Md. 2018); *cf. Texas v. United States*, 809 F.3d 134, 163-170 (5th Cir. 2015). In the absence of any conflicting decision, there is no reason for review.

1. Section 1252(g) can be addressed briefly. It deals with judicial review of orders of removal, and applies to "any cause or claim" brought "by or on behalf of any alien arising from the decision or action" by federal authorities "to commence proceedings, adjudicate cases, or execute removal orders against any alien[.]" 8 U.S.C. § 1252(g). To begin with, Section 1252(g) cannot apply to claims advanced by the States (or other entity respondents) in this case. Those claims are brought on behalf of the entity plaintiffs themselves, not "by or on behalf of any alien." 8 U.S.C. § 1252(g); *see Texas*, 809 F.3d at 164; *Batalla Vidal* App. 38a-39a.

In any event, Section 1252(g) by its terms "applies only to three discrete actions": a "'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'" *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482 (1999) (*AADC*) (emphasis omitted). Petitioners' decision to terminate DACA is not any of those actions. *See* Supp. App. 42a-45a. And contrary to petitioners' suggestion (Pet. 21-22), *AADC*'s observation that Section 1252(g) is "designed to give some measure of protection to 'no deferred action' decisions," 525 U.S. at 485, addresses "litigation over *individual* 'no deferred action' decisions," Supp. App. 43a—that is, decisions that were part of the determination "to commence proceedings" against a particular individual. That observation has no application to "a programmatic shift like the DACA rescission." *Id.* No court of appeals—indeed, no court—has held otherwise.[5]

2. Section 701(a)(2) prohibits judicial review of agency actions that are "committed to agency discretion by law." This Court has "read the exception in § 701(a)(2) quite narrowly," to give effect to the normal "strong presumption favoring judicial review." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, No. 17-71, slip op. 11, 12 (Nov. 27, 2018). In *Heckler v. Chaney*, 470 U.S. 821, 823, 832 (1985), this Court held that the "decision of an administrative agency to exercise its 'discretion' not to undertake certain enforcement actions" was traditionally committed to agency discretion, and should be treated as "presumptively

[5] Petitioners also invoke Section 1252(b)(9). Pet. 22. But that provision applies only to claims "arising from an[] action taken or proceeding brought to remove an alien." 8 U.S.C. § 1252(b)(9). This case does not involve any such action or proceeding. *See* Supp. App. 45a n.19.

unreviewable" under Section 701(a)(2). Petitioners argue that their decision to terminate the DACA program "falls comfortably" under *Chaney*. Pet. 18; *see id.* at 17-21. But that is not correct, for at least two reasons.

a. First, the decision at issue here is not the type of decision addressed by *Chaney*. As the district courts in this case and *Batalla Vidal* have recognized, the action challenged here is a wholesale termination of a general program designed to channel and guide individual deferred action decisions with respect to a broad class of potential recipients. *Chaney*'s presumption against review does not apply to that kind of decision. Pet. App. 26a-30a; *Batalla Vidal* App. 28a-31a. Nor does the termination decision fall into any other category of actions that courts have "traditionally regarded as committed to agency discretion." *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993); *see Weyerhaeuser*, slip op. 12; Pet. 17-18. Accordingly, the decision is subject to the normal strong presumption in favor of review.

b. In any event, *Chaney* "explicitly left open the question whether 'a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction' might be reviewable." Supp. App. 25a (quoting *Chaney*, 470 U.S. at 833 n.4). Here, the court of appeals assumed (without deciding) that petitioners' termination of DACA fell within the general "non-enforcement" rule of *Chaney*. *Id.* at 34a n.13. It then explained why the action was still reviewable, because it was based "solely on a belief that DACA was beyond the authority of DHS." *Id.* at 41a; *see id.* at 34a-42a. That analysis is consistent with this Court's cases and with fundamental principles of administrative law.

