No. 18-1469

IN THE

Supreme Court of the United States

U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,

Petitioners,

v.

CASA DE MARYLAND, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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OPPOSITION TO PETITIONERS' MOTION TO EXPEDITE

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For the reasons given below, Respondents respectfully oppose Petitioners' motion for expedited consideration of their petition for *certiorari*. Petitioners have identified no circumstance whatsoever that would justify granting their request for an extraordinary departure from this Court's normal procedures; rather, Petitioners' motion is, in effect, a plea to this Court to rule on petitions in parallel cases. Indeed, Petitioners themselves concede in their motion that there is no exigency to ruling on this petition. This Court should deny Petitioners' request for expedition.

STATEMENT

1. This case concerns Petitioners' announcement on September 5, 2017 that they were rescinding the Deferred Action for Childhood Arrivals (DACA) program. DACA was a program announced in 2012 that has provided approximately 800,000 individuals who, through no fault of their own, were brought to this country as children with both protection from deportation and the opportunity to seek work authorization in the only home they have ever known.

2. Respondents are 16 individuals who currently have or are eligible to apply for DACA status and nine immigrant rights organizations from across the United States, many of which count DACA beneficiaries among their members and provide DACA application assistance to eligible individuals. In October 2017, Respondents filed suit in federal district court in Maryland, alleging that the rescission of DACA violated the Administrative Procedure Act (APA) and various constitutional provisions.

3. The District Court concluded that the dispute was justiciable and granted partial summary judgment to Respondents and entered a permanent injunction requiring Petitioners to comply with restrictions promulgated in 2012 that safeguard DACA applicant data from being shared with immigration enforcement authorities. The District Court granted summary judgment to Petitioners on the remaining claims, concluding that the rescission of DACA was not arbitrary or capricious and dismissing the constitutional claims without permitting any discovery or addressing Respondents' declarations under Fed. R. Civ. P. 56(d) requesting fact discovery.

4. In November 2018, Petitioners petitioned for *certiorari* before judgment of three other District Court decisions that reached contrary results -- that the rescission of DACA was or likely would be proven to be arbitrary and capricious. *See Department of Homeland Security v. Regents of the University of California*, No. 18-587, *Trump v. NAACP*, No. 18-588, and *Nielsen v. Vidal*, No. 18-589.

5. While seeking *certiorari* before judgment in the other DACA cases, Petitioners decided not to petition for *certiorari* in this case and allowed the case to proceed before the Fourth Circuit.

6. On cross-appeals, on May 17, the Fourth Circuit: (i) reversed and vacated the District Court's injunction regarding the information sharing provisions; (ii) reversed the District Court's conclusion that the rescission of DACA was legal, concluding that the "decision to rescind DACA was arbitrary and capricious and must

be set aside"; and (iii) remanded the decision for further proceedings, *i.e.,* entry of final judgment for Respondents on the APA claim. The Fourth Circuit also affirmed the District Court's ruling that the dispute was justiciable, and it vacated the District Court's judgment for Petitioners on Respondents' constitutional claims, concluding it was "unnecessary to address Plaintiffs' constitutional challenge" or whether the District Court misapplied Fed. R. Civ. P. 56.

7. On May 24, 2019, Petitioners petitioned for *certiorari* and sought expedited consideration of that petition.

ARGUMENT

Petitioners identify no compelling need for the Court to expedite this case, or to order a brief in opposition in 10 calendar days.

1. This petition is not urgent. The petition presents identical questions to the Petitions for Certiorari before Judgment filed in *Department of Homeland Security v. Regents of the University of California*, 18-587, *Trump v. NAACP*, 18-588, and *Nielsen v. Vidal*, 18-589, as well as the supplemental petition filed in *DHS v. Regents*. Petitioners filed each of these petitions in November 2018. Petitioners have not sought a stay of any of the injunctions entered by the district or appellate courts that have ruled in *Regents*, *NAACP*, or *Vidal*.

