IN THE SUPREME COURT OF THE UNITED STATES

No. 17-1003

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 BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO EXPEDITE CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT AND TO EXPEDITE CONSIDERATION OF THIS MOTION

The Solicitor General, on behalf of the U.S. Department of Homeland Security (DHS) and the other federal parties, hereby moves, pursuant to Supreme Court Rule 21, for expedited consideration of the petition for a writ of certiorari before judgment to the United States Court of Appeals for the Ninth Circuit filed in this case. The certiorari petition was filed on January 18, 2018. Because of the importance of the questions presented for review and the urgent need for their prompt resolution, the government moves for expedited consideration of the petition so that the case may be decided this Term. The government

also moves for this Court to order respondents to respond to this motion by Monday, January 22, 2018, and for expedited consideration of this motion.

1. This case concerns the policy of immigration enforcement discretion known as Deferred Action for Childhood Arrivals (DACA). See Pet. App. 95a-99a (June 15, 2012 memorandum). As discussed in the government's petition, deferred action is a practice in which the Secretary of Homeland Security exercises her enforcement discretion to notify an alien of her decision to forbear from seeking his removal for a designated period. See Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 484 (1999). DACA made deferred action available for a period of two years, subject to renewal, to "certain young people who were brought to this country as children." Pet. App. 95a; see id. at 97a-98a. The DACA policy made clear, however, that it "confer[red] no substantive right, immigration status or pathway to citizenship," because "[o]nly the Congress, acting through its legislative authority, can confer these rights." Id. at 99a. Since its inception in 2012, approximately 793,000 individuals have received deferred action under the DACA policy. Id. at 13a. As of September 2017, there remained approximately 689,000 active DACA recipients. Ibid.

In 2016, this Court affirmed, by an equally divided Court, a decision of the United States Court of Appeals for the Fifth Circuit holding that two related DHS deferred-action policies --

including an expansion of the DACA policy -- likely violated the Administrative Procedure Act (APA) and were contrary to the Immigration and Nationality Act (INA), and therefore should be enjoined. See United States v. Texas, 136 S. Ct. 2271 (per curiam). In September 2017, the former Acting Secretary of Homeland Security determined that the original DACA policy would likely be struck down by the courts on the same grounds and that the policy was unlawful. Accordingly, she instituted an orderly wind-down of the DACA policy. Pet. App. 109a-117a.

Respondents brought these five suits in the United States District Court for the Northern District of California challenging the rescission of DACA. Collectively, they allege that the termination of DACA is unlawful because it violates the APA's requirement for notice-and-comment rulemaking; is arbitrary and capricious; violates the Regulatory Flexibility Act; denies respondents equal protection and due process; and permits the government to use information obtained through DACA in a manner inconsistent with principles of equitable estoppel. See Pet. App. 21a-22a. Similar challenges have been brought in district courts in New York, Maryland, Virginia, Florida, and the District of Columbia.

On January 9, 2018, the district court entered a preliminary injunction requiring the government to "maintain the DACA program on a nationwide basis." Pet. App. 66a; see id. at 1a-70a. The

court rejected the government's argument that respondents' claims are not reviewable because the Acting Secretary's decision to rescind DACA is committed to agency discretion by law, see 5 U.S.C. 701(a)(2); and because judicial review of the denial of deferred action, if available at all, is barred under the INA prior to the issuance of a final removal order, see 8 U.S.C. 1252(g). Pet. App. 26a-33a. And the court concluded that respondents had demonstrated a likelihood of success on claims that the rescission of DACA was arbitrary and capricious, because "the agency's decision to rescind DACA was based on a flawed legal premise" and because the government's "supposed 'litigation risk' rationale" was an invalid "post hoc rationalization" and, "in any event, arbitrary and capricious." Id. at 42a; see id. at 41a-62.

Finding that respondents had satisfied the remaining equitable requirements for an injunction, Pet. App. 62a-66a, the district court ordered the government, "pending final judgment" or other order, "to maintain the DACA program on a nationwide basis on the same terms and conditions as were in effect before the rescission on September 5, 2017," id. at 66a. The court specifically directed that the government must "allow[] DACA enrollees to renew their enrollments." Ibid.[1] The court also required DHS to post

[1] The district court identified certain "exceptions" to its injunction. The court specified "(1) that new applications from applicants who have never before received deferred action need not be processed; (2) that the advance parole feature need not be continued for the time being for anyone; and (3) that defendants

"reasonable public notice that it will resume receiving DACA renewal applications" and to provide "summary reports to the Court (and counsel)" every three months about "its actions on all DACA-related applications." Id. at 67a.[2]

On January 16, 2018, the government filed timely notices of appeal of the district court's order in each of the five suits. Pet. App. 71a-75a. And, on January 18, 2018, the government filed a petition for a writ of certiorari before judgment to the United States Court of Appeals for the Ninth Circuit.

