No. 17-1003

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.,

Respondents.

On Petition For A Writ Of Certiorari Before Judgment To The United States Court of Appeals For The Ninth Circuit

Brief in Opposition for Respondents Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn

THEODORE J. BOUTROUS, JR.
COUNSEL OF RECORD
ETHAN D. DETTMER
KIRSTEN GALLER
JONATHAN N. SOLEIMANI
KELSEY J. HELLAND
GIBSON, DUNN & CRUTCHER LLP
333 SOUTH GRAND AVENUE
LOS ANGELES, CA 90071
(213) 229-7000
TBOUTROUS@GIBSONDUNN.COM

NICOLE A. SAHARSKY
MATTHEW S. ROZEN
HALEY S. MORRISSON
GIBSON, DUNN & CRUTCHER LLP
1050 CONNECTICUT AVENUE, N.W.
WASHINGTON, DC 20036
(202) 955-8500

MARK D. ROSENBAUM
JUDY LONDON
PUBLIC COUNSEL
610 SOUTH ARDMORE AVENUE
LOS ANGELES, CA 90005
(213) 385-2977

Counsel for Respondents Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn

(*Additional Counsel Listed on Inside Cover*)

LUIS CORTES ROMERO
BARRERA LEGAL GROUP, PLLC
19309 68TH AVENUE SOUTH,
SUITE R102
KENT, WA 98032
(253) 872-4730

ERWIN CHEMERINSKY
UNIVERSITY OF CALIFORNIA,
BERKELEY SCHOOL OF LAW*
215 BOALT HALL
BERKELEY, CA 94720
(510) 642-6483

LAURENCE H. TRIBE
HARVARD LAW SCHOOL*
1575 MASSACHUSETTS AVENUE
CAMBRIDGE, MA 02138
(617) 495-1767

LEAH M. LITMAN
UNIVERSITY OF CALIFORNIA,
IRVINE SCHOOL OF LAW*
401 E. PELTASON DRIVE
IRVINE, CA 92697
(949) 824-7722

Additional Counsel for Respondents Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn

**Affiliation for identification purposes only*

QUESTIONS PRESENTED

Since 2012, the Deferred Action for Childhood Arrivals program (DACA) has enabled nearly 800,000 undocumented individuals who were brought to the United States as children to live and work here without fear of deportation. In September 2017, the Acting Secretary of Homeland Security abruptly decided to terminate the program.

Respondents brought suit to challenge that decision. The district court granted respondents' motion for a preliminary injunction and also denied the government's motion to dismiss for lack of jurisdiction. Those rulings are now before the court of appeals, and that court has expedited briefing. Apparently unsatisfied with expedited appellate review, and without seeking a stay of the district court's orders, the government has filed a petition for a writ of certiorari before judgment in this Court—a procedure reserved for only the most extraordinary cases.

The questions presented are:

1. Whether either the Administrative Procedure Act (APA), 5 U.S.C. § 701(a)(2), or a particular provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1252(g), precludes judicial review of the Acting Secretary's decision to terminate the DACA program.

2. Whether the district court abused its discretion in entering a preliminary injunction, based on its balancing of the equities and its conclusion that respondents are likely to succeed on their claim that the decision to end DACA was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the APA, 5 U.S.C. § 706(2)(A).

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BRIEF IN OPPOSITION

This case is about whether 700,000 young adults who came to the United States as undocumented immigrant children and have lived their entire lives here will be subject to removal because the government decided to rescind the Deferred Action for Childhood Arrivals (DACA) program. Since 2012, DACA has allowed these individuals, known as "Dreamers," to obtain an education, work, and contribute to our Nation. The program has been an unqualified success, and DACA recipients have relied on the federal government's repeated promises of protection from removal.

In September 2017, the federal government dramatically reversed course and announced that it would terminate DACA as of March 5, 2018. The fate of the Dreamers has captured the attention of the administration, Congress, and millions of Americans who worry about the devastating impact that terminating DACA will have on families, schools, communities, and our economy.

Respondents brought this lawsuit to challenge the government's decision to end DACA. The district court entered a preliminary injunction to freeze the DACA program in place, and protect the livelihood and well-being of the nearly 700,000 current DACA recipients, while the courts determine whether the rescission was lawful. The district court also rejected the government's arguments that no court may review the decision to end DACA. The court of appeals is now reviewing those rulings on an expedited basis.

The government has not sought a stay of the district court's rulings. Instead, it leapfrogged the court of appeals to seek a writ of certiorari before judgment in this Court—an extraordinary procedure reserved

only for cases of such "imperative public importance" that the Court's "immediate" review is necessary. Sup. Ct. R. 11.

This Court should reject the government's attempt to upset the normal appellate process. The decision below is preliminary and interlocutory; no appellate court has ruled on the questions presented; and the government conspicuously declined to argue below that DACA is unlawful. There is no need for immediate review. The appeal has been expedited, and the government cannot credibly claim harm when it has not even bothered to seek a stay. DACA recipients are contributing members of society who have been carefully vetted, and their continued presence in this country while the courts determine their rights harms no one. This Court should not rush in, especially because Congress currently is considering whether to provide a permanent solution for the Dreamers, and the President has stated that he supports allowing the Dreamers to remain in the United States. Nothing about the merits warrants immediate review: The district court had ample justification to enter a preliminary injunction, and the government is flatly wrong to say that no court can review its decision to terminate a long-standing program and disrupt the lives of 700,000 people. The petition should be denied.

OPINIONS BELOW

The order of the district court granting respondents' motion for a preliminary injunction and denying the government's motion to dismiss for lack of jurisdiction (Pet. App. 1a-70a) is not yet published in the Federal Supplement but is available at 2018 WL 339144. The district court's order granting in part

and denying in part the government's motion to dismiss for failure to state a claim (Pet. App. 76a-94a) is not yet published in the Federal Supplement but is available at 2018 WL 401177.

