No. 17-1003

In the Supreme Court of the United States

U.S. 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 THE STATES OF CALIFORNIA, MAINE, MARYLAND, AND MINNESOTA, THE CITY OF SAN JOSE, THE COUNTY OF SANTA CLARA, AND SEIU LOCAL 521

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QUESTION PRESENTED

Whether this Court should grant certiorari before judgment to consider whether the district court abused its discretion by entering a preliminary injunction partially suspending petitioners' termination of the Deferred Action for Childhood Arrivals program.

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JURISDICTION

Since the date of the petition, the court of appeals has granted petitioners' request for permission to appeal the adverse rulings certified by the district court. *See* C.A. No. 18-80004 Dkt. 11. Respondents thus agree that the court of appeals has jurisdiction over petitioners' appeal of the preliminary injunction under 28 U.S.C. § 1292(a)(1), and now has jurisdiction over petitioners' appeal of the certified rulings under 28 U.S.C. § 1292(b). This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

STATEMENT

1. This case involves petitioners' decision to terminate the Deferred Action for Childhood Arrivals program (DACA). Deferred action is a "regular practice" under federal immigration law, entailing a decision that "no action will thereafter be taken to proceed against an apparently deportable alien." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (*AADC*). It has been recognized by Congress and by this Court. *See, e.g.*, 8 U.S.C. § 1227(d)(2); *AADC*, 525 U.S. at 484. Recipients of deferred action may apply for work authorization and receive other benefits. *See* 8 C.F.R. § 274a.12(c)(14) (work authorization); *id.* § 214.14(d)(3) (no accrual of "unlawful presence" for purposes of re-entry bars); 28 C.F.R. § 1100.35(b)(2) (similar).

Established in 2012, the DACA program applies to "certain young people who were brought to this country as children and know only this country as home." Pet. App 95a-96a; *see id.* at 96a (listing criteria). It recognizes that immigration laws are not "designed to remove productive young people to countries where they may not have lived or even speak the language." *Id.* at 97a. Under the program, eligible individuals

may receive protection from removal for renewable two-year periods, obtain permission for foreign travel, and enjoy other benefits associated with deferred action. *Id.* at 12a. In September 2017 there were nearly 700,000 active DACA beneficiaries nationwide, with an average age of just under 24 years old. *Id.* at 13a. More than 90 percent of DACA recipients are employed, and 45 percent are in school. *Ibid.*

In 2014, the Office of Legal Counsel at the U.S. Department of Justice memorialized its advice that a general program such as DACA was legally sound so long as immigration officials "retained discretion to evaluate [its] application on an individualized basis." D.Ct. Dkt. 64-1 at 21 n.8.[1] Until recently, Executive Branch lawyers likewise argued consistently that DACA is "a valid exercise of the Secretary's broad authority and discretion to set policies for enforcing the immigration laws, which includes according deferred action and work authorization to certain aliens who, in light of real-world resource constraints and weighty humanitarian concerns, warrant deferral rather than removal." *E.g.*, Br. of United States as Amicus Curiae at 1, *Ariz. Dream Act Coal. v. Brewer* (9th Cir. No. 15-15307), 2016 WL 5120846 (filed Aug. 28, 2015).

In 2015, the Fifth Circuit upheld a preliminary injunction secured by Texas and other States against a separate program, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), on Administrative Procedure Act and other statutory grounds. *See Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015). This Court affirmed that judgment by an equally divided Court. *United States v. Texas*, 136

[1] Citations to the district court docket are to N.D. Cal. Case No. 17-cv-5211.

S. Ct. 2271 (2016) (per curiam). In defending DAPA, the United States argued that the court of appeals had "seriously misconstrued immigration law," because deferred action policies such as DAPA and DACA were lawful and consistent with "more than 50 years of settled practice." Br. of United States at 13, *United States v. Texas*, No. 15-674; *see id.* at 48-50, 60. While this Court's affirmance of the preliminary injunction suspended the implementation of DAPA pending further proceedings in that litigation, the injunction did not affect the operation of the original DACA program.

After the change in federal administrations in January 2017, the new administration initially continued the DACA program. In February 2017, for example, then-Secretary of Homeland Security John Kelly changed a number of immigration policies, but left DACA intact. Pet. App. 16a. In June 2017 the administration rescinded DAPA, but did not disturb DACA. *Ibid.* On the contrary, the President indicated that the "policy of [his] administration [was] to allow the dreamers [*i.e.*, DACA recipients] to stay." D. Ct. Dkt. 121-1 at 285.

