No. 18-589

In the Supreme Court of the United States

KIRSTJEN M. NIELSEN, SECRETARY OF HOMELAND SECURITY, ET AL.,

Petitioners,

v.

MARTÍN JONATHAN BATALLA VIDAL, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENTS MARTÍN JONATHAN BATALLA VIDAL, ANTONIO ALARCON, ELIANA FERNANDEZ, CARLOS VARGAS, MARIANO MONDRAGON, CAROLINA FUNG FENG, AND MAKE THE ROAD NEW YORK

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QUESTION PRESENTED

The Solicitor General concedes that the Ninth Circuit's decision in a companion case "eliminates" what appears to have been the government's principal reason for filing this petition. Nevertheless, the government has not withdrawn this petition and instead asks this Court to take the extraordinary step of granting certiorari before judgment to answer several routine questions:

1. Whether the Administrative Procedure Act or Immigration and Nationality Act preclude judicial review of the rescission of Deferred Action for Childhood Arrivals (DACA).

2. Whether the district court abused its discretion in issuing a preliminary injunction on the ground that the rescission of DACA was arbitrary and capricious.

3. Whether Respondents pled equal protection claims sufficiently.

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INTRODUCTION

The government seeks an extraordinary and unwarranted intervention from this Court to save it from routine judicial process and decisions it does not like. This Court grants certiorari before judgment "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court," Sup. Ct. R. 11, and historically has done so only in national emergencies. This case does not meet that "very demanding standard." *Mount Soledad Memorial Ass'n v. Trunk*, 134 S. Ct. 2658, 2658 (2014) (Alito, J., statement respecting the denial of certiorari before judgment). Moreover, in a supplemental filing in a companion case correcting a material misrepresentation to this Court, the government has essentially abandoned this petition altogether.

The preliminary injunction entered by the district court—a stay of which the government never sought below—does no more than preserve the status quo and creates no circumstances that justify the extraordinary procedural departure of certiorari before judgment. In contrast, for this Court to disrupt the status quo without ordinary appellate review, as the government urges, would upend the lives of hundreds of thousands of young people and their families, schools, workplaces, and communities.

Nor does this case rise to the level of warranting certiorari at all: The government does not present any momentous legal question, but rather seeks review merely of the application of settled law to the unique facts of this case. Additionally, this Court should not

adjudicate the merits of this case while disputes regarding completion of the administrative record and discovery remain pending.

In reality, this petition is a transparent gambit to sidestep "normal appellate practice," Sup. Ct. R. 11, simply because the government lost below. This Court has rejected similar attempts by the government, *see Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 138 S. Ct. 1182, 1182 (2018), and there is no valid reason to reward the government's hyperbolic and inaccurate claims of emergency here—claims the Solicitor General now admits were overstated. The Court should deny the petition and allow the case to proceed before the Second Circuit, which has scheduled argument for January 25, 2019.

STATEMENT

On September 5, 2017, then-Attorney General Sessions abruptly announced the termination of DACA, a decision affecting nearly 800,000 individuals, on the basis of conclusory and erroneous legal assertions. Prior to the termination, the government had repeatedly and successfully defended DACA's legality for over five years, and no court held it unlawful. *See, e.g., Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015) (rejecting a challenge to the legality of DACA); *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015) (same). In a memorandum that has never been withdrawn, the Department of Justice Office of Legal Counsel (OLC) concluded that DACA was lawful as long as officials "retained discretion to evaluate each application on an individualized basis." The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, O.L.C. 2014

WL 10788677, at *18 n.8 (Nov. 19, 2014); *see also* Br. for United States as Amicus Curiae supporting appellees at *1, *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957 (9th Cir. 2017) (No. 15-15307), 2015 WL 5120846. After entering office, the Trump Administration twice declined to terminate DACA, exempting it from other broad changes in immigration policy announced in February and June 2017.

DACA allowed hundreds of thousands of young people to pursue their education, support their families, and build a life in the only country they had ever known as home. For instance, after receiving deferred action, Respondent Fung Feng began a career teaching; Respondent Vargas finished his undergraduate degree and enrolled in law school; and Respondent Batalla Vidal became a physical therapist aide and enrolled in further education.

