NO. 17-1003

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL., PETITIONERS,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL., RESPONDENTS

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

RESPONSE OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AND JANET NAPOLITANO, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA, TO MOTION TO EXPEDITE CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

On January 18, petitioners filed a petition for certiorari before judgment in these cases. On January 19—after 5 p.m. and without consulting with counsel for respondents—petitioners filed a motion seeking to require respondents to respond to the petition by January 31. For the reasons explained below, respondents request that responses to the petition be made due no earlier than February 2.

1. On September 5, 2017, the government announced that it would terminate the Deferred Action for Childhood Arrivals program (DACA), a program that since 2012 has protected from deportation nearly 800,000 immigrants who were brought

to this country as children. Shortly thereafter, the University of California and others filed suits alleging that the rescission of DACA is arbitrary and capricious and violates applicable notice-and-comment requirements. Similar challenges are pending in New York, Maryland, and the District of Columbia.

On January 9, 2018, the district court rejected the government's jurisdictional defenses and granted, in part, respondents' motion for a preliminary injunction, finding that respondents are likely to succeed on their claim that the rescission of DACA was arbitrary and capricious. It ordered the government to maintain the status quo ante by keeping the DACA program in place "on the same terms and conditions as were in effect before the rescission on September 5, 2017." Pet. App. 66a.

The January 9 order was carefully drawn to address only the most severe of the irreparable harms plaintiffs had alleged. It provides that the government need not process new applications from individuals who have never before received deferred action; that the "advance parole" feature of DACA "need not be continued for the time being for anyone"; and that the federal defendants "may take administrative steps to make sure fair discretion is exercised on an individualized basis for each renewal application." *Id.* at 66a-67a. The district court was also careful to state that the injunction does not affect the government's ability to remove any immigrant who "poses a risk to national security or public safety, or otherwise deserves, in [the government's] judgment, to be removed." *Id.* at 67a.

The government has appealed the order entering the preliminary injunction to the court of appeals, which has already established a briefing schedule. The government has also filed a petition for permission to appeal other issues that the district court certified for interlocutory appeal. Petitioners have not sought a stay of the preliminary injunction in any court, Pet. 11, and have disavowed any intention to do so, D.Ct. Dkt. 243 at 1.[1] Meanwhile, on January 13, the Department of Homeland Security announced that it has "'resumed accepting requests to renew a grant of deferred action under DACA.'" Pet. 10.

Then, on January 18, petitioners filed a petition seeking an extraordinary writ of certiorari before judgement—asking this Court to skip over the courts of appeals that otherwise would review the district courts' decisions in the first instance.

2. As respondents will explain in opposing the petition, certiorari before judgment is not warranted. Exercise of that "power by the Court is an extremely rare occurrence." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 n.* (Rehnquist, J., in chambers). This case does not resemble the cases cited by the government in which this Court preemptively reviewed a district court's ruling. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683 (1974) (subpoena for White House recordings); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (seizure of national steel industry).

This case is, of course, important—especially for hundreds of thousands of young immigrants who have relied on the DACA program and who, because of the

[1] "D.Ct. Dkt." refers to documents filed in the district court in No. 17-cv-5211.

program's rescission, are facing the abrupt termination of their employment and ability to remain in this country. But importance is not a sufficient reason to short-circuit the ordinary appellate process. The preliminary injunction here merely requires the government to leave in place, during the pendency of the district court litigation, the DACA program as it has existed since 2012 in the form that this Administration accepted for the first eight months of its term.

The government has pointed to no concrete harm that will accrue during ordinary review of the preliminary injunction. Indeed, it has not sought a stay of the injunction from any court. It does not contend that there is any danger in permitting DACA recipients to remain in this country while litigation proceeds, since by definition DACA recipients have been in this country since they were children, and the government is free to remove any individual it deems a threat to public safety. Nor does the government assert a division among the circuits, since no court of appeals has yet had the opportunity to evaluate the government's arguments. At bottom, the government's contention is that the district court erred in granting the injunction and overruling the government's jurisdictional defenses. Respondents do not agree that the district court erred, but in any event error alone is no reason to grant even an ordinary writ of certiorari, Sup. Ct. R. 10, let alone an extraordinary writ that pre-empts review by the court of appeals.

This Court is likely to benefit from review by the courts of appeals. Moreover, in view of the ongoing discussions between Congress and the President regarding the DACA program, it would be prudent for this Court to avoid intervening earlier

than necessary while those discussions proceed. The present circumstances therefore do not "justify deviation from normal appellate practice and … require immediate determination in this Court." Sup. Ct. R. 11.

3. While this case is not suitable for review before judgment, in order to facilitate this Court's prompt disposal of the government's petition, the University of California requests that its response to the petition be made due no earlier than February 2. The additional time is needed to allow for adequate consultation between and among the multiple respondents in these cases and their counsel.

Respectfully submitted,

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