Also in June, however, federal officials began discussing DACA with the Texas Attorney General's Office. D.Ct. Dkt. 124 at 80-82. On June 29, the Texas Attorney General and others wrote to Attorney General Sessions indicating that if the administration did not "phase out the DACA program" by September 5, Texas would amend its complaint in the ongoing DAPA proceedings to include a challenge to DACA. D.Ct. Dkt. 64-1 at 239. On September 4, Attorney General Sessions sent a one-page letter advising Acting Secretary of Homeland Security Elaine Duke that her Department should terminate DACA because it "was an unconstitutional exercise of authority by the Executive Branch." D.Ct. Dkt. 64-1 at 251. The letter

stated summarily that DACA "has the same legal and constitutional defects that . . . courts recognized as to" DAPA, and asserted that "it is likely that potentially imminent litigation would yield similar results with respect to DACA." *Ibid.*

On September 5, Attorney General Sessions announced the termination of DACA at a press conference. *See* D.Ct. Dkt. 1-3. The same day, Acting Secretary Duke issued a memorandum formally rescinding DACA. Pet. App. 109a-117a. Her stated reason was that "[t]aking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing [DAPA] litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated." *Id.* at 115a. She instructed her Department to stop accepting new DACA applications or applications for advance parole, and to accept renewal applications only until October 5, and only from individuals whose current deferred-action status would expire on or before March 5, 2018. *See id.* at 115a-116a.

2. The complaints in the five related cases at issue here allege, among other things, that petitioners' termination of DACA was arbitrary, capricious, or not in accordance with law, in violation of the Administrative Procedure Act. The parties filed cross-motions for dismissal and provisional relief on November 1, and the district court heard argument in mid-December. *See* D.Ct. Dkt. 49 at 2-4.[2] On January 9, the district court largely denied petitioners' motion to dismiss on threshold jurisdictional grounds and granted a limited preliminary injunction. Pet. App. 1a-70a. On January

[2] As the Court is aware, there has also been litigation over the proper scope of the administrative record and other related issues. *See In re United States*, 138 S. Ct. 443 (2017); *In re United States*, 875 F.3d 1200 (9th Cir. 2017); *see also infra* p. 14 & n.7.

12, the court ruled on petitioners' motion to dismiss various claims on the merits. *Id.* at 76a-94a.

a. The court first rejected (Pet. App. 26a-30a) petitioners' argument that the decision to rescind DACA was "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). It concluded that the decision, ending a general and substantial program on the stated premise that it was unlawful, had none of the characteristics of an unreviewable discretionary action described by this Court in *Heckler v. Chaney*, 470 U.S. 821 (1985), and other cases. *See* Pet. 28a-30a.

The court also rejected petitioners' argument that 8 U.S.C. § 1252(g) stripped it of jurisdiction to hear the case. Pet. App. 30a-33a. It recognized the "'strong presumption in favor of judicial review of administrative action'" (*id.* at 30a (quoting *INS v. St. Cyr*, 533 U.S. 289, 298 (2001))), and that this Court has construed section 1252(g) as a "narrow[]" provision applying "only to three discrete actions": the "'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders'" (*AADC*, 525 U.S. at 482; *see* Pet. App. 31a). The court concluded that section 1252(g) did not apply to the cases before it, which were all "brought prior to the commencement of any removal proceedings." Pet. App. 32a.[3]

The district court certified its rulings on these issues for interlocutory appeal. Pet. App. 70a.

b. Turning to respondents' request for provisional relief, the court applied the traditional four-factor test governing issuance of a preliminary injunction. Pet. App. 41a (citing *Winter v. Nat. Res. Def. Council Inc.*,

[3] The district court likewise rejected most of petitioners' arguments regarding Article III and prudential standing. Pet. App. 33a-41a. Petitioners have not sought review of those rulings in this Court.

555 U.S. 7, 20 (2008)). As to the first factor, the court concluded that respondents had shown a likelihood of success on their claim that the decision to rescind DACA was arbitrary, capricious, or not in accordance with law. *Id.* at 41a-62a.