JURISDICTION

The district court entered its order granting a preliminary injunction and denying the government's motion to dismiss on jurisdictional grounds on January 9, 2018, and its order granting in part and denying in part the government's motion to dismiss for failure to state a claim on January 12, 2018. The government filed a notice of appeal of the preliminary injunction order on January 16, 2018, Pet. App. 71a-75a, and that appeal is pending in the court of appeals. The government filed a petition for interlocutory review of the motion to dismiss orders on January 16, 2018; the court of appeals granted that petition on January 25, 2018; and that appeal also is pending in the court of appeals. The petition for a writ of certiorari before judgment was filed on January 18, 2018. The jurisdiction of the court of appeals rests on 28 U.S.C. § 1292(a)(1) and (b). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

STATEMENT

1. This case concerns the Deferred Action for Childhood Arrivals (DACA) program. Deferred action is "a regular practice" in which the government elects not to seek removal of individuals "for humanitarian reasons or simply for [its] own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84, n.8 (1999) (*AADC*). Congress has recognized this established practice in the Immigration and Nationality Act (INA). *See* 8 U.S.C. § 1227(d)(2); *see also* 6 U.S.C. § 202(5).

Over the past several decades, both Republican and Democratic presidential administrations have used deferred action to permit certain categories of individuals to remain in the United States. Pet. App. 5a-8a. As a result of that consistent practice, deferred action programs have become "a well-accepted feature of the [E]xecutive's enforcement of our immigration laws." *Id.* at 8a.

In 2012, Secretary of Homeland Security Janet Napolitano established DACA. Pet. App. 9a. The program permits young people who were brought to the United States as children to lawfully live and work in this country. *Id.* Qualifying individuals may obtain work authorization and a social security number, and travel overseas and lawfully return to the United States. *Id.* at 12a.

DACA has allowed nearly 800,000 people to come out of the shadows and build productive and fulfilling lives in the United States. Compl. ¶ 128.[1] The Dreamers have relied on the promise of DACA to advance their education, serve in the U.S. military, start businesses, have families, and make many other life-changing decisions. *Id.* ¶¶ 37, 41, 48-98. Like so many other Dreamers, the six individual respondents here—Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn—have achieved remarkable success through hard work, fierce determination, and incredible resilience. *Id.* ¶¶ 4-9. Because of DACA, they have been able to pursue careers as lawyers, medical professionals, and teachers, in furtherance of their commitment to serve

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[1] "Compl." refers to the complaint filed in *Garcia, et al. v. United States, et al.*, Case No. 3:17-cv-05380 (N.D. Cal.).

their communities. *Id.* ¶¶ 53-98. Without DACA, they will face possible deportation and risk losing their families, community connections, and livelihoods. *Id.* ¶¶ 48-49, 56, 63, 76, 83, 91, 128.

2. The current administration originally supported DACA and the Dreamers. In March 2017, Secretary of Homeland Security John Kelly stated that DACA embodies a "commitment … by the government towards … Dreamer[s]." Compl. ¶ 46. In April 2017, the President himself emphasized that the "dreamers should rest easy" and agreed that the "policy of [his] administration [is] to allow the dreamers to stay." *Id.* ¶ 47.

But on September 4, 2017, the administration abruptly reversed course. The Attorney General sent a one-page letter to Acting Secretary of Homeland Security Elaine Duke, summarily concluding that "DACA was effectuated by the previous administration through executive action, without proper statutory authority" and "was an unconstitutional exercise of authority by the Executive Branch." Pet. App. 114a. The following day, he announced the government's decision to end DACA. As a reason, he cited the Fifth Circuit's decision (which was affirmed by an equally divided Court) approving an injunction against a different deferred action program—Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). Dkt. 64-1 at 251 (citing remarks referring to *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271, 2272 (2016)).

Acting Secretary Duke issued a memorandum formally rescinding DACA. Pet. App. 17a. The memorandum instructed the agency to stop approving new DACA applications and to allow individuals' DACA

status to expire beginning March 5, 2018. *Id.* at 115a-16a. Her reasoning was quite brief: Citing the "Supreme Court's and the Fifth Circuit's rulings [in *Texas*] and the September 4, 2017 letter from the Attorney General," she concluded that the "program should be terminated." *Id.* at 115a. The memorandum did not analyze any purported litigation risk and did not weigh defending DACA and its widespread benefits against the many harms that would result if DACA were rescinded. Acting Secretary Duke then released a statement where she said—directly contrary to the President's and prior Secretaries' statements—that "DACA was fundamentally a lie." Dkt. 121-2 at 1869.[2]

3. Respondents filed five related lawsuits against the federal government and various federal officials to challenge the decision to rescind DACA. Respondents contend, *inter alia*, that DACA's rescission (1) is unlawful under the APA because it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A); (2) violates the APA's notice-and-comment rulemaking requirement; (3) denies DACA recipients equal protection of the laws; and (4) deprives DACA recipients of constitutionally protected property and liberty interests in violation of due process. Pet. App. 19a-22a.

Because DACA is set to expire in March 2018, the district court immediately took steps to ensure that the litigation would proceed quickly and efficiently. After an initial dispute about the administrative record (which ultimately was addressed by this Court, *see*

[2] "Dkt." refers to the electronic docket for *Regents of the University of California, et al. v. DHS, et al.*, Case No. 3:17-cv-05211 (N.D. Cal.).

In re United States, 138 S. Ct. 443 (2017) (per curiam)), the district court considered the government's motion to dismiss, Dkt. 114, and respondents' request for a preliminary injunction, Dkt. 111.

