No. 18-587

IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL.,

Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

Brief in Opposition for Respondents Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, Jirayut Latthivongskorn, the County of Santa Clara, and Service Employees International Union Local 521

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QUESTIONS PRESENTED

The Deferred Action for Childhood Arrivals (DACA) program enables nearly 700,000 undocumented individuals who were brought to the United States as children to live and work here without fear of deportation, so long as they play by the rules. In September 2017, the Acting Secretary of Homeland Security, on the advice of the Attorney General, abruptly decided to terminate the program.

Respondents brought suit to challenge that decision. The district court granted respondents' motion for a preliminary injunction and also denied the government's motion to dismiss for lack of jurisdiction. The court of appeals affirmed.

The questions presented are:

1. Whether either the Administrative Procedure Act (APA), 5 U.S.C. § 701(a)(2), or a particular provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1252(g), precludes judicial review of the Acting Secretary's decision to terminate the DACA program.

2. Whether the district court abused its discretion in entering a preliminary injunction, based on its conclusion that respondents are likely to succeed on the merits of their claim that the decision to end DACA was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the APA, 5 U.S.C. § 706(2)(A), and its balancing of the equities.

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BRIEF IN OPPOSITION

This case is about whether nearly 700,000 young adults who came to the United States as children and have lived their entire lives here will be subject to removal because the government decided to rescind the Deferred Action for Childhood Arrivals (DACA) program. Since 2012, DACA has allowed these individuals, known as "Dreamers," to obtain an education, work, and contribute to our Nation. The program has been an unqualified success, and DACA recipients have relied on the federal government's repeated promises of protection from removal.

In September 2017, the government reversed course and announced the termination of DACA. The Dreamers' fate has captured the attention of the administration, Congress, and millions of Americans who worry about the devastating impact that terminating DACA will have on families, schools, communities, and our economy.

Respondents—including individual DACA recipients whose stories "embod[y] the American Dream," App. to U.S. Supp. Br. (Supp. App.) 5a—brought this lawsuit to challenge the government's decision to end DACA. The district court entered a preliminary injunction to freeze the DACA program in place, protecting the livelihood and well-being of the nearly 700,000 current DACA recipients, while the courts determine whether the rescission was lawful. The court of appeals affirmed those rulings.

This Court should deny review. The decision below is preliminary and interlocutory. Only one court of appeals has addressed the issue. That court was not presented with, and did not decide, all aspects of the

questions presented. Indeed, the government concedes there is no way to bring the full dispute before this Court without ignoring the appellate process and leapfrogging the court of appeals in two *additional* cases addressing similar, though not identical, challenges to the decision to end DACA.

This Court should reject this attempt to upset the normal appellate process. If the Court waited until next Term, there would likely be multiple appellate decisions addressing all the issues that the government asks this Court to review. Those decisions would substantially assist this Court.

And there is no urgency here. The government cannot credibly claim it is being harmed by the preliminary injunction when it never sought a stay. DACA recipients contribute to society and have been carefully vetted. Their presence in this country while the courts determine their rights harms no one. Nothing about the merits warrants immediate review. This Court should not upset time-honored appellate procedures, especially when the President said that he supports allowing the Dreamers to remain in the country, and signaled willingness to work with Congress to achieve that widely-shared goal. The petition should be denied.

OPINIONS BELOW

The district court's order granting respondents' motion for a preliminary injunction and denying the government's motion to dismiss for lack of jurisdiction (Pet. App. 1a-70a) is reported at 279 F. Supp. 3d 1011. The district court's order granting in part and denying in part the government's motion to dismiss for failure to state a claim (Pet. App. 71a-90a) is reported at 298 F. Supp. 3d 1304.

The decision of the court of appeals affirming the district court's orders (Supp. App. 1a-87a) is reported at 908 F.3d 476.

JURISDICTION

The petition for a writ of certiorari before judgment was filed on November 5, 2018. The court of appeals entered judgment on November 8, 2018. The government filed a supplemental brief on November 19, 2018, asking the Court to convert the petition into a petition for a writ of certiorari. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. Deferred action is "a regular practice" in which the government elects not to seek removal of individuals "for humanitarian reasons or simply for its own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 & n.8 (1999) (*AADC*). Congress has recognized this established practice in the Immigration and Nationality Act (INA). *See* 8 U.S.C. § 1227(d)(2); *see also* 6 U.S.C. § 202(5).

Over many decades, presidential administrations of both parties have used deferred action to permit certain categories of individuals to remain in the United States. Pet. App. 5a-8a. Deferred action programs have become "a well-accepted feature of the [E]xecutive's enforcement of our immigration laws." *Id.* at 8a.

In 2012, Secretary of Homeland Security Janet Napolitano established DACA. Pet. App. 9a. The program permits young people who were brought to the United States as children to lawfully live and work in this country. *Id.* Qualifying individuals may obtain work authorization and a social security number, and

travel overseas and lawfully return to the United States. *Id.* at 12a.

DACA has allowed nearly 800,000 people to come out of the shadows and build productive and fulfilling lives in the United States. Compl. ¶ 128.[1] Dreamers have relied on DACA's promise to advance their education, serve in the U.S. military, start businesses, have families, and make many other life-changing decisions. *Id.* ¶¶ 37, 41, 48-98. Like so many other Dreamers, the individual respondents here—Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Norma Ramirez, and Jirayut Latthivongskorn—achieved remarkable success through hard work, fierce determination, and incredible resilience. *Id.* ¶¶ 4, 6-9.[2] Because of DACA, they have been able to pursue careers as lawyers, medical professionals, and teachers, advancing their commitment to serve their communities. *Id.* ¶¶ 53-55, 62-98. Without DACA, they will face possible deportation and risk losing their families, community connections, and livelihoods. *Id.* ¶¶ 48-49, 63, 76, 83, 91, 128.

DACA enjoys widespread support from the public and from members of both political parties. "An overwhelming percentage of Americans"—up to 87 percent—"support protections for 'Dreamers.'" *Casa de Md. v. DHS*, 284 F. Supp. 3d 758, 767, 779 (D. Md. 2018). Hundreds of America's most important business leaders signed a letter stating that the program is "vital to the future of our companies and our economy." Compl. ¶ 132. And political leaders including

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[1] "Compl." refers to the complaint filed in *Garcia v. United States*, No. 3:17-cv-5380 (N.D. Cal. Sept. 18, 2017).