As the court of appeals explained, many years ago it considered the question reserved in *Chaney* and held

"that *Chaney*'s presumption of nonreviewability 'may be overcome if the refusal is based solely on the erroneous belief that the agency lacks jurisdiction.'" Supp. App. 27a (quoting *Montana Air Chapter No. 29 v. FLRA*, 898 F.2d 753, 754 (9th Cir. 1990)). More recently, this Court has made clear that an agency's reasoning about "the scope of [its] statutory authority" is the same as a conclusion about "its jurisdiction." *City of Arlington v. FCC*, 569 U.S. 290, 296-297 (2013); *see id.* at 299; Supp. App. 27a-29a; *NAACP* App. 37a. Accordingly, when an "agency's decision is based not on an exercise of discretion, but instead on a belief that any alternative choice was foreclosed by law," Section 701(a)(2) "does not apply." Supp. App. 29a.

That rule makes sense. Section 701(a)(2) excludes from ordinary judicial review only decisions that are "committed to agency discretion by law." When an agency makes a decision on the professed basis that it lacks lawful authority to do otherwise, by definition it is not exercising any discretion that has been committed to it by law. On the contrary, it is asserting that the law has left it with *no* discretion. Such a pure proposition of law is subject to "judicially manageable standards" of review. *Chaney*, 470 U.S. at 830. And judicial review of the agency's conclusion about its lack of authority does not encroach on any administrative prerogative or discretion. If the agency's legal position is correct, its decision will stand. If not, judicial correction of that legal error will empower the agency to make whatever policy judgments Congress intended to commit to its discretion, "free of [any] mistaken legal premise" regarding the scope of its authority. *Negusie v. Holder*, 555 U.S. 511, 516 (2009); *see* Supp. App. 31a.

Petitioners contend (Pet. 20-21) that such a decision is nonetheless immune from review because of *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 (1987) (*BLE*), which rejected the general proposition that any time an "agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." *See also* Supp. App. 82a-84a (Owens, J., concurring in the judgment). But *BLE* did not involve a non-enforcement decision subject to *Chaney*, and there is no indication that the Court in *BLE* intended to resolve—or even comment on—the question reserved in *Chaney* concerning decisions based on legal conclusions about agency authority. The passage cited by petitioners observes that when an agency makes a discretionary and traditionally unreviewable decision in a particular case (there, a discretionary refusal to re-open a prior proceeding to consider a renewed merits argument), the decision does not become reviewable simply because the agency chooses to explain how it has exercised its discretion. *See BLE*, 482 U.S. at 283. Nothing about that observation suggests that normal review should be precluded where an agency decision purports to rest on the *non*-discretionary ground that a given action lies beyond the agency's statutory authority. *See also* Supp. App. 29a-31a; *NAACP* App. 38a.

Indeed, judicial review in these circumstances serves the critical function, central to administrative law, of ensuring clear public accountability for government actions. Supp. App. 31a-34a, 78a. When "an agency justifies an action solely with an assertion that the law prohibits any other course, it shifts responsibility for the outcome from the Executive Branch to Congress . . . or the courts." *Id.* at 33a. If the agency is wrong—and if its decision is treated as unreviewable—"then it avoids democratic accountability for a

choice that was the agency's to make all along." *Id.* That result is antithetical to our system of judicial review of agency action. *See id.* at 32a-34a; *Newman v. Apfel*, 223 F.3d 937, 943 (9th Cir. 2000) (O'Scannlain, J.) ("political accountability" is "the very premise of administrative discretion in all its forms"). As the district court in the *NAACP* case put it, "an official cannot claim that the law ties her hands while at the same time denying the courts' power to unbind her. She may escape political accountability or judicial review, but not both." *NAACP* App. 73a; *see* Supp. App. 33a-34a.