The district court denied the government's motion to dismiss for lack of jurisdiction and granted preliminary injunctive relief. Pet. App. 1a-70a. The court rejected the government's arguments that no court can review the decision to end DACA. *Id.* at 26a-33a. The court held that the Secretary's decision is not "committed to agency discretion by law" under the APA, 5 U.S.C. § 701(a)(2), because it is a "major policy decisio[n]" based on the agency's "interpretation of the INA"—a "quintessential[ly]" reviewable legal question for which "there *is* law to apply." Pet. App. 28a-30a. The court also held that 8 U.S.C. § 1252(g) does not bar judicial review, Pet. App. 30a-33a, because that provision applies only to the "three discrete decisions or actions named" in the statute—decisions to "commence proceedings, adjudicate cases, or execute removal orders against any alien," 8 U.S.C. § 1252(g)—and the decision to end DACA is none of those. Rather, it is an "across-the-board cancellation of a nationwide program" done "prior to the commencement of any removal proceedings." Pet. App. 31a-32a.

The district court granted respondents preliminary injunctive relief based on its initial assessment of the merits and its balancing of the equities. Pet. App. 41a-69a. The court found respondents likely to succeed on their claim that DACA's rescission is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), because neither of the government's claimed reasons for ending DACA withstood scrutiny. First, the court

rejected the view that DACA is illegal, explaining that it is "based on the flawed legal premise that the agency lacked authority to implement DACA." Pet. App. 42a. Citing guidance from the Office of Legal Counsel—guidance on which the government itself has relied—the court explained that DACA is a permissible exercise of the Executive's immigration enforcement authority because each feature of the program is "anchored in authority granted or recognized by Congress or the Supreme Court." *Id*. at 42a-43a. The court noted that "the government [had] ma[de] no effort" in this litigation "to challenge any of the … reasons why DACA was and remains within the authority of the agency," *id.* at 48a; all it did was cite the Fifth Circuit's decision in *Texas*, which the district court distinguished on multiple grounds, *id.* at 51a-52a.

Second, the court rejected the government's post hoc rationalization that litigation risk was a sufficient reason to end DACA. Pet. App. 55a-62a. The court explained that this was not the reason relied upon by the decision-makers: The Attorney General's stated reason for ending DACA was his belief that it is illegal, and the Acting Secretary's memorandum relied on that determination, without "consider[ing] whether defending the program in court would (or would not) be worth the litigation risk." *Id.* at 55a. In fact, the court concluded, the agency never assessed litigation risk or weighed it against "DACA's programmatic objectives" and "the reliance interests of DACA recipients." *Id.* at 58a. The agency's about-face without a reasoned explanation, the court held, was a paradigmatic example of arbitrary and capricious agency action. *Id.* at 60a-61a.

Finally, the district court concluded that the equities strongly favor a preliminary injunction. Pet. App. 62a-66a. The government "d[id] not dispute" that respondents—especially the individual DACA recipients—will face irreparable injury absent temporary injunctive relief. *Id.* at 62a-63a. And the court concluded that the "public interest will be served by DACA's continuation," because the rescission will "result in hundreds of thousands of individuals losing their work authorizations and deferred action status," which will tear apart families and remove productive workers from the national economy. *Id.* at 65a.

The preliminary injunction directs the government "to maintain the DACA program" as it was pre-rescission, except that the government may deny new applications and foreign travel requests. Pet. App. 66a-67a. The government may exercise its discretion "on an individualized basis for each renewal application" and may "remove 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.

The district court then entered another order, granting the government's motion to dismiss respondents' notice-and-comment and substantive due process claims and denying the motion with respect to respondents' substantive APA and equal protection claims. Pet. App. 76a-94a. (The notice-and-comment, due process, and equal protection claims are not at issue in this petition.)

4. The government appealed the preliminary injunction order but did not seek expedited briefing. Pet. App. 71a-75a. With permission from the district court and court of appeals, the government and re-

spondents each filed interlocutory appeals of the motion to dismiss order. *See* C.A. No. 18-15128, Dkt. 11; C.A. No. 18-15133, Dkt. 6; C.A. No. 18-15134, Dkt. 1; *see also* 28 U.S.C. § 1292(b). The court of appeals has consolidated the appeals and *sua sponte* ordered expedited briefing, and all briefing will be completed by May 1, 2018. C.A. No. 18-15068, Dkt. 2 at 3.

5. The government filed a petition for a writ of certiorari before judgment in this Court. That petition challenges only the district court's preliminary injunction and reviewability holdings. The government has not sought a stay of the district court's orders from any court.

ARGUMENT

The government asks this Court to grant a writ of certiorari before judgment to review two interlocutory decisions of the district court. There is no disagreement in the circuits on the questions presented. In fact, *no* court of appeals has ever addressed those questions. And the district courts that have done so have unanimously sided with respondents.

There is no immediate need for this Court's intervention. The district court and court of appeals have proceeded expeditiously to ensure that the issues in the case can reach this Court quickly and with the benefit of full appellate review. There is great benefit in following the normal appellate process, and no harm in doing so. The district court's orders simply freeze the DACA program in place and allow the government to continue exercising its usual authority to grant or deny individuals deferred action under DACA and remove them from the United States on an individualized basis.

The government cannot credibly claim harm when the current administration has willingly permitted the Dreamers to stay for over a year; has stated that it will continue to do so, either by treating recipients as a low enforcement priority or by extending DACA; and has forgone opportunities to expedite this dispute or avoid any purported harm through a stay. And the fact that Congress is now considering legislation that would provide permanent legal status for DACA recipients makes it especially wise for this Court to stay its hand.

This case is nothing like the rare and unique circumstances that have previously justified certiorari before judgment. Skipping the courts of appeals may be appropriate where necessary to protect the national defense during wartime, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583-84 (1952); prevent a treaty breach, *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981); or speed grand jury proceedings naming the sitting President as an unindicted co-conspirator in defrauding the United States, *United States v. Nixon*, 418 U.S. 683, 687-88 (1974). But there is no comparable urgency here. And nothing about the merits justifies granting certiorari at this very early stage.

