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 OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, JANET NAPOLITANO, AND THE CITY OF SAN JOSÉ IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. § 1252(g), which prohibits judicial review of decisions to "commence proceedings, adjudicate cases, or execute removal orders" in individual immigration cases, bars judicial review of a programmatic decision by the Acting Secretary of the Department of Homeland Security to rescind the Deferred Action for Childhood Arrivals (DACA) program.

2. Whether the Acting Secretary's decision to terminate the DACA program based on an assessment of its legality is a decision "committed to agency discretion by law" and therefore immune from judicial review under the Administrative Procedure Act.

3. Whether the district court abused its discretion by issuing a tailored preliminary injunction enjoining aspects of the rescission of DACA pending adjudication on the merits, considering (a) the likelihood that the rescission will be set aside as arbitrary and capricious under the Administrative Procedure Act; (b) the irreparable harm to DACA recipients and Respondents should the program be rescinded; and (c) the absence of countervailing equities given Petitioners' stated support for DACA.

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INTRODUCTION

Petitioners ask this Court to review the Ninth Circuit's interlocutory order affirming a preliminary injunction directed to the government's decision to rescind the Deferred Action for Childhood Arrivals (DACA) program, and to grant certiorari before judgment in two additional cases. While the importance of the DACA program may warrant this Court's review at an appropriate time, now is not the time.

First, the government has not shown that it is suffering significant harm that warrants immediate review by this Court. The district court's preliminary injunction operates to preserve a status quo that has existed for six years. The government has made an individualized determination that each of the hundreds of thousands of immigrants who currently benefit from DACA does not present a risk of harm to national security or the public, a determination the government remains free to revisit at any time based on new information. If the government were truly concerned about immediate harm caused by the preliminary injunction, the appropriate course would have been to seek a stay, something the government chose not to do.

Second, this case in its current posture is a poor vehicle to resolve the future of the DACA program. The court of appeals' interlocutory decision affirms the grant of a preliminary injunction, and the government has not contested that three of the four preliminary injunction factors—irreparable harm, balance of equities, and public interest—overwhelmingly favor the issuance of an injunction. This case also includes constitutional claims that must be resolved to decide

this dispute. Review by this Court at this interlocutory juncture would risk being superseded by new facts and evidence, particularly in view of lower court determinations, not addressed by the Ninth Circuit's interlocutory order, that the government has produced an incomplete administrative record.

Third, there is no circuit split. The government seeks review of the only appellate decision to date. Three additional courts of appeals will likely rule on the lawfulness of the DACA rescission in 2019.

Fourth, the government has failed to present a question of law that warrants this Court's review in the absence of a circuit split. Instead, it argues that the Ninth Circuit misapplied established legal standards to the facts of this case.

For these reasons, the Court should deny the petitions for certiorari.

STATEMENT

1. a. Since 1956, every presidential administration has exercised its authority to set "national immigration enforcement policies and priorities" by adopting deferred action programs that protect certain categories of otherwise removable immigrants from deportation. 6 U.S.C. § 202(5); SER265-66 (summarizing 17 pre-DACA deferred action programs).[1] These programs recognize that the government lacks sufficient

[1] "ER" and "SER" refer to the Ninth Circuit Excerpts and Supplemental Excerpts of Record. 18-15068 Ct. App. Dkts. 32-1–32-3; 45–45-5. "Dkt." refers to docket entries in the district court,

resources to "enforce all of the [immigration] rules and regulations presently on the books," and that "[i]n some situations, application of the literal letter of the law would simply be unconscionable and would serve no useful purpose." SER1215. The legality of such programs was commonly accepted, none was challenged in court, and Congress recognized deferred action in several amendments to the Immigration and Nationality Act (INA). See, *e.g.*, 8 U.S.C. § 1227(d)(2) (U visa and T visa applicants are eligible for "deferred action"); *id.* § 1154(a)(1)(D)(i)(II) (petitioners under the Violence Against Women Act are eligible for "deferred action and work authorization"); *id.* § 1151 note (certain immediate family members of certain United States citizens "shall be eligible for deferred action").

In 2012, the Department of Homeland Security (DHS) established the DACA program. Pet. App. 97a-101a. Under DACA, "certain young people who were brought to this country as children and know only this country as home" are eligible to apply for discretionary relief from removal if they (1) came to the United States under the age of sixteen; (2) have continuously resided in the United States since June 15, 2007, and were present in the United States on June 15, 2012, and on the date they requested DACA; (3) are in school, have graduated from high school, have obtained a GED, or have been honorably discharged from the United States military or Coast Guard; (4) do not have a significant criminal record and are not a threat to national security or public safety; (5) were

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Regents of the University of California v. DHS, No. 17-cv-5211 (N.D. Cal.). "AR" refers to the administrative record filed by the government in the district court. Dkt. 64-1.

under the age of 31 as of June 15, 2012; and (6) do not have lawful immigration status. *Id.* at 97a-98a. Eligible applicants, who are evaluated on a case-by-case basis, are required to provide the government with sensitive personal information, including their home address and fingerprints, submit to a rigorous DHS background check, and pay a substantial application fee. SER1308, SER1325-26, SER1328.

Since 2012, nearly 800,000 young people have received deferred action under DACA, which confers life-changing benefits, including freedom from deportation, to each recipient that complies with the conditions of the program. ER78. Once DACA is granted, recipients may, pursuant to preexisting regulations, obtain employment authorization and social security numbers. See 8 C.F.R. § 274a.12(c)(14); Dkt. 111 at 16. In addition to permitting recipients to work legally—a benefit that has resulted in a 91% employment rate among recipients and permitted DACA recipients to support their families, Dkt. 111 at 23—these documents unlock access to other important benefits, including driver's licenses, medical insurance, and tuition benefits. See *id.* at 17. Moreover, DACA recipients do not accrue "unlawful presence" for purposes of the INA's re-entry bars, see 8 U.S.C. § 1182(a)(9)(B)-(C), and receive favorable consideration for advance parole, allowing them to lawfully travel abroad and return to the United States, see 8 C.F.R. § 212.5(f).

b. Prior to September 2017, when the government announced its decision to rescind DACA, no court had deemed DACA unlawful and the government consistently had defended the legality of the program. In a

2014 opinion that has not been withdrawn, the Office of Legal Counsel memorialized the advice it provided prior to the promulgation of DACA "that such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis." AR21 n.8. The government argued in the courts that DACA was "a valid exercise of the Secretary's broad authority and discretion to set policies for enforcing the immigration laws." Br. of United States as Amicus Curiae in Support of Appellees at *1, *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957 (9th Cir. 2017) (No. 15-15307), 2015 WL 5120846.