On September 5, 2017, the government shifted course radically. Its decision to terminate DACA relied on conclusory legal assertions presented in a one-page letter from then-Attorney General Sessions to then-Acting Secretary of Homeland Security Elaine Duke ("Sessions Letter") (Dkt. 77-1, AR00000251).[1] The Sessions Letter asserted for the first time that DACA was "an unconstitutional exercise of authority by the Executive Branch," in part "[b]ecause [it] has the same legal and constitutional defects that the courts recognized as to DAPA [Deferred Action for Parents of Americans and Lawful Permanent Residents]," even though DACA and DAPA are distinct and no court had recognized a constitutional defect in

[1] All record citations refer to the docket in *Batalla Vidal v. Nielsen*, No. 16-CV-4756 (E.D.N.Y. filed Aug. 25, 2016), except as otherwise noted.

the latter. *Id*. Acting Secretary Duke then issued a brief memorandum terminating DACA, citing to the Sessions Letter and Fifth Circuit litigation about DAPA ("Duke Memorandum") (Dkt. 77-1, AR00000252–56); *see generally Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016).

However, rather than immediately terminating DACA, which the agency had proclaimed unlawful, the Department of Homeland Security (DHS) began a six-month "wind down" of DACA. During this time, DHS processed renewal applications received by October 5, 2017 for those whose deferred action expired before March 5, 2018. *See* Duke Memorandum at AR000000255. The government did not address its prior legal analysis (or why its analysis had changed), the legal authority under which DHS processed renewals during the wind-down period, or DACA recipients' reliance interests.

Respondents, including the organization Make the Road New York, initiated their challenge to the DACA termination in the Eastern District of New York on September 5, 2017. After amending their pleadings and joining additional Respondents, they alleged that the termination was arbitrary and capricious under the Administrative Procedure Act (APA), impermissibly motivated by discriminatory animus in violation of the equal protection guarantee of the Fifth Amendment, and a violation of procedural due process as to certain DACA recipients. Dkt. 113, ¶¶ 188–205.[2]

[2] Respondents also challenged the DACA termination as a violation of the APA's notice and comment requirement and the Regulatory Flexibility Act, claims that the district court dis-

The government filed an administrative record consisting of a mere 256 pages, three-quarters of which were the decisions in *Texas v. United States*. *See Regents* Pet. App. 23a. The district court recognized that this record was "manifestly incomplete" and ordered its completion. Dkt. 89 at 3.

Rather than comply with this order, the government sought immediate review in the Second Circuit, filing an emergency petition under the All Writs Act to stay discovery, contest completion of the administrative record, and challenge the court's jurisdiction. Second Corr. Writ of Mandamus, *In re Nielsen*, No. 17-3345 (2d Cir. Oct. 19, 2017), ECF No. 3. A Second Circuit panel unanimously denied the petition. Opinion and Order at 5, *In re Nielsen,* No. 17-3345 (2d Cir. Dec. 27, 2017), ECF No. 171.

The government filed a motion to dismiss under Rule 12(b)(1) and (b)(6), Dkt. 95, which the district court denied in part and granted in part. Pet. App. 1a–58a. Concluding that the government had failed to rebut the "strong presumption favoring judicial review of administrative action," the district court held that the decision to terminate DACA was reviewable. Pet. App. 25a. The district court also noted its jurisdiction to review constitutional claims. Pet. App. 31a–32a. The government moved to certify an interlocutory appeal of the district court's order. Pet. App. 59a–61a.

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missed, Pet. App. 145a–46a (E.D.N.Y. 2018), and which Respondents have not appealed. Further, Respondents moved for certification of a nation-wide class. The district court denied that motion as moot, in light of its entry of a nation-wide preliminary injunction. Pet. App. 71a. Respondents did not seek interlocutory review of the denial of class certification.

The district court issued a preliminary injunction on February 13, 2018, ordering the government to "maintain the DACA program on the same terms . . . that existed prior to the promulgation of the DACA Rescission Memo," except with respect to consideration of new applications and requests for advance parole. Pet. App. 126a. The district court found that Respondents were likely to succeed on their claim that the DACA termination was arbitrary and capricious because it stemmed from an "erroneous [legal] conclusion"; relied in part on a "plainly incorrect factual premise"; had internally contradictory logic; and did not take into account the reliance interests of hundreds of thousands of recipients. Pet. App. 67a–68a, 113a–14a. The government appealed the preliminary order, Pet. App. 130a–32a, but did not seek a stay of the injunction.