This case does not meet the Court's standard for certiorari, *see* Sup. Ct. R. 10, let alone the exceptionally demanding standard for certiorari before judgment, Sup. Ct. R. 11. The petition should be denied.

I. The Government's Claims Of Conflict, Urgency, And Importance Do Not Justify The Extraordinary Step Of Certiorari Before Judgment

This Court exercises its authority to review a case before judgment in the court of appeals in "extremely rare" instances. *Coleman v. Paccar Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J.) (in chambers); *see* 28 U.S.C. § 2101(e). Under the Court's rules, certiorari before judgment is warranted only where the petitioner establishes 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. This case does not meet that standard.

A. The Decision Below Is Preliminary, And There Is No Circuit Split (And In Fact No Circuit Decision) On The Questions Presented

1. The decision under review could hardly be more preliminary. The court entered a preliminary injunction—a provisional determination to freeze the DACA program in place while the courts address whether its rescission was lawful. This Court reviews that determination for "abuse of discretion" and "uphold[s] the injunction" if "the underlying … question is close." *Ashcroft v. ACLU*, 542 U.S. 656, 664-65 (2004). The district court's rulings about reviewability and about likelihood of success on the APA claim both are interlocutory. The Court normally does not review interlocutory orders, and for good reason; further development of the issues often crystallizes the arguments in preparation for this Court's review. *See*

Va. Military Inst. v. United States, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari).

The preliminary injunction is based on only one of respondents' claims for relief—the substantive APA claim—and the district court did not decide the ultimate merits of that claim, but only found that respondents "have shown a likelihood of success." Pet. App. 41a. Because the district court has not yet expressed its definitive view of the merits of the substantive APA claim after full development of the record and briefing, and because there are other claims not before this Court that could support the injunction, the petition does not provide the opportunity to decide the "ultimate merits" of respondents' claims. *Brown v. Chote*, 411 U.S. 452, 457 (1973). Granting certiorari at this very early stage therefore would embroil this Court in piecemeal review without the ability to conclusively resolve the substantive claims in this case.

2. Review of the district court's preliminary orders is especially unwarranted because the issues have not been considered by any federal appellate court. Not only is there no disagreement in the circuits on either of the questions presented, but *no* court of appeals has even *considered* those questions. The most the government can say is that challenges to DACA's rescission are pending in federal district courts in several circuits. Pet. 15. But none of those challenges (other than in this case) has even reached the court of appeals on the merits, let alone been decided on appeal.[3]

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[3] The Second Circuit considered a mandamus petition challenging an order about the administrative record, much like the one the Ninth Circuit considered in this case. *See In re Kirstjen*

Further, there is no "disarray among the Federal District Courts" that might justify review in an extraordinary case. *Mistretta v. United States*, 488 U.S. 361, 371 (1989). No district court has accepted the government's arguments. The only other court that has considered them has rejected the government's argument that "the decision to rescind the DACA program is unreviewable" and did not address the lawfulness of DACA's rescission. *Batalla Vidal v. Duke*, Nos. 16-CV-4756 & 16-CV-5228, 2017 WL 5201116, at *10 (E.D.N.Y. Nov. 9, 2017), petition for leave to appeal pending but stayed, No. 18-122 (2d Cir. Jan. 31, 2018).

With no conflict in the circuits, or even any disagreement in the district courts, the Court "should not rush to answer a novel question" that "could benefit from further attention in the court of appeals." *Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting). That is especially true where, as here, this Court would be the "first appellate tribunal" to decide the questions presented. *Elonis v. United States*, 135 S. Ct. 2001, 2013 (2015); *see Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) (Supreme Court is "a court of final review and not first view"). Granting certiorari now would require the Court to decide the issues without the benefit of views from any federal appellate court, and it would send an unfortunate message to the lower courts about the value of their work.

M. Nielsen, Secretary of Homeland Security, No. 17-3345 (2nd Cir. Dec. 27, 2017) (order denying mandamus petition). But neither petition addressed reviewability or the merits of the parties' dispute. *See In re United States*, 875 F.3d 1200, 1204 (9th Cir. 2017) ("The merits of [plaintiffs'] claims are not before us today.").

3. The government suggests that certiorari is warranted because there is a "conflict" of authority over whether DACA is lawful. Pet. 15, 32. There are two problems with that argument. First, there is no such conflict. The government's claim of conflict wrongly assumes that the Fifth Circuit's analysis of the *adoption* of *DAPA* applies equally to the *rescission* of *DACA*, despite acknowledged differences between the programs and the posture of the litigation. DAPA was a never-implemented deferred action program that would have affected up to 4.3 million individuals. Pet. App. 54a. The Fifth Circuit itself recognized that "DACA and DAPA are not identical" and that "any extrapolation from DACA [to DAPA] must be done carefully." *Texas v. United States*, 809 F.3d 134, 173-74 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271, 2272 (2016). The district court here correctly gave several reasons why the question before it was not the same as the issue before the Fifth Circuit in *Texas*. Pet. App. 50a-54a; *see* note 6, *infra*. The only court that has addressed the lawfulness of DACA is the district court below.

Second, even if there were disagreement about DACA's lawfulness, this case would be a poor vehicle for considering it, because in the court below, the government conspicuously failed to argue that DACA is unlawful. The government's argument to justify the rescission was that there was a risk of litigation if DACA remained in force—*not* that DACA was unlawful. *See* Dkt. 204 at 10-11, 14-21. In fact, the government told the district court that it "need not agree with [the Acting Secretary's] determination [that DACA was unlawful] to uphold her decision." Dkt. 204 at 17; *see also* Pet. 8 (making the same argument). The government cited the Fifth Circuit's decision in *Texas v. United States* as evidence of litigation risk

and briefly summarized that decision, *id.* at 4, 17, but it meticulously avoided defending that decision's reasoning or offering any full-throated argument that DACA is unlawful, *id.* at 17.[4] The government simply "ma[de] no effort in its briefs to challenge any of the … reasons why DACA was and remains within the authority of the agency." Pet. App. 48a. Having made that strategic decision in the district court, the government should not be allowed to change course now, especially when it is asking this Court to decide the issues in the first instance.

