No. 18-589

In the Supreme Court of the United States

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

v.

MARTIN JONATHAN BATALLA VIDAL, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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1. In September 2017, the Department of Homeland Security (DHS) determined, in accordance with the views of the Attorney General, that the non-enforcement policy known as Deferred Action for Childhood Arrivals (DACA) was likely unlawful and should be wound down in an orderly fashion. Such a quintessential exercise of the Secretary of Homeland Security's authority to establish "national immigration enforcement policies and priorities," 6 U.S.C. 202(5) (2012 & Supp. V 2017), is not judicially reviewable and was eminently reasonable in any event. See Pet. 17-31, *United States DHS* v. *Regents of the Univ. of Cal.*, No. 18-587 (Nov. 5, 2018); Reply Br. 6-11, *Regents*, *supra* (No. 18-587). Yet DHS has been compelled by two nationwide preliminary injunctions to retain the unlawful policy and thereby sanction the continuing violation of federal immigration law by nearly 700,000 aliens.

Last February, this Court declined to review the first of those injunctions before the court of appeals could pass on its validity. See *DHS* v. *Regents of the Univ. of Cal.*, 138 S. Ct. 1182 (2018) (No. 17-1003). The Court made clear its expectation, however, that the court of appeals "w[ould] proceed expeditiously to decide th[e] case," at which time the government could renew its request. *Id.* at 1182. More than ten months later, the court of appeals' judgment is here and the Court is presented the opportunity it anticipated in February. For the reasons stated in the government's reply brief filed today in *Regents*, *supra* (No. 18-587), the Court should now grant the government's *Regents* petition, and resolve this important dispute this Term.

2. In addition to granting certiorari in *Regents*, the Court may also wish to consider granting certiorari in these related cases. Such an order would be consistent with this Court's past practices in similar circumstances, and it would ensure that the Court receives a comprehensive presentation of the relevant issues for the timely and definitive resolution of this dispute. See Pet. 16-17; Supp. Br. 11, *Regents*, *supra* (No. 18-587). Respondents' arguments to the contrary are unpersuasive.

Respondents argue at length that this case "presents no emergency" that would justify granting a writ of certiorari before judgment. State Br. in Opp. 14 (capitalization omitted); see *id.* at 14-20. But that is not the right standard. When the government filed its petitions in these cases, no court of appeals had addressed the questions presented. The government therefore explained that this dispute met the Court's heightened standard for certiorari before judgment because the issues here are of such "imperative public importance as to * * * require immediate determination in this

Court." Sup. Ct. R. 11; see Pet. 14-15; *Regents* Pet. 15-17. By virtue of the Ninth Circuit's intervening judgment, however, the certiorari decision in these cases is no longer governed by that standard—and thus the bulk of respondent's opposition is moot.

Most obviously, the certiorari decision in the *Regents* cases is now governed by the Court's ordinary standard under Rule 10. As explained more fully in the briefing in those cases, further review is plainly warranted under the Rule 10 standard. See *Regents* Reply Br. 1-11. The Ninth Circuit's judgment, however, also affects the standard for determining whether certiorari before judgment is appropriate here. As the government explained in its supplemental briefing, this Court has granted certiorari before judgment "not only in cases of great public emergency but also in situations where similar or identical issues of importance were already pending before the Court and where it was considered desirable to review simultaneously the questions posed in the case still pending in the court of appeals." Stephen M. Shapiro et al., *Supreme Court Practice* § 2.4, at 86 (10th ed. 2013); see *Regents* Supp. Br. 11 (citing *United States* v. *Fanfan*, 542 U.S. 956 (2004) (No. 04-105) (granting certiorari before judgment in companion case to *United States* v. *Booker*, 543 U.S. 220 (2005) (No. 04-104)); *Gratz* v. *Bollinger*, 537 U.S. 1044 (2002) (No. 02-516) (granting certiorari before judgment in companion case to *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) (No. 02-241))). The Court should consider granting the government's petition in these related cases for similar reasons. Specifically, reviewing these cases in addition to the *Regents* cases would ensure that the Court receives the fullest presentation of the overlapping issues and would immediately bring before it any

intervening decision by the Second Circuit addressing the questions presented. See Pet. 15-17.