The court first examined the stated explanation for rescinding DACA—that the program was unlawful. *See* Pet. App. 114a-115a. It noted the deep historical pedigree of deferred action programs (*id.* at 43a-45a), and the Office of Legal Counsel's 2014 opinion concluding that a program such as DACA was lawful so long as immigration officials retained discretion to evaluate applications on an individual basis (*id.* at 42a-43a). Reviewing the rescission memorandum and the proffered administrative record in light of that background, the court found nothing to support a conclusion that DACA was not "within the authority of the agency." *Id.* at 48a.

The court observed that "the main ground given by the Attorney General for illegality was the Fifth Circuit's decision in the DAPA litigation." Pet. App. 50a. As the court explained, however, that divided decision recognized that there were important differences between DAPA and DACA (*see id.* at 51a-52a), and although "some of the majority's reasons for holding DAPA illegal would apply to DACA," the interlocutory decision of a single court of appeals "was not a death knell for DACA" (*id.* at 54a). Viewing the matter in light of the weight of authority and historical practice, the court concluded that respondents are "likely to succeed on the merits of their claim that the rescission was based on a flawed legal premise and must be set aside." *Ibid.* (citing *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007)).

The district court next addressed the alternative rationale advanced by petitioners' counsel for the

decision to rescind DACA: that the decision was "a reasonable judgment call involving management of litigation risk and agency resources." Pet. App. 55a. The court concluded that this was a *post hoc* rationale, because the "Attorney General's letter and the Acting Secretary's memorandum can only be reasonably read as stating DACA was illegal and that, given that DACA must, therefore, be ended, the best course was 'an orderly and efficient wind-down process.'" *Id.* at 56a (emphasis omitted). The September 5 rescission memorandum "plainly presuppose[s] that DACA had to end and the only question was how." *Id.* at 57a.

Even assuming that the "litigation risk" rationale was genuine, however, the court concluded that any such reasoning was unlikely to withstand APA review. *See* Pet. App. 57a-62a. The memorandum and the documents in the administrative record revealed no consideration of "the *differences* between DAPA and DACA that might have led to a different result" in the Fifth Circuit. *Id.* at 57a. They contained no discussion of legal authority from other jurisdictions indicating that DACA was lawful (*id.* at 58a) and no analysis of whether the threatened suit would have overcome a laches defense (*id.* at 57a-58a). Moreover, the Acting Secretary did not weigh the risk of litigation against the costs of terminating the program, including interfering with "DACA's programmatic objectives" and upending "the reliance interests of DACA recipients." *Id.* at 58a (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126-2127 (2016)). And the "administrative record includes no consideration to the disruption a rescission would have on the lives of DACA recipients, let alone their families, employers and employees, schools and communities." *Id.* at 60a. In short, the Acting Secretary failed to offer any explanation sufficient to justify the abrupt and disruptive change in agency policy. *See id.* at 61a-62a.

The district court next considered the remaining factors of the preliminary injunction test. Pet. App. 62a-66a. It found that respondents had "clearly demonstrated that they are likely to suffer serious irreparable harm absent an injunction." *Id.* at 62a. Individual respondents would lose their work authorization and suffer other hardships. *Id.* at 62a-63a. And the States and other respondents would "face irreparable harm as they begin to lose valuable students and employees in whom they have invested," a loss that would "have a detrimental impact on their organization interests, economic output, public health, and safety." *Id.* at 63a.

As to the balance of the equities and the public interest, the court noted that an injunction would serve the public interest. It recognized that allowing DACA recipients to lose "their work authorizations and deferred action status" would, among other things, "tear authorized workers from our nation's economy and would prejudice their being able to support themselves and their families, not to mention paying taxes to support our nation." Pet. App. 65a. The court reasoned that those harms substantially outweighed the only hardship asserted by the petitioners, which was "interference with the agency's judgment" on whether to keep DACA in place. *Id.* at 65a-66a. That was especially true in view of the fact that the President himself had repeatedly expressed support for the policy. *Id.* at 65a.