B. There Is No Urgent Need For This Court's Review

1. The government has not shown a need for an "immediate determination" by this Court. Sup. Ct. R. 11. Throughout this case, the district court and court of appeals have proceeded expeditiously in light of the government's self-imposed deadline of March 5, 2018. The district court ordered expedited briefing on the preliminary injunction request and motion to dismiss; it decided those issues promptly; and it certified certain issues for immediate interlocutory review.

[4] For example, although the petition claims that "'specific and intricate provisions' of the INA" preclude deferred action for DACA recipients, Pet. 28, the government's district court brief cited only statutes that support deferred action and similar relief, Dkt. 204 at 2, 8, 22, 28 (citing 8 U.S.C. §§ 1103(a)(1), 1154(a)(1)(D)(i)(II) and (IV), 1158(b)(1)(A), 1182(d)(5)(A), 1229b, and 1252). Further, although the Attorney General stated that he found "constitutional defects" in DACA, Pet. App. 17a, the government's brief below did not identify any relevant constitutional provisions. And the government declined to endorse the Fifth Circuit's holding (809 F.3d at 178) that DAPA was procedurally defective; instead, the government told the district court that "INS deferred-action directives" are "policy statements exempt from notice and comment." Dkt. 204 at 26-27.

The court of appeals granted permission for the interlocutory appeal quickly, then *sua sponte* entered an expedited briefing schedule, where all briefing will be completed by May 1, 2018. C.A. No. 18-15068, Dkt. 21. There is every indication here "that the Court of Appeals will proceed expeditiously to decide [the] case." *United States v. Clinton*, 524 U.S. 912 (1998).

The government contends that, because "time is of the essence," Pet. 14, it is appropriate to dispense with normal appellate review. That argument is mistaken: A desire for a prompt decision does not justify skipping the steps that help make the final decision a good one. If it did, then every significant case should come directly to this Court, without giving the parties an opportunity to develop their arguments or the lower courts a chance to provide their views. And the government should not be able to truncate appellate review based on exigency when *it* created the urgency by deciding to end DACA in March 2018. Foregoing appellate review of a decision affecting hundreds of thousands of people is not worth the incremental time benefit—especially where, as here, the government is not harmed in the interim.

2. The government's main complaint is that the injunction requires it to "sanction indefinitely an ongoing violation of federal law" by each DACA recipient. Pet. 12 (emphasis omitted). As an initial matter, the injunction does not compel the government to "sanction" the unlawful presence of anyone. As the district court made clear, the government may continue to exercise "fair discretion … on an individualized basis for each renewal application," and "[n]othing in [the] order prohibits [DHS] from proceeding to remove 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." Pet. App. 67a.

Also, the government is routinely required to "sanction" what it perceives to be ongoing violations of federal law pending appellate review, *e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, No. 16-299, slip op. at 7 (Jan. 22, 2018) (noting the "nationwide stay of the [waters of the United States] Rule pending further proceedings"), and it is often enjoined from enforcing federal laws against conduct that it believes to be unlawful, *e.g.*, *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006) (affirming injunction against enforcement of Controlled Substances Act). The government's belief in the correctness of its own position has never been enough to skip over the court of appeals.

More fundamentally, the government's conduct simply is not consistent with its expressions of harm. The injunction merely freezes the situation that has been in place for more than five years, including under the current administration, and with the support of the current President. *See* Compl. ¶ 47 (President confirming that his "policy" is "to allow the dreamers to stay"). The current administration voluntarily continued DACA for more than eight months before rescinding it. Pet. App. 115a-16a. And when the district court issued the preliminary injunction, the government did not seek a stay of the district court's rulings—not from the district court, or the court of appeals, or this Court—even though it recognizes that a

stay pending appeal is the appropriate mechanism for addressing any claim of harm. Pet. 12.[5]

Instead, the Secretary of Homeland Security stated publicly—and repeated to Congress under oath—that removal of DACA recipients would "not [be a] priority of enforcement for ICE" "should the program end." Interview by John Dickerson with Kirstjen Nielsen, Sec'y, Dep't of Homeland Sec., "CBS This Morning" (Jan. 16, 2018), https://tinyurl.com/y8ekmzar; *see Oversight of the United States Department of Homeland Security: Hearing before the S. Comm. on the Judiciary*, 115th Cong. (2018). After the petition was filed, the President stated that he "certainly [has] the right" to keep DACA in place after March 2018 (contrary to the petition's argument that DACA is unlawful), and that he very well "might" do so. *See* CNN.com, *READ: President Trump's Full Exchange With Reporters*, https://tinyurl.com/ydcafdtr (Jan. 24, 2018) (*CNN Statement*). These statements "blunt [the government's] claim of urgency," *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317-18 (1983) (Blackmun, J., in chambers), and "vitiate[] much of the force" of its claimed harm, *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers).

The truth is that the government has no demonstrable basis for demanding "immediate determination" by this Court because the continuation of DACA causes no concrete harm to anyone. DACA recipients are heavily vetted to ensure they pose no "threat to

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[5] The government's stated reason for not seeking a stay makes little sense; a stay would not cause "abrupt shifts in the enforcement of the Nation's immigration laws," Pet. 12, unless the government was doing the shifting.

national security or public safety"; have not been convicted of a felony, or multiple or significant misdemeanors; and fulfill educational and work-related criteria. Pet. App. 9a. Their continued presence is not an irreparable injury to the United States that warrants short-circuiting appellate review.

3. The government's backup argument is that granting certiorari now is needed to avoid "embroil[ing] [it] in protracted litigation." Pet. 12-13. But the only imminent litigation that the government will face if this Court denies the petition is an ordinary appeal. And with the court of appeals' expedited briefing schedule, there is no reason to believe that litigation will be "protracted."