In February 2017, then-Secretary of Homeland Security Kelly issued a memorandum reordering DHS's enforcement priorities but maintaining DACA unchanged. AR230. Secretary Kelly characterized "DACA status" as a "commitment * * * by the government towards the DACA person." SER1334. In June 2017, Administration officials, including then-Attorney General Sessions, began communicating with several state attorneys general who had challenged a different deferred action program, which never went into effect, known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). SER1442-43. Those discussions culminated in a June 29, 2017 letter, from ten states to Attorney General Sessions, demanding that the government "phase out the DACA program" by September 5, 2017, or else they would seek to amend their DAPA lawsuit to also challenge DACA. AR239.

On September 4, 2017, Attorney General Sessions sent a half-page letter to then-DHS Acting Secretary

Duke, advising that DHS "should rescind" DACA because it was "effectuated * * * without proper statutory authority" and "was an unconstitutional exercise of authority by the Executive Branch." AR251. The letter stated, in conclusory fashion, that DACA "has the same legal and constitutional defects" as the DAPA program, which had been preliminarily enjoined in a decision affirmed by the Fifth Circuit in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016). But because the *Texas* plaintiffs had challenged only DAPA, the Fifth Circuit did not address the legality of the original DACA program.[2] *Ibid.* It is unclear what "constitutional defects" the Attorney General was referring to, since neither *Texas* nor any other case has ever found any deferred action program unconstitutional.

The next day, Acting Secretary Duke issued a short memorandum formally rescinding DACA. The rescission memorandum instructed DHS immediately to stop accepting new DACA applications; immediately to stop accepting advance parole applications; to accept renewal applications only from individuals whose deferred action would expire before March 5, 2018, and only through October 5, 2017; and thereby to cause DACA grants to expire on a rolling basis beginning March 5, 2018. Pet. App. 117a-118a. The memorandum contained a single sentence of analysis: "Taking into consideration the Supreme Court's and

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[2] The DAPA program included certain expansions of DACA, which were not specifically addressed in *Texas*. Pet. Supp. App. 55a.

the Fifth Circuit's rulings in the ongoing 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.[3]

2. The University of California, four states, and other Respondents brought actions in the Northern District of California alleging that the Acting Secretary's decision to rescind DACA was unlawful on several grounds, including that the rescission was arbitrary and capricious under the Administrative Procedure Act (APA). Pet. App. 19a-22a. Respondents also challenged the constitutionality of the rescission on due process and equal protection grounds. *Id.* at 22a.

The parties agreed that the government would move swiftly to produce the administrative record. Dkt. 52-1 at 17-18. On October 6, 2017, the government produced a record consisting of 14 publicly-available documents totaling 256 pages, 187 of which consist of court decisions. See Dkt. 64-1. The Ninth and Second Circuits have held that this record is likely incomplete. For example, it excludes communications between the government and the state attorneys general whose litigation threat purportedly required the rescission of DACA. See, *e.g.*, Dkt. 79; *In re United States*, 875 F.3d 1200, 1205 (9th Cir.), *judgment vacated*, 138 S. Ct. 443 (2017) (ordering record issues to be deferred while district court resolved the government's threshold justiciability arguments); *In*

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[3] See 8 U.S.C. § 1103(a)(1) (providing that, with respect to the INA, the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling" on DHS).

re Nielsen, No. 17-3345, slip op. at 2-3 (2d Cir. Dec. 27, 2017).

Petitioners moved to dismiss all five complaints under Rule 12(b)(1) and (6). Pet. App. 26a, 72a. Respondents opposed the motion to dismiss and moved for a preliminary injunction on their APA claims. See Dkt. 111 at 10; Dkt. 205.

On January 9, 2018, the district court granted in part and denied in part the government's Rule 12(b)(1) motion and granted in part Respondents' motion for a preliminary injunction. Pet. App. 66a-69a. The court held that Respondents had demonstrated a likelihood of success on their claim that the rescission was arbitrary and capricious, *id.* at 54a, 63a, and satisfied the remaining factors for preliminary injunctive relief, including irreparable harm. *Id.* at 62a-66a. The court relied on Respondents' undisputed evidence of irreparable harm, including their showing that rescission will:

- threaten almost two hundred thousand U.S.-citizen children with the deportation of their parents, see SER1155;

- cause an average of 1,400 DACA recipients to lose their jobs each business day, SER1459;

- and force tens of thousands of DACA recipient undergraduate and graduate students to discontinue their studies for lack of support, including approximately 1,700 at the University of California alone, SER365-69, SER1152-53.

The court's injunction required the government to "allow[] DACA enrollees to renew their enrollments" under the terms applicable prior to the rescission. Pet. App. 66a. For "each renewal application," the district court permitted the government to "take administrative steps to make sure fair discretion is exercised on an individualized basis." *Ibid.* The court's order did not prohibit DHS "from proceeding 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." *Ibid.* The court did not require DHS to process DACA applications from individuals who had not previously received deferred action or to permit advance parole. *Ibid.*

The district court also granted in part and denied in part the government's Rule 12(b)(6) motion, sustaining Respondents' substantive APA and equal protection claims. *Id.* at 71a-90a.

3. The government appealed the court's orders, and the Ninth Circuit ordered expedited briefing. 18-15068 Ct. App. Dkt. 21.