[2] After the Complaint was filed in September 2017, Viridiana Chabolla Mendoza was granted Lawful Permanent Resident status.

Speaker of the House Paul Ryan and Senator Lindsay Graham have urged the government not to "pull the rug out" from Dreamers who relied on the program. *Id.* ¶¶ 41-47.

2. The current administration originally supported DACA and the Dreamers. In March 2017, Secretary of Homeland Security John Kelly stated that DACA embodies a "commitment … by the government towards … Dreamer[s]." Compl. ¶ 46 (first alteration in original). In April 2017, the President said that the "dreamers should rest easy" because the "policy of [his] administration [is] to allow the dreamers to stay." *Id.* ¶ 47 (alterations in original).

But on September 4, 2017, the administration reversed course. Attorney General Jefferson B. Sessions III sent a one-page letter to Acting Secretary of Homeland Security Elaine Duke, stating that "DACA was effectuated by the previous administration through executive action, without proper statutory authority" and "was an unconstitutional exercise of authority by the Executive Branch." Pet. App. 116a (internal quotation marks omitted). The following day, he announced the decision to end DACA. As a reason, he cited the Fifth Circuit's decision (affirmed by an equally divided Court) approving an injunction against a different deferred action program—Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). Dkt. 64-1 at 251 (citing remarks referring to *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271, 2272 (2016) (per curiam) (*Texas I*)).[3]

[3] "Dkt." refers to the electronic docket for *Regents of the University of California v. DHS*, No. 3:17-cv-05211 (N.D. Cal.).

Acting Secretary Duke issued a memorandum formally rescinding DACA. Pet. App. 17a. The memorandum instructed the agency to stop approving new DACA applications and to allow individuals' DACA status to expire beginning March 5, 2018. *Id.* at 117a-18a. Her reasoning was brief: Citing the "Supreme Court's and the Fifth Circuit's rulings [in *Texas I*], and the September 4, 2017 letter from the Attorney General," she concluded that the "program should be terminated." *Id.* at 117a. The memorandum did not analyze "litigation risk" and did not weigh DACA's widespread benefits against the many harms that would result if DACA were rescinded. Acting Secretary Duke also said—contrary to the President's and prior Secretaries' statements—that "DACA was fundamentally a lie." Dkt. 121-2 at 1869.

3. Respondents filed five related lawsuits challenging the decision to rescind DACA. Respondents contend, *inter alia*, that DACA's rescission (1) is unlawful under the APA because it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A); (2) violates the APA's notice-and-comment rulemaking requirement; (3) denies DACA recipients equal protection of the laws; and (4) deprives DACA recipients of constitutionally protected property and liberty interests in violation of due process. Pet. App. 19a-22a. Because DACA was to expire in March 2018, respondents requested a preliminary injunction. Dkt. 111.

After an initial dispute about the administrative record (*see In re United States*, 138 S. Ct. 443 (2017) (per curiam)), the district court rejected the government's arguments that no court can review the decision to end DACA. Pet. App. 1a-70a; *id*. at 26a-33a. The court held that the Secretary's decision is not

"committed to agency discretion by law" under the APA, 5 U.S.C. § 701(a)(2), because it is a "major policy decision" based on the agency's "interpretation of the INA"—a "quintessential[ly]" reviewable legal question for which "there *is* law to apply." Pet. App. 28a-30a. The court also held that 8 U.S.C. § 1252(g) does not bar judicial review, Pet. App. 30a-33a, because that provision applies only to the "three discrete decisions" named in the statute—decisions to "commence proceedings, adjudicate cases, or execute removal orders against any alien," 8 U.S.C. § 1252(g)—and the decision to end DACA is none of those. Rather, it is an "across-the-board cancellation of a nationwide program" done "prior to the commencement of any removal proceedings." Pet. App. 31a-32a.

The district court granted preliminary injunctive relief. Pet. App. 41a-69a. It found respondents likely to succeed on their APA claim that DACA's rescission is arbitrary and capricious because neither of the government's asserted reasons for ending DACA withstood scrutiny. First, the court rejected the government's argument that "the agency lacked authority to implement DACA." *Id.* at 42a. Citing guidance from the Office of Legal Counsel—guidance on which the government itself has relied and has never repudiated—the court explained that DACA is a permissible exercise of the Executive's broad immigration enforcement authority. *Id*. at 42a-43a. The court noted that "the government [had] ma[de] no effort" in this litigation "to challenge any of the … reasons why DACA was and remains within the authority of the agency," *id.* at 48a; it simply cited the Fifth Circuit's decision in the DAPA case, which is distinguishable on multiple grounds, *id.* at 51a-52a.

Second, the district court rejected the government's post hoc rationalization that litigation risk was a sufficient reason to end DACA. Pet. App. 55a-62a. The court explained that this was not the reason relied upon by the decision-makers: The Attorney General's stated reason for ending DACA was his belief that it is illegal, and the Acting Secretary's memorandum relied on that determination, without separately "consider[ing] whether defending the program in court would (or would not) be worth the litigation risk." *Id.* at 56a. The agency never assessed litigation risk or weighed it against countervailing benefits, such as "DACA's programmatic objectives" and "the reliance interests of DACA recipients." *Id.* at 58a. The agency's about-face, without a reasoned explanation was a paradigmatic example of arbitrary and capricious agency action. *Id.* at 60a-61a.

The district court concluded that the equities strongly favor a preliminary injunction. Pet. App. 62a-66a. The government "d[id] not dispute" that respondents—especially the individual DACA recipients—will face irreparable injury absent temporary injunctive relief. *Id.* at 62a-63a. And the court concluded that the "public interest will be served by DACA's continuation," because the rescission would "result in hundreds of thousands of individuals losing their work authorizations and deferred action status," tearing apart families and removing productive workers from the national economy. *Id.* at 65a.

The preliminary injunction directs the government "to maintain the DACA program," except that the government need not accept new applications and foreign travel requests. Pet. App. 66a-67a. The government may exercise its discretion "on an individualized basis for each renewal application" and may "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*. at 66a.