Contrary to respondents' contention (State Br. in Opp. 25), the cases before the Second Circuit do not present an "especially poor vehicle to address" the questions presented. Like the district court in *Regents*, the district court here addressed the merits of all respondents' claims in resolving the government's motion to dismiss and certified its order for interlocutory appeal. Pet. App. 133a-171a. And like the Ninth Circuit in *Regents*, after accepting the interlocutory appeal, the Second Circuit consolidated the appeals of the preliminary injunction and the motion-to-dismiss orders. See Pet. 13. Granting certiorari before judgment would therefore bring the entire case before this Court.

Respondents err in asserting (State Br. in Opp. 27) that the earlier dispute about the scope of the record would inhibit this Court's review. As in *Regents*, respondents themselves recognize (*ibid.*) that the Court does not need to resolve any record issues to review the preliminary injunction itself. They likewise accept (*ibid.*) that the Court would not need to resolve the scope of the record for APA review if it determines the rescission is not reviewable under the APA at all. If the Court determines that the merits of respondents' claim are reviewable under the APA, it may need to determine the scope of the record. But in those circumstances, the record issues would not be "outside of this Court's potential review." *Id.* at 27 n.14. To the extent that resolving the government's motion to dismiss these cases depends on resolving the record issues, then the district court's certification for interlocutory appeal of its motion-to-dismiss order also places those issues before the court of appeals—and therefore before this

Court. Under 28 U.S.C. 1292(b), the "scope of review includes all issues material to the order in question." *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 205 (1996) (brackets and citation omitted); see 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3929 (3d ed. 2012 & Supp. 2018) ("The court [of appeals] may * * * consider any question reasonably bound up with [a] certified order, whether it is antecedent to, broader or narrower than, or different from the question specified by the district court."). And the record issues are themselves ones on which the lower courts are in need of this Court's guidance. See, *e.g.*, *In re United States*, 138 S. Ct. 443 (2017) (per curiam); *Department of Commerce* v. *United States Dist. Court for the S. Dist. of N.Y.*, cert. granted, No. 18-557 (oral argument scheduled for Feb. 19, 2018).

3. At a minimum, the Court should hold this petition pending resolution of the *Regents* petition and any further proceedings before this Court. Because the district court here issued a nationwide injunction identical to the one in *Regents*, an order vacating the injunction in *Regents* would have no immediate practical effect unless the injunction issued here is also vacated. Holding this petition (or granting it) is the most efficient way to accomplish that result. Pet. 16-17.

Respondents contend (State Br. in Opp. 30) that a hold is unwarranted because the Court "would benefit from a [subsequent] petition that addresses the Second Circuit's reasoning * * * tailored to the issues and circumstances at that time." But respondents concede (*ibid.*) that "*Regents* is adequately postured to present for review the same categories of claims and issues raised here." If the Court grants the *Regents* petition and the Second Circuit addresses those issues before this Court

issues its decision, any relevant analysis can be addressed in the briefing for *Regents*. And if the Court decides *Regents* before the Second Circuit issues its decision, that will control the Second Circuit's analysis.[*]

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari before judgment should either be granted and consolidated with *United States DHS* v. *Regents of the University of California*, No. 18-587 (filed Nov. 5, 2018), or, at a minimum, be held pending resolution of the government's other petitions and any further proceedings in this Court.

Respectfully submitted.

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[*] The Second Circuit is also considering the district court's refusal to dismiss a due-process claim based on DHS's alleged failure to process certain renewal requests made after the rescission, which arrived late to DHS or contained clerical errors. See Pet. App. 170a. But the government is not challenging that ruling here, and the ruling provides no basis for the district court's nationwide preliminary injunction preventing DACA's rescission. See Pet. 13 n.4.