4. On January 18, 2018, the government filed a petition for a writ of certiorari before judgment, seeking review of the district court's orders. On February 26, 2018, the Court denied the petition. 138 S. Ct. 1182. After agreeing to expedite the case, the Ninth Circuit heard oral argument on May 15, 2018.

5. Meanwhile, similar challenges to the rescission of DACA proceeded in other courts. On February 13, 2018, the District Court for the Eastern District of New York preliminarily enjoined the rescission of

DACA in an order that tracks the terms of the *Regents* injunction. *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 437-38 (E.D.N.Y. 2018); see also *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 268 (E.D.N.Y. 2018). The parties appealed to the Second Circuit, where briefing is complete and oral argument is scheduled for January 25, 2019. See *Batalla Vidal v. Nielsen*, No. 18-485, Dkt. 588 (2d Cir. Dec. 12, 2018).

6. In April 2018, the District Court for the District of Columbia granted partial summary judgment against the government and vacated the rescission of DACA, holding that it violated the APA's substantive requirements. *NAACP v. Trump*, 298 F. Supp. 3d 209, 249 (D.D.C. 2018). The court stayed its order for 90 days to give DHS the opportunity to "issue[] a new decision rescinding DACA." *NAACP v. Trump*, No. 17-cv-01907, Dkt. 22 (D.D.C. Apr. 24, 2018).

In response, DHS Secretary Nielsen issued on June 22, 2018, a memorandum "declin[ing] to disturb the Duke memorandum's rescission of the DACA policy." Pet. App. 121a. The memorandum purported to "reflect[] [Secretary Nielsen's] understanding of the Duke memorandum" and to offer "further explanation" of the rescission of DACA. *Ibid.* Secretary Nielsen stated, among other things, that: she was bound by the Attorney General's conclusion that DACA was unlawful; there were "serious doubts" about DACA's legality in any event; and "considering the fact that tens of thousands of minor aliens have illegally crossed or been smuggled across our border in recent years, * * * it is critically important for DHS to project a message that leaves no doubt regarding the clear,

consistent, and transparent enforcement of the immigration laws." *Id.* at 122a-124a. The memorandum did not purport to be a new decision and did not include an administrative record. In notifying the Ninth Circuit of the memo, the government claimed that it provided additional reasons for the rescission but did not argue that it was a new agency action distinct from the initial rescission memo. 18-15068 Ct. App. Dkt. 184.

On August 3, 2018, the *NAACP* court concluded the Nielsen memo did not alter the court's earlier conclusions. *NAACP v. Trump*, 315 F. Supp. 3d 457, 464-73 (D.D.C. 2018). The government then appealed to the D.C. Circuit. Briefing will be completed by January 22, 2019. See *NAACP v. Trump*, No. 18-5243, Doc. 1756433 (D.C. Cir. Oct. 22, 2018).[4]

7. While the *Regents* appeals were pending, the government on October 17, 2018, submitted a letter to the Ninth Circuit stating that it "intend[ed] to again

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[4] On March 5, 2018, the United States District Court for the District of Maryland concluded the plaintiffs' claims in that case were justiciable, but held that the claims failed on the merits. *Casa de Md. v. DHS*, 284 F. Supp. 3d 758, 770-79 (D. Md. 2018), *appeal docketed*, No. 18-1521 (4th Cir. May 8, 2018). The Fourth Circuit held oral argument in that case on December 11, 2018.

Separately, certain states that had earlier challenged DAPA moved for a preliminary injunction enjoining DACA before the *Texas* district court. Despite finding that the plaintiffs were likely to succeed on the merits, the *Texas* court held that the plaintiffs' long delay bringing suit precluded them from establishing irreparable harm. *Texas v. United States*, 328 F. Supp. 3d 662, 736-42 (S.D. Tex. 2018). Likewise, the court held that the public interest and the hardships an injunction would cause to DACA recipients weighed in favor of preserving the status quo. *Id.* at 740-42.

petition the Supreme Court for a writ of certiorari before judgment * * * in the event that [the Ninth Circuit] d[id] not issue its judgment by Wednesday, October 31." 18-15068 Ct. App. Dkt. 198 at 1. On November 5, 2018, the government filed a second petition for certiorari before judgment, and simultaneously sought certiorari before judgment in the *NAACP* and *Batalla Vidal* cases.

8. On November 8, 2018, the Ninth Circuit issued an opinion affirming the *Regents* preliminary injunction and the related orders granting in part and denying in part the government's motion to dismiss. Pet. Supp. App. 1a-87a.

The court first considered whether the rescission is exempt from judicial review as a decision "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2). The court held the rescission is subject to review under the APA because it was based solely on a non-discretionary legal determination, namely, "a belief that DACA was beyond the authority of DHS." Applying Supreme Court and Ninth Circuit precedent, the court held that administrative decisions premised "on a belief that any alternative choice was foreclosed by law" are not "committed to agency discretion." Pet. Supp. App. 29a-42a (citing *Heckler v. Chaney*, 470 U.S. 821, 853 n.4 (1985); *Montana Air Chapter No. 29 v. FLRA*, 898 F.2d 753, 754 (9th Cir. 1990)). Next, the court concluded that 8 U.S.C. § 1252(g) presents no obstacle to review because the rescission was not one of three discrete actions—"to commence proceedings, adjudicate cases, or execute removal orders"—carved out from review by that section of the INA. *Id.* at 42a-45a (citing *Reno v. Am.*-

Arab Anti-Discrimination Comm., 525 U.S. 471, 482 940 (1999) (*AADC*)).

The court then held that Respondents are likely to succeed on the merits of their APA claims, because DACA is "a permissible exercise of executive discretion" that does not run afoul of the INA, and "where an agency purports to act solely on the basis that a certain result is legally required, and that legal premise turns out to be incorrect, the action must be set aside." *Id.* at 46a, 56a-57a. The Court made "clear" that it was "not hold[ing] that DACA *could not* be rescinded as an exercise of Executive Branch discretion," but only that the legal grounds identified by the agency were erroneous. *Id.* at 57a. Because the government did not contest the district court's holdings that the risk of irreparable harm to plaintiffs, the balance of hardships, and the public interest all favored a preliminary injunction, the court did not review those holdings. *Id.* at 45a-46a.