Finally, the district court issued an order granting in part and denying in part the government's motion to dismiss under Rule 12(b)(6). Pet. App. 133a–171a. Concluding that Respondents had alleged "sufficient facts to raise a plausible inference that the DACA rescission was substantially motivated by unlawful discriminatory purpose," Dkt. 260, at 12–13,[3] the district court declined to dismiss Respondents' equal protection claim. The government, for the third time, sought to appeal an order of the district court. Pet. App. 172a–174a.

The Second Circuit granted the government leave to appeal the district court's orders denying its mo-

[3] The government's appendix misquotes the district court's decision. The quotation provided here is accurate. *Compare* Pet. App. 147a.

tions to dismiss, Pet. App. 175a–176a, and consolidated the three pending appeals. Oral argument is scheduled for January 25, 2019.

The government filed three petitions for certiorari before judgment on November 5, 2018. Despite the supposed urgency of certiorari before judgment, the government waited more than a week after the Ninth Circuit affirmed entry of a preliminary injunction in *Regents* to supplement its petition. When it finally did so, the government misrepresented Respondents' claims. Supp. Br. at 12–13 (Nov. 19, 2018, No. 18-587).[4] When the government eventually corrected the supplemental brief, it admitted that the Ninth Circuit's ruling "eliminates [one] reason for granting the government's petition," and instead urged that the Court "hold the *Batalla Vidal* petition pending the government's petitions in these cases." Petitioner's Corr. Supp. Br. at 11 (Nov. 28, 2018, No. 18-587).

REASONS FOR DENYING THE PETITION

Rather than presenting questions "of imperative public importance," despite the unique factual circumstances, this petition concerns well-settled administrative law and pleading questions that the courts below have correctly decided. Sup. Ct. R. 11. As such, there is no need for "immediate determination in this Court," and no part of this case justifies "deviation from standard appellate practice." *Id.* Moreover, this case differs dramatically from the limited instances of

[4] The government erroneously stated that Respondents had cross-appealed the district court's dismissal of their notice-and-comment claim, and argued that this was an important reason to grant certiorari before judgment in the present case.

national emergency where the Court has taken the extraordinary step of granting certiorari before judgment.

This petition not only fails to merit certiorari before judgment, but it also fails to satisfy the Court's traditional certiorari criteria. The case does not present an unresolved legal question dividing the courts of appeals. And disputes around the administrative record and discovery remain pending. The Court should deny the request for certiorari in any form.

I. The Court Should Deny the Government's Request for Certiorari Before Judgment

A grant of certiorari before judgment is properly "an extremely rare occurrence," *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers), typically reserved for national emergencies. This petition meets none of the conditions for such a grant and should be denied.

A. This Case Fails the Demanding Test for Certiorari Before Judgment

First, although DACA is of critical practical importance , the particular questions presented in the petition are not of "imperative public importance." Sup. Ct. R. 11. The only questions of law presented are whether Petitioners' termination of DACA is reviewable and arbitrary and capricious, and whether Respondents have met their pleading requirements. These questions all concern application of settled law

to the facts of this case.[5] There are no novel legal questions that warrant extraordinary review.

Second, this case does not require "immediate determination in this Court." Sup. Ct. R. 11. The case does not present a public emergency and can be resolved expeditiously without resorting to the extraordinary measure of certiorari before judgment.

That DACA recipients may "continu[e] their presence in this country and pursu[e] their lives" under the current injunctions, which preserve the status quo, hardly presents a crisis. Nielsen Memorandum, *Regents*. Pet. App. 125a. This is evident from the government's own conduct in this litigation and the prompt schedule for appellate review. Certiorari before judgment should not be granted where it is clear "that the Court of Appeals will proceed expeditiously to decide [the] case." *United States v. Clinton*, 524 U.S. 912, 912 (1998). Here, the government has never sought a stay of the preliminary injunction, even when petitioning numerous times for appellate court review. Moreover, briefing before the Second Circuit is complete and the Court has set argument for January 25, 2019. Case Calendaring for Argument, No. 18-485 (2d Cir. Nov. 19, 2018), ECF No. 567. The government has not availed itself of remedies available at the appellate court and can identify no concrete harm caused by orderly adjudication, yet still argues that

[5] Even Amici challenging DACA itself, in a lawsuit pending before the Southern District of Texas, agree that the Executive's decision to wind down DACA is reviewable under the APA. *See* Br. for State of Texas, et al., No. 18-589, at 8 n.4 (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

the presence of DACA recipients is so urgently concerning as to require a drastic deviation from appellate practice.