2. Petitioners' argument for expedition is premised on their assumption that this Court will grant *certiorari* in *Regents*, *NAACP*, and *Vidal* before the end of term, and that they will need to coordinate briefing on those matters. Indeed,

Petitioners' motion is little more than a vehicle to convey to the Court that Petitioners consider the timing of such a grant to be "critical." Mot. 9. But Petitioners do not explain why the Court need grant *certiorari* before summer recess as to any of these petitions.

3. Nor do Petitioners explain why the Court would need full briefing on this petition before it decides whether to grant *certiorari* as to *Regents*, *NAACP*, and *Vidal*. Indeed, Petitioners concede that expedited consideration of this petition is not necessary. *See* Mot. 9-10 (acknowledging that "the Court could allow briefing on this petition to proceed on the ordinary schedule, with a view to holding this petition while the Court resolves any of the other pending cases…."). Petitioners agree that *if* the Court grants *certiorari* in *Regents*, *NAACP*, or *Vidal*, it can later decide whether it should do the same for this case.

4. Petitioners have failed to demonstrate that a concrete harm will occur pending this Court's standard consideration of the petition. The status quo that the Government itself created continues, as it has since 2012, with no demonstrable injury to anyone. The only "harm" asserted by Petitioners is the alleged "violation of federal law being committed" by the individuals brought to this country as children who currently have DACA status. Mot. 8. But no court to consider the issue has held that DACA is unlawful. Because there is no violation of federal law, there is and can be no harm to Petitioners.

5. Relatedly, there is no exigency because there is no conflict among lower courts on these issues. All four decisions (the Fourth and Ninth Circuits and the District Court decisions from New York and the District of Columbia) have reached the same conclusion -- that Petitioners' decision to rescind DACA is reviewable and was, or likely would be proven to be, arbitrary and capricious in violation of the APA. Expedited briefing, therefore, is not necessary to resolve a fundamental conflict of the lower courts.

6. Further, there is at least one benefit to hearing this petition on a normal schedule: the Second and D.C. Circuits are actively considering these issues and likely will issue opinions shortly. Oral argument in the Second Circuit was on January 26, 2019, and in the D.C. Circuit was on February 22, 2019. There is a "value to letting important legal issues 'percolate' throughout the judicial system," *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1093 (D.C Cir. 1992), and with a short deferral, the amount of percolation could double. As this Court has recognized, there is a value in litigation involving the federal government in "permitting several courts of appeals to explore a difficult question before [the Supreme Court] grants certiorari" and there will be more "thorough development of legal doctrine by allowing litigation in multiple forums." *United States v. Mendoza*, 464 U.S. 154, 160, 163 (1984). That is why the Court has granted *certiorari* before judgment so rarely.

7. Finally, as Petitioners have failed to meet their burden of showing exigencies requiring expedition, granting their requested relief would be unfair to

Respondents. Respondents are actively considering whether to file a conditional cross-petition regarding certain aspects of the Fourth Circuit decision, most notably Section IV of the decision vacating the injunction preventing Petitioners from sharing DACA applicant information with immigration enforcement authorities. Petitioners' motion provides no justification for denying Respondents the time this Court's Rules allow to file a cross-petition.

8. In addition to addressing these issues, Respondents also plan to explain in their brief in opposition to the petition why, in light of the Fourth Circuit's conclusion that it need not address Respondents' constitutional challenges or the arguments regarding Respondents' right to seek discovery pursuant to Fed. R. Civ. P. 56, granting *certiorari* would not permit this Court to address all relevant claims at issue in this matter, as asserted by Petitioners. Given that consideration of the petition would not address all claims at issue, there is no need to expedite review.

9. The Clerk has requested this brief address whether the deadline for responses to the petition could, as a practical manner, be tightened. There is simply no exigency justifying Petitioners' insistence that Respondents respond to the petition within just 10 days. To the extent the Court is inclined to consider the petition before the end of term thereby necessitating a shortened response time, Petitioners request a response time no earlier than June 11, 2019.

Respectfully submitted,

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MAY 29, 2019