The court of appeals concluded that the district court acted within its discretion by enjoining DHS from implementing certain aspects of the rescission, as such relief "is commonplace in APA cases, promotes uniformity in immigration enforcement, and is necessary to provide the plaintiffs here with complete redress." *Id.* at 58a-60a.

The court of appeals also affirmed the other district court rulings under review, including its denial of the government's motion to dismiss plaintiffs' equal protection claims, holding that "the likelihood of success on plaintiffs' equal protection claim is a second,

alternative ground for affirming the entry of the injunction." *Id.* at 61a-77a & n.31.

Judge Owens concurred in the judgment, concluding that the preliminary injunction should be affirmed on equal protection grounds. *Id.* at 84a-87a; see *id.* at 85a ("the record assembled at this early stage is promising"). Judge Owens disagreed with the majority's holding that the rescission was reviewable as to the APA claims, in part because he understood there to be a difference between challenges to the "procedures the agency used" and challenges under *Chevron*. See *id.* at 82a.

9. On November 19, 2018, Petitioners filed a supplemental brief making additional arguments based on the Ninth Circuit's opinion.

REASONS FOR DENYING THE PETITION

I. Immediate Review Is Not Warranted.

The government's petition for certiorari is its latest effort to truncate the ordinary process for judicial review of agency action. The government has not shown that it will suffer significant harm if the petition is denied. Nor can the government plausibly assert such harm, given that it has never sought a stay in any court.

The government's decision to end the DACA program is a matter of life-changing importance to hundreds of thousands of individuals who participate in the program. Consequently, this case may warrant review by this Court at an appropriate time. However, the government's latest request for immediate review

is unwarranted. The Ninth Circuit's decision is preliminary and interlocutory, and does not address all the issues in the case. It would thus be extremely difficult, and likely impossible, for this Court to fully resolve the litigation at this stage of the proceedings. In addition, the Court would benefit from allowing the issues to be considered by the D.C., Second, and Fourth Circuits, each of which has heard, or will shortly hear, argument in a pending appeal. Because the government has not demonstrated a "compelling reason[ ]" for immediate review, see Sup. Ct. R. 10, the petition should be denied.

A. The Petition Presents No Legal Issue Warranting This Court's Immediate Review.

The questions presented by the petition—considered purely as legal issues and without regard to the importance of DACA itself—do not warrant this Court's review. There is no conflict in the circuits on the questions presented by the petition, and the government does not allege one. And the questions do not merit this Court's review in the absence of a circuit split.

1. The government contends that its decision to end DACA is insulated from judicial review by two statutory provisions, 8 U.S.C. § 1252(g) and 5 U.S.C. § 701(a)(2). Neither provision presents a legal issue worthy of this Court's review.

This Court has already interpreted 8 U.S.C. § 1252(g) and held that it bars review of only "three discrete actions"—decisions to "commence proceedings, adjudicate cases, or execute removal orders." *AADC*, 525 U.S. at 482. This Court rarely reconsiders

its decisions interpreting statutory provisions, and the government does not ask the Court to reconsider *AADC*. Every court to consider the issue has concluded that section 1252(g) does not preclude judicial review here because the rescission of DACA is not one of the "three discrete actions" covered by that section. Pet. App. 31a-33a; Pet. Supp. App. 42a-45a; *NAACP*, 298 F. Supp. 3d at 223-24; *Casa de Md.*, 284 F. Supp. 3d at 769-70; *Batalla Vidal v. Duke*, 295 F. Supp. 3d 127, 152-54 (E.D.N.Y. 2017). The lower courts' unanimous application of section 1252(g) to a specific situation does not warrant further review. See Sup. Ct. R. 10 (review is "rarely granted" to consider an argument that the lower court misapplied "a properly stated rule of law").

This Court has also interpreted the "committed to agency discretion by law" language of 5 U.S.C. § 701(a)(2) in multiple cases. See *Webster v. Doe*, 486 U.S. 592, 599-601 (1988); *Chaney*, 470 U.S. at 830; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410-14 (1971). Once again, the government does not contend that the Court's decisions interpreting this statutory provision are flawed or in need of reconsideration. And once again, every court to consider the issue has reached the same conclusion. See, *e.g.*, Pet. App. 26a-30a; Pet. Supp. App. 23a-42a; *NAACP*, 298 F. Supp. 3d at 226-34; *Casa de Md.*, 284 F. Supp. 3d at 769-70; *Batalla Vidal*, 295 F. Supp. 3d at 147-52; cf. *Texas*, 328 F. Supp. 3d at 706-09. As noted above, an argument that the lower courts have misapplied a legal standard is "rarely" an occasion for Supreme Court review. Sup. Ct. R. 10.

2. There is also widespread agreement in the lower courts that an agency's determination that it is legally foreclosed from taking a specified action—like the government's determination that it lacked the authority to continue DACA—is subject to judicial review. See, *e.g.*, *Citizens for Responsibility and Ethics in Washington v. FEC*, 892 F.3d 434, 441 n.11 (D.C. Cir. 2018); *Montana Air*, 898 F.2d at 755; *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993); see also *Chaney*, 470 U.S. at 833 n.4 (distinguishing agency actions based on unreviewable discretion from an agency action "based solely on the belief that it lacks jurisdiction").

In sum, the questions presented by the petition, considered as legal issues apart from the importance of the DACA program itself, do not warrant this Court's review.

B. Petitioners Have Not Shown That Immediate Review Is Warranted.

Although the importance of DACA to the hundreds of thousands of individuals who participate in the program may warrant this Court's eventual review of the government's rescission of the program, immediate review is not warranted.