Accordingly, the court entered a preliminary injunction partially preserving the status quo as to individuals who had already received deferred action. As to those existing recipients, the court required petitioners "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, including allowing DACA enrollees to renew their enrollments." Pet. App. 66a. It made clear, however, 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 petitioners "may take administrative steps to make sure fair discretion is exercised on an individualized basis for each renewal application." *Id.* at 66a-67a. It also emphasized that the Department of Homeland Security may "proceed[] 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." *Id.* at 67a.

c. In its separate order on January 12, the district court ruled on petitioners' motion to dismiss various claims under Rule 12(b)(6). Pet. App. 76a-94a. The court dismissed claims that the rescission of DACA should have been accomplished through notice-and-comment rulemaking and related claims under the Regulatory Flexibility Act (*id.* at 77a-80a), due process claims regarding the rescission of DACA (*id.* at 80a-84a), claims based on equitable estoppel (*id.* at 86a-88a), and certain equal protection claims (*id.* at 92a). It denied the motion to dismiss with respect to the claims that the rescission was arbitrary and capricious (*id.* at 77a), due process claims based on changes in DHS's policies regarding the sharing of information provided by DACA recipients (*id.* at 84a-86a), and equal protection claims based on discriminatory purpose (*id.* at 88a-92a). The court again certified a number of its rulings for interlocutory appeal. *See id.* at 94a.

3. Petitioners filed a notice of appeal on January 16 (Pet. App. 71a-75a), and both petitioners and

respondents filed unopposed petitions to proceed with interlocutory appeals on issues certified by the district court. The court of appeals granted the petitions and docketed the appeals on January 25. The next day, the court on its own initiative consolidated the appeals and set an expedited cross-appeal briefing schedule, directing petitioners to file their opening brief on or before February 13. C.A. No. 18-15068 Dkt. 21. Meanwhile, the district court has stayed discovery, D.Ct. Dkt. 244, and the parties have jointly proposed that the court stay petitioners' obligations to complete the administrative record pending an interlocutory appeal on that issue, D.Ct. Dkt. 249.[4]

ARGUMENT

This case involves none of the considerations that have in rare instances motivated this Court to grant certiorari before judgment. There is no genuine need for the Court to act urgently, such as there was when the military was poised to execute foreign saboteurs or the President had seized control of a substantial part of the private economy. The district court's preliminary injunction, partially preserving the status quo as to existing DACA beneficiaries, has substantially reduced the threat of harm to vulnerable individuals; and petitioners advance no credible argument that they will be harmed in the absence of immediate

[4] In response to a district court order inviting briefing "as to whether some narrowing" of the court's order requiring completion of the record might be appropriate, D.Ct. Dkt. 240, respondents advanced several proposals, including limiting the order to documents at the Department of Homeland Security and the Department of Justice and excluding White House documents that never left the White House, *see* D.Ct. Dkt. 242 at 1-2. Respondents also proposed an orderly process for resolving privilege disputes before disputed documents are publicly disclosed. *See id.* at 2-3.

review by this Court. Nor is there anything about petitioners' arguments, either on reviewability or on the merits of the district court's decision to enter a preliminary injunction, that would justify an extraordinary departure from the usual course of judicial proceedings.

I. THIS IS NOT AN APPROPRIATE CASE FOR CERTIORARI BEFORE JUDGMENT

This Court will grant a petition for certiorari before judgment "only upon a showing 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. Even in important and time-sensitive cases, the exercise of this power by the Court is "an extremely rare occurrence." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers). That customary reticence is especially appropriate where it is apparent "that the Court of Appeals will proceed expeditiously to decide [the] case." *United States v. Clinton*, 524 U.S. 912 (1998); *see Aaron v. Cooper*, 357 U.S. 566, 567 (1958).

Here, the parties and the courts below have already acted to allow prompt review by the court of appeals. That court has agreed to review the issues certified by the district court, consolidated those issues with petitioners' appeal of the preliminary injunction, and set an expedited briefing schedule. C.A. No. 18-15068 Dkt. 21. In past proceedings in this case, and in recent appeals of other preliminary injunctions regarding executive actions, the court of appeals has proceeded expeditiously. There is no reason to think there will be any delay in the current proceedings.

Moreover, this case is not like those few the Court has previously deemed to satisfy the "very demanding standard" of Rule 11. *Mount Soledad Mem'l Ass'n v. Trunk*, 134 S. Ct. 2658, 2659 (2014) (Alito, J., statement respecting denial of certiorari before judgment); *cf.* Pet. 14-15. In *Ex parte Quirin*, 317 U.S. 1, 6 (1942), for example, the Court considered the legality of a military commission trial of German saboteurs at the outset of World War II. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952), the Court reviewed the constitutionality of President Truman's order directing the federal government to take possession of most of the steel mills in the United States in the middle of the Korean War. In *United States v. Nixon*, 418 U.S. 683, 686 (1974), the Court addressed questions of presidential confidentiality and executive privilege in the midst of the Watergate scandal. And in *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981), in the wake of the Iran hostage crisis, the Court considered a suit to nullify various presidential actions, in anticipation of a fast-approaching deadline after which "Iran could consider the United States to be in breach of" a critical executive agreement between the two nations.