Piggybacking off its prior mandamus petition, the government invokes "the risk [of] onerous discovery and administrative-record orders" if normal appellate proceeds. Pet. 13. But the district court and court of appeals have taken this Court's mandamus ruling to heart. *See* Pet. App. 25a. Discovery has been stayed, Dkt. 244, and both sides have advised the district court that they are willing to maintain that stay pending appeal, Dkt. 249. With respect to the administrative record, the court of appeals instructed the district court not to compel disclosure of privileged documents before the government can contest that outcome and encouraged the district court to certify interlocutory appeals where appropriate to obtain prompt resolution of those issues. C.A. No. 17-72917, Dkt. 45. The parties and the district court are following that approach. Dkt. 249. The government's complaints are baseless.

4. At the same time the Solicitor General claims an urgent need for resolution by this Court, Congress and the President are pursuing a political solution

that will permit the Dreamers to remain in the United States. *See, e.g.*, *Trump Pressures Democrats to Bargain on Immigration*, N.Y. Times, Feb. 1, 2018, https://tinyurl.com/ydb2hcn9. This Court sometimes "choose[s] not to resolve [a] question" on writ of certiorari when "Congress itself can eliminate [the] conflict" between the parties. *Braxton v. United States*, 500 U.S. 344, 347-48 (1991); *see Volpe v. D.C. Fed'n of Civic Ass'ns*, 405 U.S. 1030, 1030 (1972) (Burger, C.J., concurring in denial of certiorari) (noting "legislative action" could effectively preclude review of questions presented to the Court before it would be able to decide the case).

Here, the government's petition would potentially preempt the political process (in addition to preempting the work of the court of appeals). And it would do so in contravention of the President's statements that his policy is to protect the Dreamers, that he favors a political resolution of their status, and that he has the "right" to keep DACA in place and (absent a political solution) may well do so. *See* Compl. ¶ 47; *CNN Statement*; Donald J. Trump (@realDonaldTrump), Twitter (Jan. 22, 2018, 8:30 p.m.), https://twitter.com/realdonaldtrump/status/ 955658992793149440 ("I want a big win for everyone, including Republicans, Democrats and DACA ... Should be able to get there. See you at the negotiating table!"). This is an "unusual" case in which "the ultimate authority over the agency, the Chief Executive, publicly favors the very program the agency has ended." Pet. App. 65a.

C. This Dispute Does Not Raise An Issue Of "Imperative Public Importance" Warranting Immediate Review

1. The parties' dispute at this stage is not one of "imperative public importance." Sup. Ct. R. 11. Certainly this case is important, especially for the individual respondents here, who have relied on the promise of DACA to make decisions about their education, jobs, and families. *See*, *e.g.*, Compl. ¶¶ 37, 41, 48-98.

But in this posture there is no imminent crisis that warrants parting with the tried-and-true appellate process. The district court has entered a preliminary injunction freezing DACA while the lower courts work diligently to resolve the parties' claims and Congress and the President work towards a political solution. Moreover, the narrow issues presented—concerning APA review of the government's cursory justification for the rescission—have nothing in common with the issues that this Court has previously resolved on writ of certiorari before judgment.

2. Historically, "all public importance cases" in which the Court has granted certiorari before judgment involved just three types of circumstances: "the constitutionality of [an] Ac[t] of Congress," "foreign policy," or a threat to "the Court's institutional authority." James Lindgren & William P. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259, 289-97 (1986). These are questions that "touch fundamentally on the manner in which our Republic is to be governed." *Dames & Moore*, 453 U.S. at 659.

Of the four cases that the government cites, for example, three asked this Court to determine whether the Constitution grants the President extraordinary

powers—to suspend litigation against a foreign state to ensure compliance with this country's treaty obligations, *id.* at 661; to "take possession of and operate most of the Nation's steel mills" to "avert a national catastrophe" due to a wartime labor strike, *Youngstown*, 343 U.S. at 582; and to claim "absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances," *Nixon*, 418 U.S. at 706. In the fourth—the last time this Court granted certiorari before judgment in the court of appeals—this Court reviewed the constitutionality of the Sentencing Guidelines used to issue "more than 40,000 sentences" annually—an issue that without prompt resolution would have paralyzed the lower courts. *Mistretta*, 488 U.S. at 369. Each of these questions was so important and urgent that both sides of the dispute favored this Court's immediate intervention. *See id*. at 371; *Dames & Moore*, 452 U.S. at 932-33 (1981); *Nixon*, 418 U.S. at 686-87; *Youngstown*, 343 U.S. at 937.

The routine questions of administrative review presented here are not remotely comparable. The first question—interpretation of judicial review bars in the APA and INA—is a question of statutory interpretation, and plainly not an issue that "touch[es] fundamentally upon the manner in which our Republic is to be governed." *Dames & Moore*, 453 U.S. at 659. The second question—a challenge to a preliminary injunction—concerns whether a particular agency decision was arbitrary or capricious. The parties disagree about the reasons for the rescission, Pet. App. 55a-57a; whether those reasons are inadequate, legally erroneous, or pretextual; and whether the government considered all of the relevant factors, Dkt. 111 at 16-31. These are run-of-the-mill APA issues, raised in the context of a preliminary injunction reviewed for

abuse of discretion, not questions of "imperative public importance" necessitating immediate review.

