

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.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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This supplemental brief, filed pursuant to Rule 15.8 of this Court, brings to the Court's attention the opinion of the court of appeals in these related cases, which was issued after the filing of the government's petition for a writ of certiorari before judgment, and addresses its impact on the pending petition.

1. On January 9, 2018, the district court entered a preliminary injunction requiring the Department of Homeland Security (DHS) to maintain its policy of immigration enforcement discretion known as Deferred Action for Childhood Arrivals (DACA) for the pendency of these cases challenging the agency's decision to rescind the policy. Pet. App. 1a-70a. In the same order, the court granted in part and denied in part the government's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and certified the ruling for interlocutory appeal. Pet. App. 69a-70a. On January 12, the

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court granted in part and denied in part the government's Rule 12(b)(6) motion and again certified its decision for interlocutory appeal. *Id.* at 71a-90a. The government filed a timely notice of appeal, *id.* at 91a-95a, and, on January 25, the Ninth Circuit granted permission to appeal both orders, *id.* at 96a. More than eight months later, on November 5, the government filed a petition for a writ of certiorari before judgment in these cases to ensure that this Court could consider this important dispute this Term.

2. Three days later, the court of appeals affirmed the preliminary injunction and the orders resolving the government's motion to dismiss. App., *infra*, (App.) 1a-97a.

a. The court of appeals first determined that DHS's decision to rescind DACA is reviewable under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* App. 23a-45a. The court acknowledged that an agency's decision not to enforce "is a decision generally committed to an agency's absolute discretion." App. 25a (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)). But the court reasoned that "an agency's nonenforcement decision is outside the scope of the *Chaney* presumption" if it is "based solely on a belief that the agency lacked the lawful authority to do otherwise." App. 29a. And the court determined that DACA's rescission, as reflected in the initial rescission memorandum, rested exclusively on "a belief that DACA was unlawful," not on concerns about maintaining the policy in the face of the then-ongoing litigation or any other exercise of the agency's discretion. App. 35a; see App. 35a-42a. The court observed that the Acting Secretary did not use the words "litigation risk" or "discretion" in the memorandum and that the noted considerations—*i.e.*, rulings in the ongoing litigation and the Attorney General's advice—were "more readily

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