Third, the questions presented in the government's petition would benefit from further review by the courts of appeals.[6] Agencies are routinely subject to court orders and injunctions with which they disagree, including on actions that affect large numbers of people. This Court has not granted certiorari before judgment in past cases simply due to the presence of controversy, instead allowing for development of the circuit court law and relevant records. *See, e.g.*, *Baldwin v. Sebelius*, 562 U.S. 1037, 1037 (2010) (denying certiorari before judgment on a challenge to the Affordable Care Act).

Appellate practice is especially important to clarify and distill issues for this Court's review, without which this Court is deprived of "all of the wisdom that our judicial process makes available." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937, 938 (1952) (Burton J., dissenting from grant of certiorari before judgment); *id.* ("The need for soundness in the result outweighs the need for speed in reaching it. The Nation is entitled to the substantial value inherent in [a decision] . . . by the Court of Appeals.").

B. Past Cases of Certiorari Before Judgment Featured True Emergencies

The government's petition falls dramatically short of prior instances in which this Court has taken the

[6] The Fourth Circuit also held argument in a fourth case challenging the termination of DACA on December 11, 2018. *Casa de Maryland v. Dep't of Homeland Sec.*, No. 18-01522 (4th Cir. 2018), ECF No. 56.

extraordinary step of granting certiorari before judgment. Those cases presented a national wartime emergency, implicated the privacy of presidential communications, or required immediate resolution to prevent chaos at the lower courts. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 371 & n.6 (1989) (finding an urgent need to clarify divisions in the district courts regarding sentencing guidelines); *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981) (authorizing action during a hostage crisis); *United States v. Nixon*, 418 U.S. 683, 686–87 & nn.1–2 (1974) (addressing a subpoena for recordings of presidential conversations); *Youngstown*, 343 U.S. at 584–85 (addressing seizure of national steel industry); *Ex parte Quirin*, 317 U.S. 1, 1 (1942) (considering a challenge to jurisdiction of military tribunals during World War II). Here, the government claims merely that it should not have to "retain a discretionary non-enforcement policy" for a longer period. Pet. 16.

Lacking true urgency, the government's petition is but its latest attempt to avoid regular order in judicial review of its actions.[7] If the government were committed to achieving the correct legal result in this case, it would proceed with orderly appellate review.[8]

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[7] Similarly, if the government truly viewed the present situation as urgent, it could promulgate a new, procedurally correct and adequately-reasoned memorandum to rescind DACA, as Judge Bates invited. *NAACP v. Trump*, 298 F. Supp. 3d 209, 216 (D.D.C. 2018), *adhered to on denial of reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018). It also had multiple opportunities to a seek a stay of the preliminary injunction pending appeal, but repeatedly chose not to do so.

[8] The Court should also reject the government's weak plea to hold this petition in abeyance. Denying the petition outright

II. Certiorari Is Not Proper in Any of the DACA Termination Cases

The DACA cases do not meet the Court's criteria for granting certiorari, nor do they adequately present the questions on which the government seeks review. "Review on a writ of certiorari is not a matter of right, but of judicial discretion . . . granted only for compelling reasons." Sup. Ct. R. 10.

The petitions do not offer any compelling reasons for this Court to grant certiorari. First, no conflict exists between courts of appeals. Every court in the cases being considered for certiorari has concluded that the rescission of DACA was both reviewable and arbitrary and capricious.[9] The courts' judgment on these cases so far is clear.