1. The Ninth Circuit's decision affirming the district court's entry of a preliminary injunction is interlocutory, which ordinarily weighs against immediate review by this Court. See *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Moreover, the decision to grant or deny a preliminary injunction is reviewed only for an abuse of discretion, which

could complicate this Court's review of the legal questions presented. See *Ashcroft v. ACLU*, 542 U.S. 656, 664-65 (2004). In addition, the Court would benefit from allowing the issues to be considered by the D.C., Second, and Fourth Circuits, each of which has heard, or will shortly hear, oral argument.

2. Immediate review by this Court also is unlikely to end the litigation. *First*, there is no dispute that Respondents' constitutional claims are subject to judicial review. *See Webster*, 486 U.S. at 601-05. The court of appeals held that the equal protection claims could proceed beyond the pleadings stage and form an alternative basis for the injunction. Pet. Supp. App. 77a n.31. Thus, even if the Court were to grant the petition and hold that the APA claims are not subject to judicial review, the constitutional claims would remain to be decided.

Second, multiple courts have held that the administrative record is likely incomplete. See, *e.g.*, *In re United States*, 875 F.3d at 1205-07; *In re Nielsen*, No. 17-3345, slip op. at 2-3. A ruling based on the current administrative record could be overtaken by additional material added to the record at a later stage of the case. For example, a ruling accepting the government's purported "litigation risk" rationale for rescinding DACA could become untenable if further factual development revealed that the rescission was actually a pretextual effort to gain leverage in negotiations with Congress or was based on racial animus. See Pet. App. 64a ("These theories deserve the benefit of the full administrative record.").

Third, neither the district court nor the court of appeals substantively considered Secretary Nielsen's post-hoc memorandum. That memorandum was issued months after the district court issued the preliminary injunction, in response to a different court's order, and after this case was fully briefed and argued to the court of appeals. To the extent Secretary Nielsen's post-hoc memorandum merits consideration, this case is a poor vehicle for considering it. To get around this problem, the government asks the Court to grant certiorari before judgment in *NAACP*. But certiorari before judgment is a truly extraordinary step, and the government has not shown that it is warranted, particularly given that the memorandum consists of post-hoc rationalizations. *See* pp. 35-36 *infra*.

3. The government devotes more than three-quarters of its statement of reasons why the petition should be granted to an argument that the decisions below are incorrect. *See* Pet. 17-31. But as already noted, this Court "rarely" grants review—let alone accelerated, interlocutory review—merely to correct a legal error. Sup. Ct. R. 10. Moreover, the court of appeals' rulings are correct. See pp. 23-36 *infra*.

The government's petition devotes a scant two pages to the argument that immediate review is warranted at this interlocutory stage and prior to decisions by several other courts of appeals where DACA cases are pending. See Pet. 15-17. It asserts that review is "necessary to obtain an appropriately prompt resolution of this important dispute," *id.* at 16, but fails to demonstrate that this is so. Indeed, the government does not advance any of the reasons most likely to justify immediate review by this Court.

First, the government does not contend that continuing the DACA program creates a national security risk or a risk to the public. That is because DACA is limited to individuals who were brought to the United States as children, have lived here continually for a significant period of time, and have not committed any serious criminal offenses. Pet. App. 97a-98a. For each individual DACA recipient, the government has made a decision, based on a detailed background check, not to pursue removal. Because DACA status must be renewed every two years, this very Administration has made that individualized decision for almost every DACA recipient. In addition, the government is entirely free to take action against any DACA recipient it believes endangers national security or the public. *Id.* at 66a.

Second, the government does not assert that it wants to immediately begin deporting DACA recipients. To the contrary, the Administration has stated that it does not think DACA recipients should be deported. See Pet. App. 64a-65a ("In September, President Trump stated his support for DACA, tweeting: 'Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military? Really! . . . .'"). The government is therefore in the unusual position of seeking this Court's review of a court of appeals' decision authorizing the government to maintain a program that it favors as a policy matter.

Third, the government does not challenge the lower courts' findings that DACA recipients will suffer severe and irreparable harm. Nor does it challenge the courts' findings that the balance of hardships and

the public interest tip sharply in favor of DACA recipients and against the government. Pet. App. 64a-66a. These lopsided and unchallenged preliminary injunction factors weigh against a discretionary decision to grant accelerated interlocutory review. See *Ashcroft*, 542 U.S. at 664-65.

Finally, Petitioners' failure to seek a stay provides an additional reason to deny their request for interlocutory review by this Court. Petitioners have not sought a stay of the present injunction from the district court, the Ninth Circuit, or this Court, nor of the similar injunctions and judgments from the New York and D.C. district courts.[5] Indeed, when Petitioners previously sought certiorari before judgment, they committed *not* to seek a stay in order to "avoid the disruptive effects on all parties of abrupt shifts in the enforcement of the Nation's immigration laws." Pet. 12-13, *DHS v. Regents of Univ. of Cal.*, No. 17-1003 (U.S. 2018); see also Dkt. 243 at 4.

It is unsurprising that Petitioners have not sought a stay, which would have required demonstrating irreparable harm in the absence of a stay, and showing that the balance of hardships favors a stay. See Pet. App. 62a-66a. They cannot satisfy those standards, not least because the preliminary injunction main-

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[5] Petitioners initially moved for a stay of the *NAACP* order, or, in the alternative, a stay to the extent the order went beyond the *Regents* preliminary injunction. *NAACP v. Trump*, 321 F. Supp. 3d 143, 145-46 (D.D.C. 2018). The district court agreed to "stay its order as to new DACA applications and applications for advance parole, but not as to renewal applications." *Ibid.* Petitioners have not sought a stay before the D.C. Circuit.

tains a status quo that has existed for six years—including the period following this administration's affirmative decision to continue the DACA program in February 2017. AR230. Consequently, Petitioners cannot articulate any concrete harm, let alone irreparable harm, from allowing these cases to proceed in an orderly fashion.

4. The government asserts that it should not be "required to retain a discretionary non-enforcement policy that * * * is unlawful and that sanctions the ongoing violation of federal law by more than half a million people." Pet. 16. Given the government's professed support for the objectives of the DACA program, it is unclear how this is a cognizable harm. Ordinarily, a court of appeals' decision affirming the government's authority to implement a discretionary deferred action program would be regarded as beneficial to the government.