Here, petitioners purported to base the decision to terminate DACA on a legal conclusion that maintaining the program is unlawful. *See* Pet. App. 116a-117a; D.Ct. Dkt. 64-1 at 251; Pet. 14, 28. Although in litigation they sometimes seek to characterize the decision as resting at least in part on more discretionary factors (such as "litigation risk"), *see, e.g.*, Supp. App. 36a; Pet. 33-34, most courts that have reviewed the record have agreed with the court below that this amounts to no more than "post-hoc rationalization," Supp. App. 35a; *see* Pet. App. 55a-57a; *Batalla Vidal* App. 109a-112a. In any event, any "litigation risk" rationale would be "too closely bound up with [petitioners'] evaluation of DACA's legality to trigger *Chaney*'s presumption of unreviewability." *NAACP* App. 41a, 42a; *cf.* Supp. App. 35a n.14. And it remains clear that what petitioners really want the courts—and especially this Court—to endorse is the proposition that they were required to dismantle DACA because it was unlawful from the start. As the lower courts have so far consistently held, that proposition is subject to standard judicial review.

B. The Preliminary Injunction

Petitioners do not explain why they believe the district court abused its discretion in applying the factors governing issuance of a preliminary injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). They rest entirely on the contention that the lower courts' preliminary assessment of the merits is incorrect. Pet. 17-34. But that merits analysis is sound—and the equitable considerations here overwhelmingly favored the entry and affirmance of provisional relief. *See IRAP*, 137 S. Ct. at 2087.

1. The Administrative Procedure Act requires an agency to "articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see* 5 U.S.C. § 706(2)(A). That explanation must be "based on consideration of the relevant factors," and may not "fail[] to consider an important aspect of the problem." *State Farm*, 463 U.S. at 42, 43; *see also Weyerhaeuser*, slip op. 14. Where an agency departs from its prior position, it must supply a "reasoned analysis for the change"—including by "display[ing] awareness that it is changing position," "show[ing] that there are good reasons for the new policy," and explaining why it chose to disregard any "serious reliance interests" engendered by the prior policy. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514, 515 (2009). Where an agency bases its decision on a conclusion of law, the decision "may not stand if the agency has misconceived the law." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (*Chenery I*); Supp. App. 46a-47a.

a. Petitioners' proffered explanation for terminating DACA does not satisfy these requirements. Petitioners decided to end the program on the asserted

ground that it "is unlawful." Pet. 14; *see* Pet. App. 116a-117a. But neither the one-sentence rationale for rescinding DACA offered by the Acting Secretary, *see* Pet. App. 117a, nor the one-page letter from the Attorney General underlying it, *see* D.Ct. Dkt. 64-1 at 251, offers any adequate explanation for that abrupt change in the government's position.

The Attorney General's letter asserted that DACA is "an unconstitutional exercise of authority by the Executive Branch," with "the same . . . constitutional defects that the courts recognized as to DAPA." D.Ct. Dkt. 64-1 at 251. That assertion "is a puzzling one," both because "[t]he Fifth Circuit and district court in *Texas* explicitly declined to address the constitutional issue" in the DAPA litigation, Supp. App. 48a-49a; *see Batalla Vidal* App. 105a-106a; *NAACP* App. 52a-54a, and because the Attorney General ignored a lengthy opinion from his Department's Office of Legal Counsel explaining why programs such as DACA are consistent with constitutional requirements, *see NAACP* App. 52a-53a. The letter also asserted that "DACA was effectuated . . . without proper statutory authority." D.Ct. Dkt. 64-1 at 251. But it did not identify "any statutory provision with which DACA was in conflict," or address any of the material differences between DACA and DAPA that render "the Fifth Circuit's statutory analysis . . . inapposite" in this context. *NAACP* App. 51a; *see also* Supp. App. 51a-55a; *infra* 27.

As the district court in *NAACP* concluded, the "scant legal reasoning" in the rescission memorandum "was insufficient to satisfy the Department's obligation to explain its departure from its prior stated view that DACA was lawful." *NAACP* App. 51a. It left the courts and the public without the ability to "'discern[]'

the 'path' that the agency followed." *Id.* at 53a. That failure "was particularly egregious here in light of the reliance interests involved"—which the rescission memorandum did not acknowledge—on the part of "hundreds of thousands of beneficiaries" who have "structured their education, employment, and other life activities" around the program. *Id.* at 54a; *see* Pet. App. 58a-62a; *Batalla Vidal* App. 113a-117a. Petitioners' refusal to address those legitimate reliance interests rendered their "barebones" explanation "doubly insufficient." *NAACP* App. 55a; *cf. Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2125-2126 (2016).