2. For the same reasons that the government has filed a petition for a writ of certiorari before judgment, it requests expedited consideration of that petition. Indeed, without expedited consideration of the petition, the primary benefit of the petition -- prompt and definitive resolution of these important questions this Term -- will be lost. Expedited consideration is

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may take administrative steps to make sure fair discretion is exercised on an individualized basis for each renewal application." Pet. App. 66a-67a. The court also specified that "[n]othing in [its] order" would prohibit DHS from "remov[ing] 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 67a.

[2] Consistent with the district court's order, DHS has issued guidance announcing that it has "resumed accepting requests to renew a grant of deferred action under DACA." U.S. Citizenship & Immigration Servs., Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction (Jan. 13, 2018), https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction.

warranted based on the imperative public importance of this case and the urgent need for a prompt resolution.

The district court has entered a nationwide injunction that requires DHS to keep in place a discretionary policy of non-enforcement that no one contends is required by federal law and that DHS has determined is, in fact, unlawful and should be discontinued. The district court's unprecedented order requires the government to sanction indefinitely an ongoing violation of federal law being committed by nearly 700,000 aliens -- and, indeed, to confer on them affirmative benefits (including work authorization) -- pursuant to the DACA policy. That policy is materially indistinguishable from the DAPA and expanded DACA policies that the Fifth Circuit held were contrary to federal immigration law in a decision that four Justices of this Court voted to affirm. Without this Court's immediate intervention, the district court's injunction will remain in force at least for months while an appeal to the Ninth Circuit is resolved. Even if the losing party were to seek certiorari immediately following the Ninth Circuit's decision, this Court would not be able to review the decision in the ordinary course until next Term at the earliest.

To be sure, some of these harms could be avoided by a stay of the district court's order. But a primary purpose of the Acting Secretary's orderly wind-down of the DACA policy was to avoid the

disruptive effects on all parties of abrupt shifts in the enforcement of the Nation's immigration laws. Inviting more changes before final resolution of this litigation would not further that interest. Moreover, a stay would not address the institutional injury suffered by the United States of being embroiled in protracted litigation over an agency decision that falls squarely within DHS's broad discretion over federal immigration policy and that is not even judicially reviewable. A stay also would not address the risk that the onerous discovery and administrative-record orders that already justified this Court's intervention, see In re United States, 138 S. Ct. 443 (2017), will be reinstated and create the need for additional rounds of interlocutory appellate review.

There can be no reasonable question that this Court's review will be warranted. Challenges to the rescission of DACA are pending before courts in the Second, Fourth, Ninth, Eleventh, and District of Columbia Circuits, nearly all of which include requests for similar nationwide injunctions. From the start of the suits here, all parties involved have agreed that time is of the essence.[3] The Court is already familiar with the relevant issues

[3] See, e.g., D. Ct. Doc. 87, at 1 (Oct. 23, 2017) (district-court response to mandamus petition) (declaring that "[t]ime is of the essence"); 17-801 Regents Br. in Opp. 30 (emphasizing "the time-sensitive nature of this case"); 9/21/2017 Tr. 18 (statement of government counsel) ("We think your suggestion to get to final judgment quickly makes a lot of sense in this case.").

in light of its consideration of the Texas case. And additional burdensome discovery, vast expansions of the administrative record, and privilege disputes would only burden the courts and parties without bringing any additional clarity to those issues. Accordingly, the government respectfully submits that the most suitable and efficient way to vindicate the law in these unique circumstances is to grant certiorari before judgment and resolve the dispute this Term. In order to ensure that there will be adequate time for briefing by the parties and consideration by the Court this Term, we respectfully submit that the Court should consider the petition for a writ of certiorari before judgment on an expedited basis.

3. For the foregoing reasons, the government moves that the Court adopt a briefing schedule that would require respondents to file a response to the government's petition by January 31, 2018 -- 13 days after the petition was filed and a longer period than the government took to file the petition itself -- in order to allow the Court to consider the government's petition at its scheduled February 16, 2018 Conference for decision this Term. Through this motion, the government waives the 14-day period provided for in this Court's Rule 15.5 between the filing of a brief in opposition and the distribution of the petition and other materials to the Court.

4. Finally, the government also respectfully requests expedited consideration of this motion. To allow for expedited consideration, the government moves for this Court to direct respondents to respond to this motion by Monday, January 22, 2018.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JANUARY 2018