Indeed, the lower court rulings effectively expand, rather than contract, the scope of executive power. Those courts ruled that DACA is lawful, thereby relieving the government of a perceived legal constraint. This case therefore presents an unusual situation in which the government is seeking accelerated review of a lower court ruling that enlarges the scope of the agency's authority.

In any event, the preliminary injunction does not "require" the government to retain the DACA program in all circumstances. If the government believes it has non-arbitrary grounds for rescinding DACA, it could issue a new decision concerning the future of the

DACA program at any time and submit that new agency action for review to the district courts.

Moreover, neither the preliminary injunction nor the DACA program itself "sanctions" violations of federal law. DACA is a non-enforcement program. It expressly states that it does not grant legal status to DACA recipients. Pet. App. 101a. An agency's decision not to enforce the law is not the same as "sanctioning" a violation of the law.

Finally, the government suggests that this Court's intervention will facilitate action by Congress. The government offers no support for this speculative assertion. A decision by this Court to grant review could have the effect of freezing possible congressional action rather than facilitating it. And to the extent the Administration is seeking immediate review by this Court in order to strengthen its hand in negotiations with Congress, the Court should be cautious about injecting itself into discussions between the political branches. At a minimum, this is not a persuasive reason to grant immediate review.

For all of these reasons, the government has not shown that immediate review is warranted. Accordingly, the Court should deny the petitions for immediate review without prejudice to the right of any party to seek this Court's review at a later stage of the litigation.

II. The Decision Of The Court Of Appeals Is Correct.

The court of appeals' decision is also correct.

A. The Government Does Not Dispute That Three Of The Four Preliminary Injunction Factors Overwhelmingly Favor Respondents.

Petitioners do not challenge the district court's determinations that three of the four preliminary injunction factors—risk of irreparable harm, balance of hardships, and the public interest—overwhelmingly favor a preliminary injunction. Without a preliminary injunction, hundreds of thousands of DACA recipients will face devastating, life-changing harm, including loss of employment and educational opportunities, and possible exile from the country in which they have lived since they were children. At the same time, a preliminary injunction inflicts no substantial harm on Petitioners, who have expressed support for DACA, who have never sought to stay the injunction, and who may remove any individual who "poses a risk to national security or public safety, or otherwise deserves, in [their] judgment, to be removed." Pet. App. 66a.

B. The Rescission Of DACA Is Subject To Judicial Review.

The government argues that courts are powerless to review its decision to rescind the DACA program. It claims that judicial review is precluded by the INA in 8 U.S.C. § 1252(g) and by the APA in 5 U.S.C. § 701(a)(2). Neither provision applies, as the Ninth

Circuit and all four other courts to examine this question have found.

1. The Ninth Circuit correctly concluded that section 1252(g) does not preclude review. Pet. Supp. App. 42a-45a. This Court has interpreted this provision as "appl[ying] only to three discrete actions that the [Secretary] may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *AADC*, 525 U.S. at 482 (quoting section 1252(g)); see also *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (plurality opinion) (same). Because Respondents' claims do not challenge any of these enumerated actions, section 1252(g) does not apply.

Petitioners seek to resurrect the broader reading of section 1252(g) that this Court rejected in *AADC*. They assert that the rescission is unreviewable because it is "part of the process by which [the alien's] removability will be determined." Pet. 22 (quoting *Jennings*, 138 S. Ct. at 841). Even if the rescission were a "part of the process" for determining removability—a dubious assertion, since rescinding DACA does not trigger or even suggest the removal of any particular immigrant—section 1252(g) would not bar review. This Court in *AADC* rejected a similar argument, observing that actions such as opening an investigation—surely a "part of the process" for determining removability—would not come within section 1252(g)'s bar. *AADC*, 525 U.S. at 482; see also *Jennings*, 138 S. Ct. at 841 ("We did not interpret this language [in section 1252(g)] to sweep in any claim that can technically be said to 'arise from' the three listed actions of the [Secretary].").

2. a. The Ninth Circuit also correctly held that the APA permits judicial review here. The APA "manifests a congressional intention that it cover a broad spectrum of administrative actions." *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988) (citation omitted). Congress "ordinarily intends that there be judicial review" of agency action because "'[t]he statutes of Congress are not merely advisory when they relate to administrative agencies.'" *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 671 (1986) (quoting H.R. Rep. No. 79-1980, at 41 (1946)). The APA thus provides that "[a] person suffering legal wrong because of agency action * * * is entitled to judicial review thereof." 5 U.S.C. § 702; see *id.* § 704.

Consistent with Congress's intent, this Court applies a "strong presumption favoring judicial review of administrative action," which the government "bears a heavy burden" to overcome. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (internal quotation marks omitted). This strong presumption applies equally in the immigration context. See *INS v. St. Cyr*, 533 U.S. 289, 298-99 (2001).

The presumption of judicial review applies when an agency believes its action is compelled by statute. *See* 5 U.S.C. § 706(2) (courts shall "set aside agency action" that is "not in accordance with law"). This Court has recognized that it is the role of the Judiciary to evaluate an agency's claims that Congress has required it to act, or refrain from acting. See *Negusie v. Holder*, 555 U.S. 511, 516 (2009) (remanding because the Board of Immigration Appeals denied relief based on an incorrect reading of Supreme Court precedent);

Massachusetts v. EPA, 549 U.S. 497, 528 (2007) (reviewing the EPA's conclusion that it lacked statutory authority to regulate greenhouse gas emissions from new motor vehicles).

Recognizing that courts are the ultimate arbiters of the scope of agency authority, the courts of appeals have long held that agency action is reviewable where it is based on an agency's interpretation of a statute. See, *e.g.*, *Montana Air*, 898 F.2d at 757 ("Nothing in the Administrative Procedure Act * * * precludes review of a proper plaintiff's timely challenge of an agency's announcement of its interpretation of a statute."); *Edison Elec.*, 996 F.2d at 333 (holding agency's "Enforcement Policy Statement" reviewable because its "interpretation has to do with the substantive requirements of the law"); *Citizens for Responsibility & Ethics*, 892 F.3d at 441 n.11 ("[I]f the Commission declines to bring an enforcement action on the basis of its interpretation of [the relevant statute], the Commission's decision is subject to judicial review to determine whether it is 'contrary to law.'").