These deficiencies are not mere technical flaws. The APA was adopted to ensure that "federal agencies are accountable to the public." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). The reasoned-explanation requirement helps voters to assess whether they agree with the reasons for government action and to exercise their franchise accordingly. When the Executive Branch instead obscures its reasons for taking an important action, or fails to explain an abrupt change in position, it undermines the principles of transparency and political accountability that the APA is designed to protect. *Cf.* Supp. App. 31a-34a.

b. Apart from petitioners' failure to explain their change in position and their decision to terminate DACA, the decision is invalid because it was based on the flawed premise that DACA is unlawful. Congress has charged DHS with "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). At the same time, Congress has made choices that leave "the executive agencies charged with immigration enforcement" with inadequate resources to remove everyone "present in this country without authorization." Supp. App. 55a. In light of its

broad statutory authority and that budgetary reality, DHS has routinely employed deferred action and similar forms of discretionary immigration relief—sometimes on an individual basis, and sometimes through programs that channel the agency's discretion with respect to a "class of individuals otherwise eligible for removal." *Id.* at 8a; *see id.* at 8a-14a (reviewing history). Although deferred action "is not expressly grounded in statute," Congress has repeatedly "recognized the existence of deferred action" in INA amendments. *Id.* at 8a-9a. This Court, too, has recognized deferred action as a "regular practice," involving "exercising discretion for humanitarian reasons or simply for" the agency's "own convenience." *AADC*, 525 U.S. at 483-484; *see* Supp. App. 9a. These considerations establish that DACA is "a permissible exercise of executive discretion." Supp. App. 56a; *see also* D.Ct. Dkt. 64-1 at 21 n.8 (OLC opinion). And petitioners "do[] not contest any" of them. Supp. App. 49a.

Instead, petitioners' arguments about DACA's legality focus entirely on the Fifth Circuit's *Texas* decision, which affirmed a preliminary injunction addressing the DAPA program. Pet. 24-25, 28-29; *see* Supp. App. 49a; Pet. App. 113a-115a. But an interlocutory decision by a single court of appeals does not resolve the legality of a federal program—let alone that of a different program not directly before that court. *See, e.g.*, *IRAP*, 137 S. Ct. at 2087 (preliminary injunction is "often dependent as much on the equities of a given case as the substance of the legal issues it presents," and purpose is "not to conclusively determine the rights of the parties"). Nor does the affirmance of such a decision by an equally divided Court. *See Neil v. Biggers*, 409 U.S. 188, 192 (1972).

Moreover, petitioners overreach in contending that the "entirety of the Fifth Circuit's reasoning applies equally to" DACA. Pet. 24. As to procedural validity, for example, the Fifth Circuit concluded that DAPA likely required a notice-and-comment process because it would not be implemented on a truly discretionary basis. *Texas*, 809 F.3d at 171-178. The Fifth Circuit relied on statistics and a declaration from a union representative, both from 2014, suggesting that DACA applications were rarely denied. *Id.* at 172. More recent data show a materially higher denial rate for DACA applications. Supp. App. 51a. And the union representative recently testified that he has no "firsthand" knowledge about the process of reviewing DACA applications and "never" reviewed such an application himself. New Jersey Br. 23, *Texas v. United States*, S.D. Tex. No. 18-cv-68, Dkt. 215 (filed July 21, 2018). None of that recent information was available to the Fifth Circuit when it issued its decision in 2015.

As to substantive validity, the Fifth Circuit reasoned that the Executive Branch lacked authority to operate DAPA "because 'Congress has "directly addressed the precise question at issue."'" Supp. App. 52a (quoting *Texas*, 809 F.3d at 186). But Congress has not acted in any similar manner with respect to the population subject to DACA. *See id.* The Fifth Circuit also focused on the "economic and political magnitude" of DAPA, through which 4.3 million immigrants would have potentially been eligible for deferred action. *Texas*, 809 F.3d at 181. The DACA population, while significant, is much smaller. *See* Supp. App. 54a (689,800 enrollees as of September 2017).