3. The conceded importance of the issues presented should only *enhance*, rather than diminish, the need for lower court review. The critical question of whether 700,000 current Dreamers will be permitted to remain and earn a livelihood in the only country they have known since childhood "deserves for its solution all of the wisdom that our judicial process makes available." *Youngstown*, 343 U.S. at 938 (Burton, J., dissenting from certiorari before judgment). "The need for soundness in the result outweighs the need for speed in reaching it." *Id.* Respondents and—indeed, "[t]he Nation"—are therefore "entitled to the substantial value inherent in an intermediate consideration of the issue by the Court of Appeals." *Id.*

II. The Government's Merits Arguments Do Not Justify Certiorari Before Judgment

The government also argues that certiorari is warranted because "[t]he decision below is wrong." Pet. 15. But this Court does not sit as a "court of error correction," least of all as to the type of issues of first impression presented here. *Martin v. Blessing*, 134 S. Ct. 402, 405 (2013) (Alito, J., respecting the denial of certiorari). The government's merits arguments fail to demonstrate a compelling need for this Court's involvement at this stage.

A. The Government's Reviewability Arguments Are Insubstantial

The government first argues that the APA, 5 U.S.C § 701(a)(2), and a particular provision of the INA, 8 U.S.C. § 1252(g), preclude all judicial review of the Acting Secretary's decision to end the DACA program. Not so.

1. Section 701(a)(2) precludes APA review of agency action that is "committed to agency discretion by law." The government's argument rests on the premise that a "presumption of nonreviewability applies with particular force when it comes to immigration." Pet. 18. That premise is flatly wrong: This Court has consistently applied a "strong presumption in favor of judicial review of administrative action" in the immigration context. *INS v. St. Cyr*, 533 U.S. 289, 298 (2001); *see also, e.g.*, *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) ("[T]his Court applies a 'strong presumption' favoring judicial review of administrative action.") (citation omitted).

Section 701(a)(2) "is a very narrow exception" that is applicable only where "there is *no* law to apply," *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (citation omitted), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), meaning that "a court would have no judicially manageable standards … for judging how and when an agency should exercise its discretion," *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). This is not one of those rare instances where there is no law to apply. As the district court explained, "the new administration didn't terminate DACA on policy grounds"; it "terminated DACA over a point of law." Pet. App. 18a. Rather than arguing that the rescission rested on the Acting Secretary's discretion to determine DHS's enforcement priorities, the government now maintains that she had no choice but to terminate DACA due to its purported unlawfulness. *See* Pet. 30 n.8. "[D]etermining illegality is a quintessential role of the courts." Pet. App. 30a.

The government's backup argument—that the rescission was justified by litigation risk—likewise is reviewable. The agency abruptly changed position, and when that happens, courts may review the decision to see if the agency provided reasons to justify the change. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126-27 (2016); *see* Pet. App. 58a-60a. The government's "litigation-risk rationale," Pet. 26, is not one that depends on a "complicated balancing of a number of factors which are peculiarly within [DHS's] expertise" or an assessment whether the decision "best fits the agency's overall policies." *Chaney*, 470 U.S. at 831. And the decision to rescind DACA is a "major policy decision" that is "quite different from day-to-day agency nonenforcement decisions," and thus the "appropriate starting point" in such a case is the "APA presumption of reviewability." *Nat'l Treas. Emps. Union v. Horner*, 854 F.2d 490, 496 (D.C. Cir. 1988).

2. Section 1252(g) of Title 8 likewise does not bar judicial review here. By its text, that provision bars judicial review of three specific types of decisions or actions: those taken "to commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. § 1252(g). This Court has interpreted those provisions narrowly, explaining that judicial review is precluded only for those "three discrete actions." *AADC*, 525 U.S. at 482. This case involves none of them. This case is not a challenge to the government's decision to start the removal process against a particular person, or to adjudicate an individual's immigration case, or to actually remove an individual. It is a challenge to the decision to end the DACA program, not a challenge to an individual enforcement action.

The government attempts to avoid the plain text of Section 1252(g) by arguing that the rescission is an "ingredient" to the commencement of enforcement proceedings at some future date. Pet. 22. But as the district court recognized, Pet. App. 32a, this Court already rejected that argument when it explained that the three categories listed in Section 1252(g) are not a "shorthand" for "all claims arising from deportation proceedings." *AADC*, 525 U.S. at 482.

The government seizes on *AADC*'s statement that Section 1252(g) seems "designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations." Pet. 21-22. But the context makes clear that the statement referred only to decisions involving a specific individual whose removal proceedings had already commenced. The government has cited no case where Section 1252(g) has barred a policy challenge by a group of plaintiffs against whom the government has not even begun removal proceedings. And the courts of appeals have consistently cabined Section 1252(g) to the three circumstances enumerated and rejected its application to programmatic challenges. *See, e.g.*, *Wong v. United States*, 373 F.3d 952, 965 (9th Cir. 2004); *Texas*, 809 F.3d at 164. There is no imminent need for this Court to review the issue.

B. The Preliminary Injunction Ruling Does Not Warrant Immediate Review

The district court entered a preliminary injunction after making an initial assessment of the merits, assessing irreparable injury, and weighing the equities. Nothing about the court's decision—which is reviewed at this stage for abuse of discretion and upheld if it is a "close" call, *ACLU*, 542 U.S. at 664-65—necessitates immediate review.

1. The preliminary injunction is based on the district court's conclusion that respondents are likely to prevail on their claim that the rescission is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Here, the government has provided two justifications for DACA's rescission, both of which fail APA review.

a. The government's principal argument before this Court is that the Acting Secretary ended DACA because continuing the DACA program would have been unlawful. Pet. 31. That view is contrary to the government's long-standing position that deferred action programs are permissible, and so the agency was required to "provide a reasoned explanation for the change." *Encino Motorcars*, 136 S. Ct. at 2125. But the only legal analysis the Attorney General and Acting Secretary provided for their decision was a citation to the Fifth Circuit's decision about the DAPA program. Dkt. 64-1 at AR251; Pet. App. 115a. Before the district court, the government shifted its argument to litigation risk—an argument that, according to the government, did not depend on a showing that DACA is unlawful. *See* Dkt. 204 at 17; *see also* Pet. 8. And the government declined to defend the Fifth Circuit's ruling. *See* note 4, *supra*.