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will permit the Second Circuit to proceed to decision on the government's three pending appeals. Moreover, as noted above, the government's material error in its first supplemental brief substantially undermines its argument for certiorari in this case. Respondents here have *not* cross-appealed the district court's dismissal of their notice-and-comment claim, as the government concedes. *Compare* Petitioner's Supp. Br. at 12–13 *with* Petitioner's Corr. Supp. Br. at 10–11. Nor does past practice support granting certiorari to *Batalla Vidal* as a "companion" case even if this Court grants certiorari in *Regents*. *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 259–60 (2003) (certiorari before judgment granted as a companion case where both cases challenged policies by the same University and had been heard by the Sixth Circuit on the same day).

[9] *See* Pet. App. 24a; *id.* at 67a; *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 503, 510 (9th Cir. Nov. 8, 2018); *NAACP v. Trump*, 298 F. Supp. 3d 209, 235, 243 (D.D.C. April 24, 2018), *adhered to on denial of reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018). *But see Casa de Maryland v.*

Second, the administrative and factual records have not been finalized. Review under the APA requires courts to make their decision based on "the full administrative record" before the executive branch official "at the time [she] made [her] decision." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). However, the government "ha[s] yet to produce a plausible administrative record in these cases, without which the court cannot render a merits decision." Pet. App. 123a; *cf.* Opinion and Order at 5, *In re Nielsen* (2d Cir. Dec 27, 2017).[10]

Third, even if this Court grants certiorari on all three cases, it could not "reach all of the claims" and "provide a definitive resolution," as the government suggests, without ruling on constitutional claims in the first instance, which is disfavored, let alone dismissed claims not yet appealed.[11] Pet. 17. The district court has not ruled on Respondents' equal protection claim, merely finding that Respondents adequately stated that claim. Pet. App. 147a–157a; *Nixon*, 418 U.S. at 690 ("The finality requirement of 28 U.S.C. §

U.S. Dep't of Homeland Sec., 284 F. Supp. 3d 758, 770, 773 (D. Md. 2018), *appeal argued*, (4th Cir. Dec. 11, 2018).

[10] Completion of the administrative record and discovery on the constitutional claims in this case are stayed. *See* Dkt. 233; *cf.* Joint Discovery/Case Management Plan, *State of Texas v. United States*, No. 18-00068, (S.D. Tex. Oct. 31, 2018) (discovery underway in separate challenge to lawfulness of DACA).

[11] *See California v. Carney*, 471 U.S. 386, 399–401 (1985) (Stevens, J., dissenting) (citing B. Cardozo, The Nature of the Judicial Process 179 (1921)) ("To identify rules that will endure, we must rely on the . . . lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law.").

1291 embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals."). Additionally, the Ninth Circuit ruling in *Regents* did not reach key issues in the case, underscoring the need for further proceedings prior to certiorari. *See supra* Part I.A.

III. The Decisions Below Are Correct

This Court should not grant certiorari because the decisions below are correct. The termination is both reviewable and arbitrary and capricious, and Respondents have stated an equal protection claim.

A. The DACA Termination Is Subject to Judicial Review

The DACA termination does not fall into the "very narrow" exception to APA review, nor the discrete categories of immigration enforcement action for which the INA bars judicial review; as such, it is reviewable. *Overton Park*, 401 U.S. at 410.

The very narrow exception to the APA's presumption of judicial review, where "agency action is committed to agency discretion by law," applies only "in those rare instances where [. . .] there is no law to apply." *Id.* at 410; *see also Heckler v. Chaney*, 470 U.S. 821, 830 (1985). The district court correctly determined that the government's decision to abruptly terminate DACA did not fall under this narrow exception.[12]

[12] Notably, when confronted with Texas's lawsuit to enjoin DACA itself, the government did not contest the district court's jurisdiction. *See* Defs.' Resp. to Mot. for Prelim. Inj., *State of*

As the government's petition confirms, DHS terminated DACA exclusively on the basis of a legal determination. Pet. App. 26a–27a, 30a–31a. Thus, there is "law to apply": the same law that the agency relied on in making the legal determination that DACA was unlawful. Pet. App. 26a–28a. This legal analysis does not "involve the complicated balancing" of policy and resource factors, nor is it within the "peculiar[] . . . expertise" of DHS. *Chaney*, 470 U.S. at 831.