The district court granted the government's motion to dismiss respondents' notice-and-comment and rescission-based substantive due process claims, but denied the motion with respect to respondents' substantive APA, equal protection, and information-sharing-based substantive due process claims. Pet. App. 71a-90a.

4. The government appealed the preliminary injunction order. Pet. App. 91a-95a. With permission from the district court and court of appeals, the government and respondents each filed interlocutory appeals of the motion to dismiss order. *See* C.A. No. 18-15128, Dkt. 1; C.A. No. 18-15133, Dkt. 6; C.A. No. 18-15134, Dkt. 1; *see also* 28 U.S.C. § 1292(b). The government did not seek—and never has sought—a stay of the preliminary injunction.

Not content with the normal appellate process, the government filed a petition for a writ of certiorari before judgment, which this Court denied. *DHS v. Regents of Univ. of Cal.*, 138 S. Ct. 1182 (2018).

5. In the meantime, another district court in the District of Columbia entered an order vacating the Acting Secretary's memorandum rescinding DACA and giving the government 90 days to provide a "fuller explanation for the determination that the program lacks statutory and constitutional authority." *NAACP v. Trump*, 298 F. Supp. 3d 209, 245 (D.D.C. 2018). The court stayed its order pending the government's response. *Id*.

In response, Secretary of Homeland Security Kirstjen Nielsen issued a memorandum on June 22, 2018, in which she "decline[d] to disturb" the Acting Secretary's rescission decision because, in her view, that decision "was, and remains, sound." Pet. App. 121a. Her memorandum purported to offer "further explanation" for the rescission decision. *Id.*

The district court in *NAACP* reaffirmed its decision to vacate the rescission, concluding that Secretary Nielsen's additional memorandum did not "meaningful[ly] elaborat[e]" on the initial memorandum. *NAACP v. Trump*, 315 F. Supp. 3d 457, 471-73 (D.D.C. 2018). Consistent with the preliminary injunction here, the *NAACP* court allowed its order to go into effect to the extent it required the government to continue processing renewal applications but stayed its order with respect to new applications. *See NAACP v. Trump*, 321 F. Supp. 3d 143, 150 (D.D.C. 2018).

6. Without waiting for the court of appeals, the government filed a second petition for a writ of certiorari before judgment in this case, Pet. 15, and similar petitions in *NAACP* and a third similar case, *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 421-33 (E.D.N.Y. 2018). *See* U.S. Cert. Pets., Nos. 18-588, 18-589.

The court of appeals affirmed in all key respects. U.S. Supp. Br. 2-7. Like every court that has considered the question, the court of appeals concluded that the rescission is judicially reviewable. Supp. App. 23a-45a. The court explained that the APA permits review of "an agency's nonenforcement decision" that is "based solely on a belief that the agency lacked the lawful authority to do otherwise": If the "agency head is mistaken in her assessment that the law precludes

one course of action," the courts can correct that legal error. *Id.* at 27a-31a (citing *Mont. Air Chapter No. 29 v. Fed. Labor Relations Auth.*, 898 F.2d 753 (9th Cir. 1990)). The court concluded that the INA permits review of "programmatic" decisions regarding deferred action "like the DACA rescission." *Id.* at 43a.

On the merits, the court of appeals agreed with the district court that the rescission was likely arbitrary and capricious because it was based on the government's erroneous belief that the program was unlawful. Supp. App. 35a-42a, 45a-57a. The court of appeals determined that Secretary Nielsen's new memorandum was not properly before it, so any argument about it would have to be presented to the district court in the first instance. *Id.* at 57a n.24. The court cautioned, however, that the memorandum did not represent "fresh agency action" and that the government could not rely on "post-hoc rationalizations" for the decision to end DACA. *Id.* Noting that the government had not challenged the district court's weighing of the equities, the court affirmed the preliminary injunction. *Id.* at 45a-46a, 58a-60a. The court also held that "plaintiffs' equal protection claim is a second, alternative ground for affirming the entry of the injunction." *Id.* at 77a n.31.

The court also affirmed dismissal of respondents' notice-and-comment and rescission-based substantive due process claims and denial of the government's motion to dismiss respondents' remaining claims. Supp. App. 61a-77a.

Judge Owens concurred in the judgment. Supp. App. 79a-87a. In his view, the rescission is an "immigration enforcement decision[]" that is categorically "unreviewable" under the APA even if it rests on an incorrect view of the law. *Id.* at 81a. Judge Owens

nonetheless would have affirmed the preliminary injunction based on respondents' equal protection claim. *Id.* at 84a.

7. After the court of appeals issued its decision, the government filed a supplemental brief in this Court seeking to convert its petition for certiorari before judgment into a petition for certiorari. U.S. Supp. Br. 9.

REASONS FOR DENYING THE PETITION

The government asks this Court to intervene to decide a significant issue that the lower courts have not yet fully addressed. In this case, neither the district court nor the court of appeals has conclusively adjudicated respondents' claims. And although five pending cases present the legal questions here, only one court of appeals has actually addressed some, but not all, of the issues the government wants this Court to address. Three other courts of appeals are considering the issue. There is no reason for this Court to ignore normal processes and grant review now. There is no harm to the government—it has never sought a stay of these rulings—as the decision below simply freezes DACA in place and allows the government to continue exercising its usual enforcement discretion. And there is a real prospect of a policy solution by the political branches that would make this Court's intervention unnecessary. The petition should be denied.

A. Only One Court Of Appeals Has Considered The Questions Presented

1. The Court ordinarily waits until the circuits have divided to decide an important legal question. Sup. Ct. R. 10(a). There is nothing even close to a circuit split here.

Five relevant cases are pending: *Regents of Univ. of Cal. v. DHS*, No. 3:17-cv-05211 (N.D. Cal.); *NAACP v. Trump*, No. 1:17-cv-1907 (D.D.C.); *Casa de Md. v. DHS*, 8:17-cv-2942 (D. Md.); *Batalla Vidal v. Nielsen*, 1:16-cv-4756 (E.D.N.Y.); *Texas v. United States*, 1:18-cv-68 (S.D. Tex.). Only one—this one—has been decided by a court of appeals. Appeals are pending in three others, and the courts are proceeding expeditiously to decide them.[4] In the remaining case, which challenges the creation of DACA (not its rescission), the district court declined to issue a preliminary injunction to stop the DACA program, *Texas v. United States*, 328 F. Supp. 3d 662, 740-42 (S.D. Tex. 2018) ("*Texas II*"); the States did not appeal that decision but instead are trying to obtain a final judgment, Joint Discovery/Case Management Plan at 6, *Texas II*, Dkt. 335.

