



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

BARBARA D. UNDERWOOD
ATTORNEY GENERAL

DIVISION OF APPEALS & OPINIONS
NEW YORK CITY BUREAU

November 23, 2018

Hon. Scott Harris
Clerk of the Court
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Re: *Nielsen v. Batalla Vidal*, No. 18-589 (U.S.)

Dear Mr. Harris,

I write on behalf of the state plaintiffs in *Nielsen v. Batalla Vidal*, No. 18-589 (U.S.). It has come to our attention that in a supplemental brief that the U.S. Solicitor General filed on November 19, 2018, in *U.S. Dep't of Homeland Sec. v. Regents of the Univ. of California*, No. 18-587 (U.S.), the Solicitor General made arguments about our case designed to secure a grant of certiorari before judgment in our case. Specifically, the Solicitor General asserted that the Ninth Circuit's decision in *Regents* supports a grant of certiorari before judgment in our case because we have supposedly cross-appealed to the Second Circuit on an issue that the Ninth Circuit, in the *Regents* case, resolved in the federal government's favor: whether defendants' termination of Deferred Action for Childhood Arrivals (DACA) should have undergone notice-and-comment rulemaking under the Administrative Procedure Act. See Suppl. Br. at 12-13.

The Solicitor General's statement about the ongoing Second Circuit proceedings is inaccurate. Neither the state plaintiffs nor the individual plaintiffs in *Nielsen v. Batalla Vidal* appealed or cross-appealed the dismissal of their notice-and-comment claims, nor did any party rely on the failure to provide notice and comment regarding the termination as an alternative ground on which to affirm the preliminary injunction. See generally Brief for State Appellees, *Batalla Vidal v. Nielsen*, No. 18-485, Doc. 504 (2d Cir.); Brief for Plaintiffs-Appellees, *Batalla Vidal v. Nielsen*, No. 18-485, Doc. 255 (2d Cir.).

Moreover, it is improper for the Solicitor General to submit a supplemental brief designed to advance a pending petition for certiorari in our case without serving us with that submission. Indeed, the Solicitor General's actions appear to violate this Court's rules of practice. *See* Sup. Ct. Rules 15(8), 29(3).

We trust that this will not happen again. The need to give the parties notice and an opportunity to respond is demonstrated by the Solicitor General's inaccurate representations about the issues presented in our case.

Respectfully,

A handwritten signature in blue ink, appearing to read "Barbara D. Underwood", followed by a horizontal line.

Barbara D. Underwood
Attorney General of the State of New York

cc:

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