Thus, even if one were to accept the Fifth Circuit's preliminary assessment of the legality of DAPA, it

would not establish that DACA is unlawful. In any event, for present purposes it is sufficient to observe that the Ninth Circuit applied established principles in holding that DACA is a permissible exercise of executive discretion, and there is no conflict among the courts of appeals on that question. If some future decision creates such a conflict, this Court will be able to evaluate at that time whether the issue warrants further review.

c. In this litigation, petitioners have also sought to defend their decision to terminate DACA as one based on an assessment of "litigation risk." *See, e.g.*, Pet. 9. Even if such a rationale could reasonably be discerned from the rescission memorandum, *but see* Supp. App. 35a, it would be inadequate to support the decision. While the memorandum notes that Texas had threatened to amend its DAPA lawsuit to add a challenge to DACA, *see* Pet. App. 116a, there is no indication that the agency conducted a reasoned assessment of that threat. Any such assessment would have considered the availability of possible defenses, both procedural and on the merits. It also would have balanced any perceived risk against the costs to be inflicted on individual DACA recipients, the States, the federal government, and the overall economy by abruptly abandoning a policy that has allowed nearly three-quarters of a million people to obtain work authorization and other benefits. Nothing in the memorandum or the proffered administrative record suggests that petitioners took any account of those countervailing considerations. *See, e.g.*, Pet. App. 57a-62a.

Petitioners' counsel have attempted to supply in litigation some of the reasoning that the rescission memorandum lacks. They have told the courts that the DAPA rulings created "the inevitable prospect of

an immediate, nationwide injunction against DACA," D.Ct. Dkt. 204 at 1, compelling the Acting Secretary to terminate DACA to avoid a "disruptive, court-imposed," and "imminent judicial invalidation," C.A. Dkt. 31 at 35-36. But the district court in the DAPA litigation entered a preliminary injunction before that program was ever implemented, preserving the status quo pending further litigation. In contrast, the threatened suit challenging DACA was to be filed half a decade *after* the program went into effect, when hundreds of thousands of young people had already structured their lives around the program. The equities in those two situations are profoundly different. Indeed, after the threatened litigation eventually materialized in May 2018, the same district court *refused* to enter "preliminary" relief, noting the plaintiffs' "nearly six-year" delay in bringing their claims. *Texas v. United States*, 328 F. Supp. 3d 662, 739 (S.D. Tex. 2018).[6]

d. Petitioners now repeatedly invoke the memorandum issued in June 2018 by Secretary Nielsen—which "decline[d] to disturb" the September 2017 termination decision (Pet. App. 121a)—in support of their merits positions. *See* Pet. 13-14, 24-31, 33; Supp. Br. 9-10. But Nielsen's memorandum cannot be a basis for concluding that the district court in this case abused its discretion by entering a preliminary injunction in January 2018. In fact, petitioners still have not submitted that memorandum to the district court in this case. Although petitioners did submit it to the court of appeals, that court correctly recognized that

---

[6] The court did conclude that the plaintiff States "are likely to succeed on the merits" of their challenge to DACA. 328 F. Supp. 3d at 736; *see* Pet. 25. But it did not reach any final conclusion to that effect, and instead set a deadline for dispositive motions for late 2019 and scheduled a trial on the merits to begin in 2020.

"to the extent the Nielsen memorandum is offered as an additional justification of the original DACA rescission," it is "well-settled that '[courts] will not allow the agency to supply post-hoc rationalizations for its actions . . . .'" Supp. App. 57a-58a n.24. Beyond that observation, the court of appeals properly left "it to the district court in the first instance to determine the admissibility of Secretary Nielsen's [memorandum] . . . and its impact, if any, on this case." *Id.* In light of those circumstances, petitioners' heavy reliance on the Nielsen memorandum only underscores why this would not be a suitable case for the Court to provide a "definitive resolution" (Pet. 34) of their arguments on the merits.