Thus, it is likely that there will be additional appellate decisions within months. This Court could obtain the benefit of those courts' decisions soon, and have all of the government's issues properly presented. There is no countervailing harm to the government should the Court do so. *See* pp. 21-23, *infra*.

All courts that have considered the issue have found the decision to rescind DACA judicially reviewable. *See NAACP v. Trump*, 298 F. Supp. 3d 209, 234-35 (D.D.C. 2018); *Batalla Vidal v. Duke*, 295 F. Supp. 3d 127, 148-50 (E.D.N.Y. 2017); *Casa De Md. v. DHS*, 284 F. Supp. 3d 758, 770 (D. Md. 2018). The district court in Texas also concluded that the decision to start

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[4] *See Batalla Vidal*, No. 18-485 (2d Cir.), Dkt. 588 (oral argument scheduled for Jan. 25, 2019); *Casa De Md.*, No. 18-1522 (4th Cir.), Dkt. 55 (oral argument held Dec. 11, 2018); *NAACP*, No. 18-5245 (D.C. Cir.), Dkt. 1756433 (briefing to be completed by Jan. 22, 2019).

the DACA program is judicially reviewable. *Texas II*, 328 F. Supp. 3d at 706-09. There is no disagreement among *any* courts about the first question presented in this case.

On the merits, the district court decisions are more varied, but most favor respondents' position. The *NAACP* court held on summary judgment that the rescission violated the APA for largely the same reasons stated by the court of appeals here. 298 F. Supp. 3d at 237-43. The *Batalla Vidal* court preliminarily enjoined the rescission for largely the same reasons. *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 421-33 (E.D.N.Y. 2018). The *Casa de Maryland* court disagreed, holding that "[r]egardless of whether DACA is, in fact, lawful or unlawful," the government reasonably believed the program was unlawful and could terminate the program on that basis. 284 F. Supp. 3d at 768-79. The district court in Texas held that DACA likely was unlawful because it violated the INA and was adopted without notice-and-comment rulemaking. *Texas II*, 328 F. Supp. 3d at 712-36.

Of these decisions, only *NAACP* addressed Secretary Nielsen's memorandum offering "additional justification" for the decision to rescind DACA, which was not before the court of appeals here, Supp. App. 57a n.24. The *NAACP* court held that the memorandum failed to "meaningful[ly] elaborat[e]" on the decision to rescind DACA. 315 F. Supp. 3d at 471-72.

In the "absence of a pronounced conflict among the circuits," the Court "should not rush to answer a novel question" that "could benefit from further attention in the court of appeals." *Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting). Awaiting "diverse opinions" from the federal appellate

courts "may yield a better informed and more enduring final pronouncement" that avoids unforeseen consequences for administrative law, immigration law, and Executive authority beyond the immediate dispute. *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). The questions presented here should be vetted by the courts of appeals, and they will be soon. If the Court denies certiorari now, it should have ample opportunity to revisit the question next Term with the benefit of decisions from the Second, Fourth, and D.C. Circuits. There is no reason to act now.

2. The government contends (Pet. 16) that the courts of appeals have disagreed over whether DACA is lawful. The government made this same argument in its prior petition for certiorari before judgment. U.S. Pet., No. 17-1003, at 15-32. It was wrong then, Individual Pls.' Br. in Opp., at 15-16, and is wrong now.

As before, the government wrongly assumes that the Fifth Circuit's analysis of the *adoption* of *DAPA* applies equally to the *rescission* of *DACA*, despite acknowledged differences between the programs and the posture of the litigation. DAPA was a never-implemented deferred action program that would have affected up to 4.3 million individuals. Pet. App. 54a; Supp. App. 54a. The Fifth Circuit itself recognized that "DACA and DAPA are not identical" and that "any extrapolation from DACA [to DAPA] must be done carefully." *Texas v. United States*, 809 F.3d 134, 173-74 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271, 2272 (2016). The lower courts here each correctly gave several reasons why the questions before them were not the same as those before the Fifth Circuit. Pet. App. 50a-54a; Supp. App. 52a-55a; *see* note 5, *infra.* Given

these distinctions, the Court should not assume a circuit split before the Fifth Circuit has had a chance to weigh in about the implications of its earlier decision.

Even if there were disagreement about DACA's lawfulness, this case would be a poor vehicle for considering it: The government conspicuously failed to make a full argument below that DACA is unlawful. The government's justification for the rescission was that DACA's continued implementation posed a risk of litigation—"*not* the legality of DACA *per* se." C.A. No. 18-15068, Dkt. 31, at 36-38; *see also* Dkt. 204 at 10-11, 14-21. The government told the district court that it "need not agree with [the Acting Secretary's] determination [that DACA was unlawful] to uphold her decision." Dkt. 204 at 17. It told the court of appeals that the Acting Secretary could rely on her "assessment of DACA's legality" even if it was not "correct as a matter of law." C.A. No. 18-15068, Dkt. 31, at 38-39. The government cited the Fifth Circuit's prior DAPA decision as evidence of litigation risk, but conspicuously avoided defending that decision's reasoning or offering any fully-developed argument that DACA is unlawful. *Id.* at 17.[5] The government

[5] For example, although the petition claims that "specific and detailed provisions" of the INA preclude deferred action for DACA recipients, Pet. 24, the government's briefs on appeal cited only statutes that support deferred action and similar relief, C.A. No. 18-15068, Dkt. 31, at 2-5, 13, 17, 25-7, 34-38, and *id.*, Dkt. 134, at 1, 15, 17, 24, 33 (citing, collectively, 6 U.S.C. § 202(5), 8 U.S.C. §§ 1182(h)-(i), 1229b-1229c, 1252, 1255). Further, although the Attorney General stated that he found "constitutional defects" in DACA, Pet. App. 17a, the government's briefs below did not identify any relevant constitutional provisions. And the government declined to endorse the Fifth Circuit's holding (809 F.3d at 178) that DAPA was procedurally defective; instead, the government told the district court that "INS deferred-action directives" are "policy statements exempt from notice and comment." Dkt. 204 at 26-27.