Because judicial review of agency action is the rule, "nonreviewability" is "an exception which must be demonstrated." *Bowen*, 476 U.S. at 672 n.3. One such "very narrow" exception that applies only in "rare instances," *Overton Park*, 401 U.S. at 410, is for actions "committed to agency discretion by law," 5 U.S.C. § 701(a)(2); see also *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) ("to honor the presumption of review, we have read the exception in §701(a)(2) quite narrowly"). To escape judicial review, an agency action must be one for which a court "would have no meaningful standard against

which to judge the agency's exercise of discretion," *i.e.*, where there is "no law to apply." *Chaney*, 470 U.S. at 830. So long as there is "law to apply," the default rule of judicial review remains in force.

b. The government's position here is contrary to well-established precedent and the foundational principles of judicial review under the APA. The Acting Secretary of DHS rescinded DACA based on the Attorney General's conclusion that DACA was created "without proper statutory authority" and "was an unconstitutional exercise of authority by the Executive Branch." AR251. The government nonetheless asserts that its action was "committed to agency discretion" and is thus unreviewable.

Thus far, the courts have unanimously rejected the government's argument that this "narrow" exception to judicial review bars review of the rescission. See, *e.g.*, Pet. Supp. App. 23a-42a; *NAACP*, 298 F. Supp. 3d at 226-34; *Casa de Md.*, 284 F. Supp. 3d at 769-70; *Batalla Vidal*, 295 F. Supp. 3d at 147-52. The Ninth Circuit explained that the reviewability of the rescission "follows necessarily from existing doctrine" in this Court and the courts of appeals. Pet. Supp. App. 31a. There is plainly "law to apply," *Chaney*, 470 U.S. at 830, because the rescission rested upon the legal conclusion that DACA was unlawful. See Pet. Supp. App. 35a-42a.[6]

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[6] The Ninth Circuit properly rejected the government's inapposite comparison of the rescission of the DACA program to a prosecutor's individualized decision not to institute criminal proceed-

c. The government's reliance on this Court's decision in *Chaney* is misplaced because, in that case, the agency had not "refus[ed] * * * to institute proceedings based solely on the belief that it lack[ed] jurisdiction." 470 U.S. at 833 n.4. Here, the Acting Secretary's decision to rescind DACA fits comfortably within *Chaney*'s footnote 4, as the rescission was based on the conclusion that DHS lacked power to continue DACA. See Pet. Supp. App. 24a-31a.

Chaney also focused on an agency's refusal to take an individual "requested enforcement action," 470 U.S. at 831, not the creation or rescission of a program. See Pet. Supp. App. 34a-35a n.13 ("Nowhere does [*Chaney*] suggest the broader proposition that any decision simply related to enforcement should be presumed unreviewable."); see also *ibid.* (collecting cases holding that general enforcement policies are subject to review).

In *Chaney*, the Court explained that an individualized decision not to enforce "often involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," including the proper allocation of agency resources. 470 U.S. at 831. The decision here, by contrast, did not reflect a "balancing of a number of factors." It was a legal conclusion—something peculiarly within courts' expertise. Cf. *Massachusetts*, 549 U.S. at 527 (holding denials of petitions for rulemaking reviewable in part because,

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ings. See Pet. Supp. App. 30a n.12 ("Such a belief is not equivalent to a conclusion that the government lacked the power to institute a prosecution in the first place.").

"[i]n contrast to nonenforcement decisions," such denials are "more apt to involve legal as opposed to factual analysis" (internal quotation marks omitted)). The rescission of DACA "involves the sort of routine dispute that federal courts regularly review," *Weyerhaeuser,* 139 S. Ct. at 370, namely, an agency's belief that its actions are compelled by statute.

This Court's decision in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) (*BLE*), is not to the contrary. *BLE* involved an agency action—denial of a petition to reconsider based on material error—that, like the individual nonenforcement decision at issue in *Chaney*, was "traditionally" unreviewable. The Court noted that an "otherwise unreviewable action" does not "become[] reviewable" merely because "the agency gives a 'reviewable' reason." *Id.* at 283. But the decision to rescind DACA was reviewable, so *BLE* is inapposite. See Pet. Supp. App. 29a-31a.

d. Petitioners seek to blame the rescission of DACA on the courts, asserting that they were legally constrained by judicial decisions from continuing DACA. In the next breath, however, they invoke agency discretion to avoid judicial review altogether. But the purpose of the APA is to ensure agency accountability. When agencies exercise policy discretion, they may receive deference or, in "rare" cases where there is no standard to apply, their actions may escape judicial review. When, however, they assert that their actions are compelled by law, courts can, and should, evaluate those claims. The Ninth Circuit's decision thus furthers "values fundamental to the administrative process," serving "the critical function of promoting * * * democratic accountability to the people" by

preventing the Executive Branch from shifting responsibility to the courts for its actions. Pet. Supp. App. 31a-33a.

C. Respondents Are Likely To Prevail On The Merits Of Their APA Claims.

1. a. The court of appeals correctly determined that the rescission is likely arbitrary, capricious, and contrary to law, because Petitioners' stated reason for terminating DACA—its purported illegality—is incorrect. 5 U.S.C. § 706(2)(A) (courts "shall" set aside agency action that is "not in accordance with law"); *Massachusetts*, 549 U.S. at 532-34 (setting aside EPA decision premised on misinterpretation of its legal authority); *Negusie*, 555 U.S. at 516 (remanding for agency to "confront the same question free of [its] mistaken legal premise"); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("an order may not stand if the agency has misconceived the law").