2. Tellingly, petitioners do not address any of the equitable factors of the four-factor preliminary injunction test. *See* Pet. 17-34; *see generally Winter*, 555 U.S. at 20; *IRAP*, 137 S. Ct. at 2087. As the district court found, those factors weigh heavily in favor of provisional relief. Pet. App 62a-66a. The preliminary injunction partially preserves the status quo that existed before September 2017, only for those who had already applied for and received deferred action under DACA. *Id.* at 66a. It preserves petitioners' ability to exercise discretion on an individualized basis for each person who applies for renewal, and to proceed to remove anyone, at any time, on any lawful ground. *Id.* Without the injunction, hundreds of thousands of young Americans would lose their work authorization and deferred action status. That would profoundly damage the individual respondents, the States and the other entity respondents, our educational institutions, our businesses, and the entire Nation. *Id.* at 62a-65a.

In contrast, the only allegation of injury that petitioners have ever mustered in this case is that the injunction requires them to "sanction[] an ongoing violation of federal immigration law by nearly 700,000 aliens." Pet. 14. But it is hard to credit that as an allegation of serious harm under the circumstances here. Petitioners themselves decided to leave DACA in place for the first seven months of this Administration, long after the decisions in the DAPA litigation. The President previously proclaimed that the policy of his Administration was "to allow the dreamers to stay." D.Ct. Dkt. 121-1 at 285. Petitioners never even tried to argue for a stay of the preliminary injunction in this case (or in *Batalla Vidal*). And even their present petition recognizes "the legitimate policy concerns underlying . . . DACA." Pet. 16. If there is any abstract injury to petitioners from continuing to preserve the status quo while the courts reach a final resolution of this dispute, it is overwhelmed by the concrete injury that DACA recipients would suffer in the absence of that provisional relief.

C. The Motion to Dismiss

Finally, there is no reason for immediate review of the denial of petitioners' motion to dismiss the due process and equal protection claims advanced by certain respondents. Pet. 30-31. The only due process claim remaining in this case is a narrow challenge to changes in the policy governing the use of DACA recipients' sensitive information. Petitioners argue that they have not changed their policies, or that if they have then they were entitled to do so. Pet. 31. But the courts below concluded that respondents have plausibly alleged to the contrary. Supp. App. 70a; Pet.

App 79a-81a.[7] The district court did not grant any provisional relief based on this claim, and there is no reason for this Court to review the matter before the claim has been further developed and resolved by the lower courts.

As to equal protection, petitioners assert that the claim raised by some respondents here "is foreclosed by this Court's decision in *AADC*, which imposed a general bar on discriminatory-motive claims in the immigration-enforcement context." Pet. 30. Petitioners read that decision too broadly. As the court below concluded, the claim raised here "does not implicate the concerns motivating the Court in *AADC*," such as "inhibiting prosecutorial discretion, allowing continuing violations of immigration law, and impacting foreign relations." Supp. App. 75a-76a; *see* 525 U.S. at 489-490. In any event, petitioners will have the ordinary opportunity to demonstrate in the lower courts why the facts surrounding their termination of DACA do not give rise to an equal protection violation. They offer no persuasive reason why this Court should consider that question now.

---

[7] The district court in Maryland, although otherwise agreeing with petitioners' merits arguments, "enjoin[ed] the Government from using information provided by Dreamers through the DACA program for enforcement purposes." *Casa de Md.*, 284 F. Supp. 3d at 779, *appeal pending*, 4th Cir. No. 18-1521 (argued Dec. 11, 2018).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
MICHAEL L. NEWMAN
Senior Assistant Attorney General
MICHAEL J. MONGAN
Deputy Solicitor General
SAMUEL P. SIEGEL
Associate Deputy Solicitor General

JANET T. MILLS
Attorney General of Maine
SUSAN P. HERMAN
Deputy Attorney General

BRIAN E. FROSH
Attorney General of Maryland
STEVEN M. SULLIVAN
Solicitor General
LEAH J. TULIN
Assistant Attorney General

LORI SWANSON
Attorney General of Minnesota
JACOB CAMPION
Assistant Attorney General

December 17, 2018