"ma[de] no effort in its briefs to challenge any of the … reasons why DACA was and remains within the authority of the agency." Pet. App. 48a. Having made that strategic decision below, the government should not be allowed to change course now, especially when it is asking this Court to decide the issues in the first instance.

B. The Decision Below Is Preliminary And Interlocutory And Would Not Present The Full Dispute

1. Review is unwarranted now because the decision under review is preliminary and interlocutory. The district court entered a preliminary injunction to freeze the DACA program in place while the courts address whether the government's decision to rescind it was lawful. This Court reviews that determination for "abuse of discretion" and "uphold[s] the injunction" if "the underlying … question is close." *Ashcroft v. ACLU*, 542 U.S. 656, 664-65 (2004). The district court's rulings about reviewability and likelihood of success on the APA claim both are interlocutory. The Court normally does not review interlocutory orders, and for good reason; further development of the issues often crystallizes the arguments in preparation for this Court's review. *See Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari).

Importantly, the preliminary injunction at issue here is based on only one of respondents' claims for relief—the substantive APA claim. The courts below did not decide the ultimate merits of that claim, but only found that respondents "have shown a likelihood of success." Pet. App. 41a; *accord* Supp. App. 46a. And the court of appeals' decision expressly contemplates further proceedings. It directs the district court

to determine "in the first instance" the relevance, if any, of Secretary Nielsen's memorandum offering "additional justification" for the decision to rescind DACA. Supp. App. 57a n.24.

As the government recently told the Court, this Court's "general practice is 'not to decide in the first instance issues not decided below'" in the course of the litigation. U.S. Mem. in Opp. to Mot. to Substitute, at 10, *Michaels v. Whitaker*, No. 18-496 (alteration omitted) (quoting *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)). That is especially true where, as here, this Court would be the "first appellate tribunal" to decide the issue. *Elonis v. United States*, 135 S. Ct. 2001, 2013 (2015). Granting certiorari now would require the Court to address Secretary Nielsen's memorandum without the benefit of views from any federal appellate court, and would send an unfortunate message to the lower courts about the value of their work.

2. Further, respondents have another, independent ground that potentially supports the preliminary injunction—the equal protection claim. Supp. App. 77a n.31, 87a. But *no* court has yet assess the likelihood that respondents will succeed on that claim. All the court of appeals did is affirm the denial of the government's motion to dismiss that claim. *Id.* at 73a-74a, 77a. The panel majority also agreed with Judge Owens that "plaintiffs' equal protection claim is a second, alternative ground for affirming the entry of the injunction," *id.* at 77a n.31, but in doing so, neither the panel majority nor Judge Owens actually determined whether respondents are likely to succeed on that claim. Instead, Judge Owens explained that the district court should decide on a full record—including

"whatever additional evidence Plaintiffs muster on remand"—whether Respondents can "demonstrat[e] a likelihood of success on the merits" by "rais[ing] a presumption that unconstitutional animus" against Latinos was a "substantial factor in the rescission of DACA." *Id.* at 84a (Owens, J., concurring). That requires discovery and completion of the administrative record, which were stayed pending appeal. Dkt. 266, at 12. There is not yet a full record on this claim that would permit meaningful review by this Court.

Because the district court has not yet expressed its definitive view of respondents' claims after full development of the record and briefing, granting certiorari at this early stage would embroil this Court in piecemeal review without the ability to conclusively resolve the "ultimate merits" of respondents' claims. *Brown v. Chote*, 411 U.S. 452, 457 (1973).

3. The government attempts to get Secretary Nielsen's memorandum before this Court by asserting without explanation that it was "error" for the Ninth Circuit not to consider it. U.S. Supp. Br. 9. But it is well settled that appellate courts need not decide in the first instance issues not decided below. *E.g.*, *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018).

The government ultimately recognizes (Pet. 32) that there is no way "[t]o ensure an adequate vehicle for the timely and definitive resolution of this dispute" without simultaneously seeking certiorari before judgment from district court decisions in two other cases: *NAACP*, in which the court vacated the memorandum rescinding DACA, 315 F. Supp. 3d at 471-73; and *Batalla Vidal*, which involves a preliminary injunction with the same terms as the preliminary injunction here, 279 F. Supp. 3d at 421-33. In particu-

lar, the government seeks certiorari in *NAACP* because that court has "passed on the effect of [Secretary Nielsen's] memorandum on the questions presented," Pet. at 33, while the district court and court of appeals here did not. But granting certiorari in those cases would not solve the problem of piecemeal, interlocutory review: *Batalla Vidal* is likewise preliminary and interlocutory, and *NAACP* "defer[red] ruling" on the constitutional claims in that case, 298 F. Supp. 3d at 246. None of these cases presents a full record on any equal protection claim.

More significantly, certiorari before judgment is an extraordinary measure reserved only for cases of such "imperative public importance" that the Court's "immediate" review is necessary. Sup. Ct. R. 11. The Court has already denied that extraordinary remedy once, 138 S. Ct. 1182, and nothing has changed that would make it any more appropriate now than it was in February. Regardless of whether the Court grants certiorari here, therefore, this Court should deny certiorari before judgment in *NAACP* and *Batalla Vidal*. And rather than engage in piecemeal review, it should also deny certiorari here.

C. There Is No Urgent Need For This Court's Review

The government rushed this case to this Court by filing a second petition for certiorari before the court of appeals even issued its decision, all in the hopes of "ensur[ing] review by [the Court] during its current Term." Pet. 13 n.5. The decision has now issued, but there is still no circuit split on the issues presented, no court of appeals decision presenting the full dispute, and no harm to the government. There is accordingly no urgency justifying this Court's immediate review.

1. The government's main complaint is that the preliminary injunction requires it to "sanction[] an ongoing violation of federal immigration law" by each DACA recipient. Pet. 14. But the injunction does not compel the government to "sanction" the unlawful presence of anyone. It expressly preserves the government's authority to exercise "fair discretion … on an individualized basis for each renewal application," and "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." Pet. App. 66a.