Even though the government had not made the argument that DACA is unlawful, the district court addressed that argument and correctly concluded that it is wrong. The district court reviewed the numerous authorities that have long justified deferred action programs. Pet. App. 42a-47a. The court then explained the reasons why the Fifth Circuit's decision

about DAPA does not apply to DACA.[6] In response, the government "ma[de] no effort" "to challenge any of the … reasons why DACA was and remains within the authority of the agency." *Id.* at 48a. Under the circumstances, the district court had ample basis to conclude that respondents are likely correct on this issue.

b. The government's principal argument before the district court, repeated in its petition, Pet. 8, 26, was that DACA's rescission was justified by litigation risk. But that rationale appears "[n]owhere in the administrative record." Pet. App. 56a. The reason "actually given" by the Attorney General and the Acting Secretary was "DACA's purported illegality"; neither the Attorney General nor the agency ever "consider[ed] whether defending the program in court would (or would not) be worth the litigation risk." *Id.* The government now finds a litigation-risk rationale in the Acting Secretary's statement that DACA should be "wound down in 'an efficient and orderly fashion.'"

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[6] In brief: First, the Fifth Circuit's procedural holding rested on the district court's factual finding that "DAPA would not genuinely leave the agency and its employees free to exercise discretion." *Texas*, 809 F.3d at 172-78. Here, by contrast, the district court found ample evidence of "discretionary denials of DACA applications." Pet. App. 49a. Second, the Fifth Circuit's substantive holding—that DAPA exceeded the government's statutory authority—rested in part on its determination that granting deferred action to alien parents of U.S. citizens conflicted with INA provisions that gave them an alternate pathway to lawful presence. Pet. App. 54a. DACA, in contrast, fills a gap in the statute by indicating how the government exercises its prosecutorial discretion with respect to a class of non-citizens whose fate was never directly decided by Congress. *Id.* at 58a. Third, DAPA was challenged before it took effect, whereas DACA has been in place for more than five years, meaning that any legal challenge to DACA would have to overcome the significant reliance interests that have developed over those years, and the doctrine of laches. Pet. App. 57a.

Pet. 26 (quoting Pet. App. 115a). But that decision was made *in light* of the decision to rescind DACA and was never offered as a *reason* for rescinding it. Pet. App. 115a; *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (APA review is limited to the "grounds invoked by the agency").

In any event, the district court correctly determined that the government's post hoc "litigation risk" justification is arbitrary and capricious. Rescinding DACA makes no sense as a way to avoid litigation given the predictable eventuality that the rescission would and has engendered further litigation. "At most, the [government] deliberately traded one lawsuit for another." *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015). Further, the government failed to consider the "differences between DAPA and DACA that might have led to a different result" in any litigation than in *Texas*. Pet. App. 57a; *see* note 6, *supra*. And the government did not weigh any perceived litigation risks against countervailing interests that could have warranted defending DACA. Pet. App. at 58a-60a. Those interests include the "serious reliance interests" by DACA recipients, which are precisely the kinds of interests that an agency "must … tak[e] into account" before changing position. *Encino Motorcars*, 136 S. Ct. at 2126 (citation omitted). The paucity of the government's explanation for its change in position meant the district court had ample basis for believing that respondents' claims had sufficient merit to justify preliminary injunctive relief.

2. The preliminary injunction also rested on the district court's assessment of irreparable injury and weighing of the equities. The court rightly concluded

that respondents—especially the individual DACA recipients—would be irreparably harmed if the DACA program were permitted to expire during the pendency of this litigation. Pet. App. 62a-64a. The court also found that the public interest favors temporary relief to freeze the DACA program. *Id.* at 64a-66a. As the President himself explained, "[no]body really want[s] to throw out good, educated and accomplished young people who have jobs, some serving in the military." *Id.* at 65a (quoting President's statement).

Tellingly, the government says nothing about these factors. Combined with the district court's preliminary assessment of the merits, they sufficiently justify the preliminary injunction. The government has shown no error, let alone error worthy of upending the normal process of appellate review and upsetting a political process that may soon provide a long-term solution for the Dreamers.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

NICOLE A. SAHARSKY
MATTHEW S. ROZEN
HALEY S. MORRISSON
GIBSON, DUNN & CRUTCHER LLP
1050 CONNECTICUT AVE., N.W.
WASHINGTON, DC 20036
(202) 955-8500

MARK D. ROSENBAUM
JUDY LONDON
PUBLIC COUNSEL
610 SOUTH ARDMORE AVENUE
LOS ANGELES, CA 90005
(213) 385-2977

LUIS CORTES ROMERO
BARRERA LEGAL GROUP, PLLC
19309 68TH AVENUE SOUTH,
SUITE R102
KENT, WA 98032
(253) 872-4730

ERWIN CHEMERINSKY
UNIVERSITY OF CALIFORNIA,
BERKELEY SCHOOL OF LAW*
215 BOALT HALL
BERKELEY, CA 94720
(510) 642-6483

THEODORE J. BOUTROUS, JR.
ETHAN D. DETTMER
KIRSTEN GALLER
JONATHAN N. SOLEIMANI
KELSEY J. HELLAND
GIBSON, DUNN & CRUTCHER LLP
333 SOUTH GRAND AVENUE
LOS ANGELES, CA 90071
(213) 229-7000
TBOUTROUS@GIBSONDUNN.COM

LAURENCE H. TRIBE
HARVARD LAW SCHOOL*
1575 MASSACHUSETTS AVENUE
CAMBRIDGE, MA 02138
(617) 495-1767

LEAH M. LITMAN
UNIVERSITY OF CALIFORNIA,
IRVINE SCHOOL OF LAW*
401 E. PELTASON DRIVE
IRVINE, CA 92697
(949) 824-7722

Counsel for Respondents Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn

**Affiliation for identification purposes only*

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