DACA, like other deferred action programs dating back more than 60 years, is a lawful exercise of DHS's broad statutory authority to "[e]stablish[] national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). Both this Court, see *AADC*, 525 U.S. at 483-85, and multiple provisions of the INA, see, *e.g.*, 8 U.S.C. §§ 1227(d)(2), 1154(a)(1)(D)(i)(II), have recognized that deferred action is an ordinary feature of our immigration system. See also Br. of United States at *42-64, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674), 2016 WL 836758. The government itself has likewise concluded that DACA falls within its au-

thority to employ deferred action to effectuate its enforcement priorities. See Pet. App. 99a (DACA memorandum); AR21 n.8 (Office of Legal Counsel advice).

The Fifth Circuit's DAPA decisions do not decide the legality of DACA.[7] One of the primary defects the *Texas* court identified in DAPA was that it encroached upon an "intricate [statutory] process for illegal aliens to derive a lawful immigration classification from their children's immigration status." *Texas*, 809 F.3d at 179. But there is no statutory apparatus conferring lawful immigration status on the pool of individuals eligible for DACA, and nothing in the INA *forbids* DACA. The *Texas* court's concern about the scope of DAPA—which would have reached 4.3 million people, 809 F.3d at 181—is not similarly implicated by DACA, which has reached nearly 800,000, Pet. App. 14a.

Accordingly, Petitioners' decision to terminate DACA rested on a legal error. That decision was "not in accordance with law," and must be set aside. 5 U.S.C. § 706(2)(A).

b. Although the rescission memorandum offered only DACA's purported illegality as its basis for the rescission, *see* Pet. App. 116a-117a, Petitioners have argued in the course of this case that DACA was terminated because of perceived "litigation risk" from its continuation. This rationale "is not independent of an on-the-merits assessment of DACA's legality," Pet.

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[7] Although *Texas* enjoined "expanded DACA," it devoted no analysis to that program. Furthermore, because the "expanded DACA" provisions never went into effect, they are not part of this case.

Supp. App. 35a n.14, and therefore does not alter the analysis.

Moreover, this purported justification is not in the administrative record, rendering it a post-hoc rationalization that cannot justify the agency's action in rescinding DACA. *Id.* at 35a; see *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

c. Even taking the "litigation risk" rationale at face value, the rescission would likely fail arbitrary-and-capricious review. The rescission memorandum does not contain any reasoned assessment of the "litigation risk" from the *Texas* case. For example, it does not explain how Texas and other states could obtain an immediate injunction terminating DACA, despite their waiting nearly six years to sue. See *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (agency action is unlawful if it "entirely failed to consider an important aspect of the problem"). Indeed, the *Texas* court *denied* an injunction of DACA based on plaintiffs' delay. 328 F. Supp. 3d at 736-42. The memorandum also contains no evaluation of alternative policies short of rescission that would mitigate litigation risk, such as addressing any purported defects that DACA might share with DAPA. See *State Farm*, 463 U.S. at 48 ("At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment.").

Apart from these shortcomings of "litigation risk" as a justification for agency action, it could be invoked in virtually any circumstance, and this would allow an

agency to evade meaningful APA review merely by labeling an otherwise reviewable legal conclusion as a "litigation risk" assessment. See *Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 44 (D.C. Cir. 2004) (litigation risk was not valid grounds upon which to act); *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015) (en banc) (rejecting litigation risk rationale).

d. The rescission is likely to fail arbitrary-and-capricious review for the separate reason that it reversed a "prior policy [that] has engendered serious reliance interests," without giving "a reasoned explanation * * * for disregarding facts and circumstances * * * engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). For over six years, DACA recipients have embarked on careers, enrolled in degree programs, started businesses, purchased homes, and even married and had children, all in reliance on DACA's fundamental promise: that they could remain in the United States if they followed the rules. See, *e.g.*, SER1470-72, Topics 1, 2, 4, 5. Employers and educational institutions will likewise lose their extensive investments in DACA recipients if those recipients become ineligible to work or are deported. See, *e.g.*, SER832-33.

The rescission memorandum did not acknowledge, let alone weigh, these profound reliance interests and the devastating consequences of the rescission on the hundreds of thousands of DACA recipients and the countless other stakeholders who have come to rely on the program. Pet. App. 111a-119a. The administrative record contains no assessment of those

interests. Those failures render the rescission arbitrary and capricious. See *Fox*, 556 U.S. at 515-16.

The government asserts that DACA did not create cognizable reliance interests because it was subject to revocation. Virtually every agency decision is subject to revocation, so long as it is done in accordance with law. But those decisions create reliance interests all the same. See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (Department of Labor was free to reinterpret the Fair Labor Standards Act, but only if it appropriately accounted for reliance interests arising from its prior interpretation). The government was required to consider those interests here.

e. Secretary Nielsen's memorandum, published more than nine months after the rescission and never submitted to the district court in this case, consists of post-hoc rationalizations that cannot overcome the inadequacies of the rescission memorandum. See *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) (agency action may be "upheld, if at all, on the same basis articulated in the order by the agency itself"). In particular, the memorandum's references to enforcement policy and reliance interests advance justifications that appear neither in the rescission memorandum nor in the administrative record, and thus cannot justify the decision. See *ibid.* Importantly, the Nielsen memorandum does not purport to be an independent agency action entitled to review on its own merits; instead, it purports only to offer "explanation" of the earlier-issued rescission memorandum, which it "decline[d] to disturb." Pet. App. 121a. The Ninth Circuit therefore correctly concluded the memorandum was a post-hoc rationalization.

To the extent the memorandum merits consideration, given that it was submitted to the Ninth Circuit after oral argument and was not substantively briefed, its impact, if any, should be left to the district court in the first instance. Pet. Supp. App. 57a-58a n.24.

2. Upon finding the rescission of DACA was likely arbitrary and capricious, the court of appeals properly affirmed the preliminary injunction. That remedy is needed to provide relief to the parties, is consistent with the ordinary remedy of vacatur in APA cases, and ensures a uniform immigration policy nationwide.

CONCLUSION

The petition for a writ of certiorari should be denied.

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