And the government is routinely required to "sanction" what it perceives to be ongoing violations of federal law pending appellate review. *E.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 627 (2018) (noting "nationwide stay" of enforcement of Waters of the United States Rule). It is often enjoined from enforcing federal laws against conduct that it believes to be unlawful. *E.g.*, *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006) (affirming injunction against enforcement of Controlled Substances Act). The government's belief in the correctness of its own position does not defeat the policy of delaying review until these issues have been considered by the other courts of appeals.

2. More fundamentally, the government's conduct is not consistent with its current expressions of harm.

The injunction merely freezes the situation that has been in place for more than five years, including under the current administration, and with the current President's support. *See* Compl. ¶ 47 (President confirming that his "policy" is "to allow the dreamers to stay"). The current administration purposefully

continued DACA for more than eight months before rescinding it. Pet. App. 115a-16a. The government has never sought a stay of the preliminary injunction in this case. That fact alone demonstrates that the preliminary injunction causes no harm.[6]

Further, the Secretary of Homeland Security stated publicly—and repeated to Congress under oath—that removal of DACA recipients would "not [be a] priority of enforcement for ICE" "should the program end." Interview by John Dickerson with Kirstjen Nielsen, Sec'y, Dep't of Homeland Sec., "CBS This Morning" (Jan. 16, 2018), https://tinyurl.com/y8ekmzar; *see Oversight of the United States Department of Homeland Security: Hearing before the S. Comm. on the Judiciary*, 115th Cong. (2018) (statement of Kristjen Nielsen). After the government's prior petition was filed, the President said he "certainly [has] the right" to keep DACA in place after March 2018 (contrary to the petition's argument that DACA is unlawful), and that he very well "might" do so. *See READ: President Trump's Full Exchange With Reporters*, CNN.com (Jan. 24, 2018), https://tinyurl.com/ydcafdtr (*CNN Statement*). These statements "blunt [the government's] claim of urgency," *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317-18 (1983) (Blackmun, J., in chambers), and "vitiate[] much of the force" of its claimed harm, *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers).

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[6] Indeed, it was not until August of this year—when the court in *NAACP* went beyond maintaining the status quo for current DACA recipients and vacated the decision rescinding DACA in full—that the government asked any court to stay any part of any order regarding DACA.

The government cannot credibly claim harm when the current administration willingly permitted the Dreamers to stay for over a year; and stated that it will continue to do so, either by treating recipients as a low enforcement priority or by extending DACA; and has forgone opportunities to avoid any purported harm through a stay.

3. The truth is that the government has no demonstrable basis for demanding "immediate determination" by this Court because the continuation of DACA harms no one. DACA recipients are vetted to ensure they pose no "threat to national security or public safety"; have not been convicted of a felony, or multiple or significant misdemeanors; and fulfill educational and work-related criteria. Pet. App. 9a. Their continued presence does not injure the United States, and does not warrant short-circuiting appellate review.

Any conceivable hardship on the government is muted, moreover, because the orders in this case, *Batalla Vidal*, and *NAACP*, currently are in effect only with respect to existing DACA recipients. *See* Pet. App. 66a-67a; *Batalla Vidal*, 279 F. Supp. 3d at 437; *NAACP v. Trump*, 321 F. Supp. 3d 143, 150 (D.D.C. 2018). These are individuals the government has already vetted and permitted to remain in this country, and who have already relied on the government's promises to start families, pursue employment and education, and invest in their communities. Every court to consider these reliance interests has concluded they strongly outweigh any interest in hastening DACA's end. *See* Pet. App. 62a-66a; *Batalla Vidal*, 279 F. Supp. 3d at 434; *NAACP*, 321 F. Supp. 3d. at 147-49. Even the district court in the Texas

case, which stated the view that DACA was likely unlawful, left the program in place pending its ultimate resolution of the merits because of the significant reliance interests of DACA recipients and the "great risk" to them and their families should the case be wrongly decided on "only a preliminary injunction record." 328 F. Supp. 3d at 742.

4. At the same time the Solicitor General claims an urgent need for resolution by this Court, the President and the leadership of the new Congress have both expressed their desire to pursue a political solution that will permit the Dreamers to remain in the United States. *See, e.g.*, *Remarks by President Trump in Press Conference After Midterm Elections* (Nov. 7, 2018), https://tinyurl.com/y8ab6pjc ("THE PRESIDENT: I think we could really do something having to do with DACA."); *Pelosi Statement on Immigration Priorities* (Dec. 1, 2018), https://tinyurl.com/y8ya2hz3 ("Our House Democratic Majority will once again pass the Dream Act.").

Here, the government's petition would potentially preempt the political process (in addition to preempting the work of the other three courts of appeals). And it would do so in contravention of the President's statements that his policy is to protect the Dreamers, that he favors a political resolution of their status, and that he has the "right" to keep DACA in place and (absent a political solution) may well do so. *See* Compl. ¶ 47; *CNN Statement*; Donald J. Trump (@realDonaldTrump), Twitter (Jan. 22, 2018, 8:30 p.m.), https://tinyurl.com/yajslj5l ("I want a big win for everyone, including Republicans, Democrats and DACA ... Should be able to get there. See you at the negotiating table!"). While the government contends that

this litigation is "imped[ing] efforts to enact legislation" addressing DACA, Pet. 16, and the President has threatened to delay negotiations unless this Court grants review and holds that DACA is unlawful, Jake Sherman & Anna Palmer, *Exclusive: Trump Threatens Government Shutdown Over Border Wall Funding*, Politico (Nov. 28, 2018), https://tinyurl.com/ya6bsgpr, the President's statements of support for DACA and for a legislative fix speak louder than these apparent attempts to influence this Court's ruling. This is an "unusual" case in which "the ultimate authority over the agency, the Chief Executive, publicly favors the very program the agency has ended." Pet. App. 65a. This Court therefore should give the political process a chance to work. *See, e.g.*, *Braxton v. United States*, 500 U.S. 344, 347-48 (1991); *Volpe v. D.C. Fed'n of Civic Ass'ns*, 405 U.S. 1030, 1030 (1972) (Burger, C.J., concurring in denial of certiorari) (noting "legislative action" could effectively preclude review of questions presented to the Court before it would be able to decide the case).