Section 1252(g) of Title 8 also does not bar judicial review of the decision to terminate DACA. *See* Pet. 21–22. This Court has already rejected the government's broad reading that § 1252(g) "covers the universe of deportation claims—that it is a sort of 'zipper' clause," *Reno v. American-Arab Anti-Discrimination Committee (AADC)*, 525 U.S. 471, 482 (1999). Instead, this Court held that the § 1252(g) jurisdiction-stripping provisions apply only to three discrete actions involving the Secretary of DHS's decision "to commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. § 1252(g); *AADC*, 525 U.S. at 502; *see also Texas v. United States*, 809 F.3d 134, 164 (5th Cir. 2015) (rejecting government's arguments that § 1252(g) precludes review of DAPA). None of those discrete actions is at issue here, as both the district court, Pet. App. 35a, and Petitioners themselves recognize. *Regents* Pet. 20 ("[T]he rescission does not, by itself, initiate removal proceedings.").

Petitioners' admission similarly defeats their argument, not raised before the district court, that 8 U.S.C. § 1252(b)(9) channels review of Respondents' claims exclusively into proceedings challenging a final

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Texas v. Nielsen, No. 18-00068 (S.D. Tex. June 8, 2018), ECF No. 71.

order of removal. *Regents* Pet. 22. The DACA termination is not an "action taken [. . .] to remove an alien from the United States," nor do Respondents challenge a final order, *see AADC*, 525 U.S. at 483, and § 1252(b)(9) is inapposite.

B. The DACA Termination Was Arbitrary and Capricious

The DACA termination fails to meet the APA's standards for reasoned decision-making. *See* 5 U.S.C. § 706(2)(a). The agency provided only "scant legal reasoning" to justify its erroneous conclusion that DACA was unlawful, and it failed to consider the reliance interests engendered by the policy. *NAACP v. Trump*, 298 F. Supp. 3d 209, 238 (D.D.C. 2018).

The agency's conclusion that DACA is unlawful is legally erroneous. DACA is consistent with the agency's authority under the INA to grant deferred action. *See, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II) (stating that certain non-citizens are eligible for deferred action); *id.* § 1227(d)(2); *AADC*, 525 U.S. at 483–85 (describing deferred action as a "commendable exercise in administrative discretion, developed without express statutory authorization"). Furthermore, although the agency purported to rely on the Fifth Circuit's analysis in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), that court's reasons for invalidating DAPA do not apply to DACA. For instance, the *Texas* court relied on assertions, since disproven, that DACA adjudications lacked discretion. *See Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 507 (9th Cir. Nov. 8, 2018); *see also* Pet. App. 100a–04a (noting other relevant differences between DAPA and DACA). The DACA rescission rests on erroneous

legal reasoning and is arbitrary and capricious. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

Nine months after terminating DACA, the agency attempted to rationalize its decision in the Nielsen Memorandum, *Regents* Pet. App. 120a, referencing alleged litigation risk and enforcement policy concerns. However, such *post-hoc* justifications carry no weight. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Even if the agency had properly articulated that DACA was subject to litigation risk, its justification remains irrational. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015) (en banc). Finally, neither the agency's contemporary nor *post-hoc* explanations adequately consider DACA recipients' reliance interests, ignoring this Court's admonition that "serious reliance interests . . . must be taken into account." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

C. Respondents Adequately Pled that Racial Bias Was a Motivating Factor in the DACA Termination

As the district court correctly concluded, Plaintiffs have properly stated a claim that the DACA termination violated the Constitution's equal protection guarantee. The agency terminated a program whose recipients are mostly of Mexican or Latino heritage, in a highly irregular manner, under the direction of a President who routinely denigrates immigrants of color. Under this Court's precedents, a court may thus infer that the decision was motivated by discriminatory animus. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). The government's argument that Respondents' equal protec-

tion claim is foreclosed by *AADC*, 525 U.S. 471, is inapposite. *AADC* was a selective prosecution case brought by individuals. Plaintiffs instead challenge the wholesale termination of deferred action under DACA, which allowed nearly 800,000 young people to obtain temporary protection from removal.

CONCLUSION

Because the petition does not present an emergency warranting this Court's immediate intervention, this Court should deny the government's request to take the extraordinary step of granting certiorari before judgment.

Respectfully submitted,

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