D. The Government's Merits Arguments Do Not Justify Review

The government also argues that certiorari is warranted because "[t]he decisions below are wrong." Pet. 17. But this Court does not sit as a "court of error correction." *Martin v. Blessing*, 134 S. Ct. 402, 405 (2013) (Alito, J., respecting the denial of certiorari). The government's merits arguments fail to demonstrate a compelling need for this Court's involvement at this stage.

1. The Court Of Appeals Properly Affirmed The District Court's Reviewability Determination

The government first argues that the APA, 5 U.S.C § 701(a)(2), and a particular provision of the INA, 8 U.S.C. § 1252(g), preclude judicial review of the Acting Secretary's decision to end the DACA program. Not so.

1. Section 701(a)(2) precludes APA review of agency action that is "committed to agency discretion by law." The government contends that a "presumption of nonreviewability applies with particular force when it comes to immigration." Pet. 19. That is flatly wrong: This Court has consistently applied a "strong presumption in favor of judicial review of administrative action" in the immigration context. *INS v. St. Cyr*, 533 U.S. 289, 298 (2001).

Rather, Section 701(a)(2) "is a very narrow exception" that is applicable only where "there is *no* law to apply," *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (emphasis added), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), meaning that "a court would have no … judicially manageable standards … for judging how and when an agency should exercise its discretion," *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). This is not one of those rare instances where there is no law to apply. As the district court explained, "the new administration didn't terminate DACA on policy grounds"; it "terminated DACA over a point of law." Pet. App. 18a. "[D]etermining illegality is a quintessential role of the courts." *Id.* at 30a.

The government's assertion that review is impossible because immigration enforcement decisions require "'a complicated balancing' of factors," Pet. 19, rings hollow given that the government ended DACA "based *solely* on a belief that [it] lacked the lawful authority to do otherwise." Supp. App. 29a (emphasis added). Judicial review of that decision in no way "encroach[es] on executive discretion"; respondents seek only to put "back on the table" the authority the government disclaimed so the government can continue to exercise that authority or face "democratic accountability to the people" for declining to do so. *Id.* at 31a-32a. Executive officials cannot "claim that the law ties [their] hands while at the same time denying the courts' power to unbind [them]. [They] may escape political accountability or judicial review, but not both." *NAACP*, 298 F. Supp. 3d at 249.

Ending a five-year old program that confers significant benefits on its recipients—including work authorization, non-accrual of unlawful presence, travel, and the right to obtain a driver's license—is a "major policy decision" that is "quite different from day-to-day agency nonenforcement decisions" that courts have sometimes found unreviewable. *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 496 (D.C. Cir. 1988). There is no tradition of withholding review in these circumstances, and thus the "appropriate starting point" remains the "APA presumption of reviewability." *Id.* at 496-97.

2. Section 1252(g) of Title 8 likewise does not bar review. By its text, that provision applies to three specific types of decisions or actions: those taken "to commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. § 1252(g). This Court has interpreted those provisions narrowly, explaining that

judicial review is precluded only for those "three discrete actions." *AADC*, 525 U.S. at 482. This case involves none of them. This is not a challenge to the government's decision to start the removal process against a particular person, or to adjudicate an individual's immigration case, or to actually remove an individual. Rather, it is a challenge to the decision to end the DACA program.

The government seizes on *AADC*'s statement that Section 1252(g) seems "designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations." Pet. 21. But the context makes clear that the statement referred only to decisions involving a specific individual whose removal proceedings had already commenced. The government has cited no case where Section 1252(g) has barred a policy challenge by a group of plaintiffs against whom the government has not even begun removal proceedings. And the courts of appeals have consistently cabined Section 1252(g) to the three circumstances enumerated and rejected its application to programmatic challenges. *See, e.g.*, *Wong v. United States*, 373 F.3d 952, 965 (9th Cir. 2004); *Texas I*, 809 F.3d at 164. There is no imminent need for this Court to review the issue.

2. The Court Of Appeals Correctly Affirmed The Preliminary Injunction

The district court entered a preliminary injunction after making an initial assessment of the merits, assessing irreparable injury, and weighing the equities. The court of appeals, reviewing for abuse of discretion, Supp. App. 22a, affirmed the district court's analysis in its entirety. Nothing about the court of appeals' decision necessitates review.

1. The court of appeals upheld the preliminary injunction because it agreed with the district court's conclusion that respondents are likely to prevail on their claim that the rescission is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Supp. App. 45a (quoting 5 U.S.C. § 706(2)(A)). Here, the government provided three justifications for DACA's rescission, all of which fail APA review.

a. The principal argument in the memorandum rescinding DACA is that the Acting Secretary ended DACA because continuing it would have been unlawful. Pet. 28. That view is contrary to the government's long-standing position that deferred action programs are permissible, and so the agency was required to "provide a reasoned explanation for the change." *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). But the only legal analysis the Attorney General and Acting Secretary provided for their decision was a citation to the Fifth Circuit's decision about the DAPA program. Dkt. 64-1 at AR251; Pet. App. 115a. Before the district court and the court of appeals, the government shifted its argument to litigation risk—an argument that, according to the government, did not depend on a showing that DACA is unlawful. *See* Dkt. 204 at 17; *see also* Pet. 23-27. And the government declined to defend the Fifth Circuit's ruling. *See* note 4, *supra*.

Even though the government had not argued that DACA is unlawful, the district court addressed and correctly rejected that argument. *See* Pet. App. 42a-54a. The court of appeals arrived at the same conclusion: "DACA was a permissible exercise of executive discretion, notwithstanding the Fifth Circuit's conclusion that the related DAPA program exceeded DHS's

statutory authority." Supp. App. 56a-57a. The court of appeals reviewed the numerous authorities that have long justified deferred action programs. *Id.* at 8a-13a. The district court (Pet. App. 50a-54a) and the court of appeals each explained why the Fifth Circuit's decision about DAPA is "entirely inapposite" to DACA. Supp. App. 57a.[7] As the district court stated, the government "ma[de] no effort" "to challenge any of the … reasons why DACA was and remains within the authority of the agency." Pet. App. 48a. Under the circumstances, the court of appeals had ample basis to conclude that respondents "are likely to succeed in demonstrating that the rescission must be set aside." Supp. App. 57a.

b. The government's principal argument before the courts below, repeated in its petition, Pet. 23-27, is that DACA's rescission was justified by litigation risk. But that rationale appears "[n]owhere in the ad-

[7] In brief: First, the Fifth Circuit's procedural holding rested on the district court's factual finding that "DAPA would not genuinely leave the agency and its employees free to exercise discretion." *Texas I*, 809 F.3d at 172-78. Here, by contrast, the district court found ample evidence of "discretionary denials of DACA applications," Pet. App. 49a; *see also* Supp. App. 50a-51a. Second, the Fifth Circuit's substantive holding—that DAPA exceeded the government's statutory authority—rested in part on its determination that granting deferred action to alien parents of U.S. citizens conflicted with INA provisions that gave them an alternate pathway to lawful presence. Supp. App. 51a-54a. DACA, in contrast, fills a gap in the statute by indicating how the government exercises its prosecutorial discretion with respect to a class of non-citizens whose fate was never directly decided by Congress. *Id.* Third, DAPA was challenged before it took effect, whereas DACA has been in place for more than five years, meaning that any legal challenge to DACA would have to overcome the significant reliance interests that have developed over those years, and the doctrine of laches. Pet. App. 57a.

ministrative record." Pet. App. 56a. The reason "actually given" by the Attorney General and the Acting Secretary was "DACA's purported illegality"; neither the Attorney General nor the agency ever "consider[ed] whether defending the program in court would (or would not) be worth the litigation risk." *Id*. The discussion of litigation in the Acting Secretary's memorandum was "limited to a simple summary of the *Texas [I]* litigation's procedural history" that "appeared only in the 'Background' section of the memorandum" and "w[as] not referenced in the Acting Secretary's statement of what she was '[t]aking into consideration.'" Supp. App. 40a (last alteration in original). The Attorney General "likewise focuse[d] on the supposed illegality of DACA." *Id.* at 37a. The court of appeals thus rightly took "Attorney General Sessions literally at his word" that "the basis for the rescission was a belief that DACA was unlawful." *Id.* at 35a.

Though the government now purports to find a litigation-risk rationale in the memorandum rescinding DACA, it offers no evidence. It merely cites the *NAACP* decision, which found a litigation-risk rationale in the Acting Secretary's statement that DACA should be "w[ound] … down in 'an efficient and orderly manner.'" 298 F. Supp. 3d at 241 (quoting Pet. App. 116a). But that statement was made *in light of* the decision to rescind DACA and was never offered as a reason for rescinding it. Pet. App. 115a; *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (APA review is limited to the "grounds invoked by the agency").

In any event, both the court of appeals and the district court correctly determined that the government's post hoc "litigation risk" justification is itself arbitrary and capricious. The government failed to consider the

"differences between DAPA and DACA that might have led to a different result" in any litigation than in *Texas I*. Pet. App. 57a; *see* note 5, *supra*. Those interests have already had an impact in *Texas II*, spurring the district court there to deny a preliminary injunction despite its doubts about the lawfulness of DACA. 328 F. Supp. 3d at 740-42. Even if that lawsuit should ultimately prevail, the court's careful consideration of the reliance interests of DACA recipients and their families and its recognition of the need for care in "unscrambl[ing] the egg," *id.*, dispels any fear of the sort of "imminent" judicial termination of DACA that the government now claims it was seeking to avoid by winding down the program, Pet. 9; *see also NAACP*, 298 F. Supp. 3d at 241-42.

Unlike the district court in Texas, the government did not weigh any perceived litigation risks against countervailing interests that could have warranted defending DACA. Pet. App. 58a-60a. Those interests include the "serious reliance interests" by DACA recipients, which are precisely the kinds of interests that an agency "must … take[] into account" before changing position. *Encino Motorcars*, 136 S. Ct. at 2126. The paucity of the government's explanation for its change in position meant the district court had ample basis for believing that respondents' claims had sufficient merit to justify preliminary injunctive relief.

c. The government's final attempt to rationalize the rescission (Pet. 24, 27-28) is to invoke Secretary Nielsen's *subsequent* memorandum, which purported to offer "further explanation" for the initial decision to rescind DACA in response to the remand order in *NAACP*. Pet. App. 121a. But that memorandum "cannot possibly be a part of the administrative record in

this case." Supp. App. 57a n.24. It was not authored until *after* the decision under review, and the court of appeals declined to consider it, instead directing the district court to do so "in the first instance." *Id.*

The memorandum also lacks any legal relevance to this case. It not a "fresh agency action" (a Rescission 2.0) that can stand or fall on the Secretary's new justifications. Supp. App. 57a n.24. It "provides almost no meaningful elaboration on the Duke Memo's assertion that DACA is unlawful," and "fails to engage meaningfully with the reliance interests and other countervailing factors that weigh against ending the program." *NAACP*, 315 F. Supp. 3d at 471-72. And to the extent the Secretary purported to offer "additional and independent policy concerns" not identified in the original memorandum rescinding DACA, Pet. 27, the court of appeals rightly declined to consider those "'post-hoc rationalization[s].'" Supp. App. 57a n.24.

2. The preliminary injunction in this case also rested on the district court's assessment of irreparable injury and weighing of the equities. The court rightly concluded that respondents—especially the individual DACA recipients—would be irreparably harmed if DACA were permitted to expire during the pendency of this litigation. Pet. App. 62a-64a. The court also found that the public interest favors temporary relief to freeze the DACA program. *Id.* at 64a-66a. As the President explained, "[no]body really want[s] to throw out good, educated and accomplished young people who have jobs, some serving in the military." *Id.* at 65a.

The government never disputed these factors below and fails to do so here. Combined with the lower courts' preliminary assessment of the merits, the equities sufficiently justify the preliminary injunction.

The government has shown no error, let alone error worthy of upsetting a political process that may soon provide a long-term solution for the Dreamers.

CONCLUSION

The petition for a writ of certiorari should be denied. Should the Court grant the petition, it should deny certiorari in Nos. 18-588 and 18-589.

Respectfully submitted.

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December 17, 2018