There is no such emergency here. Since 2012, the DACA program has allowed hundreds of thousands of young people to receive deferred action, work authorization, and other benefits. Pet. App. 9a-13a. The district court's preliminary injunction only partially and temporarily restores the situation that existed prior to petitioners' abrupt decision to terminate the program—and only for individuals who had already received deferred action under DACA. *See id.* at 66a-67a. Petitioners are entitled to a prompt appeal; but there is no imminent deadline posing a critical threat

to the public interest of the sort that might justify bypassing the normal channels for that review.[5]

On occasion, the Court has granted certiorari before judgment because of "disarray" among lower courts on an issue that required immediate, uniform resolution. *Mistretta v. United States*, 488 U.S. 361, 371 & n.6 (1989) (constitutionality of the Sentencing Guidelines used in all federal criminal cases); *see also Dames & Moore*, 453 U.S. at 660. Here there is no disarray. The two district courts that have examined petitioners' threshold arguments for dismissal in this specific context have both rejected them. Pet. App. 26a-33a; *Batalla Vidal v. Duke*, 2017 WL 5201116, at *8-13 (E.D.N.Y. Nov. 9, 2017).[6] And no other court has yet ruled on whether the merits of respondents' claims and other factors support the entry of a preliminary injunction.

Petitioners correctly recite the demanding standard for certiorari before judgment (Pet. 13-14), but their assertion that this case satisfies that standard

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[5] Petitioners now argue that "[f]rom the start of these suits, all parties involved have agreed that time is of the essence." Pet. 14. But just a few weeks ago, while asking this Court to stay aspects of this case pending disposition of a petition for mandamus or certiorari, they argued that there was no pressing need to resolve the case before the March 5 deadline for terminating DACA because that date would "not mark a watershed of expirations," and "some recipients" had grants of deferred action that would not expire until "as late as 2020." Stay Reply at 15 & n.6, *In re United States*, No. 17A570 (Dec. 7, 2017).

[6] What is more, the Fifth Circuit's decision regarding DAPA in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015)—on which petitioners otherwise rely so heavily (*see* Pet. 26-29)—squarely rejected essentially the same arguments based on *Heckler v. Chaney* and 8 U.S.C. § 1252(g). *See* 809 F.3d at 163-170; *see also* Texas Amicus Br. 23-26.

relies on considerations that would apply to any number of cases every year. Many cases involve important and time-sensitive disputes as to which litigants could surely benefit from the clarity and certainty that only this Court can ultimately provide. *See id.* at 14-15. In almost all those cases, litigants nonetheless endure the "delay" involved in presenting their arguments to the courts of appeals, allowing those courts to consider the issues and render decisions, and then seeking this Court's review "in the ordinary course." *Id.* at 14. That is true even of federal parties, and even when a district court has enjoined enforcement of an important statute, program, or executive action. *See, e.g.*, *Trump v. Hawaii*, No. 17-965 (cert. granted Jan. 19, 2018); *United States v. Texas*, 136 S. Ct. 2271 (2016). It is true even when controversial government actions have prompted parallel litigation in different forums. *Compare* Pet. 15 *with, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015), *and Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 541 (2012). And it is true even when, during the course of litigation, the parties and the lower courts might have to grapple with disputes over matters such as privilege claims or the proper scope of an administrative record. *See* Pet. 15.[7] Petitioners have made no persuasive

[7] In this case, the district court has now stayed all discovery, and the parties have agreed that petitioners' obligations to complete the administrative record should also be stayed pending an interlocutory appeal of the district court's order on the scope of that record. The district court invited the parties to present proposals for narrowing that order, and is currently considering respondents' suggestions. *See supra* n. 4; *see also In re United States*, 877 F.3d 1080 (9th Cir. 2017) (directing the district court to "stay its order requiring completion of the administrative record" until ruling on threshold arguments for dismissal, to "consider arguments as to whether some narrowing of its order . . . is necessary and appropriate," and to consider certifying issues for appeal under 28 U.S.C. § 1292(b)).

showing that this case is one of the very few in which this Court should instead become the appellate forum of first resort.

II. THE DISTRICT COURT'S RULINGS PROVIDE NO BASIS FOR IMMEDIATE REVIEW

Petitioners devote most of their effort to attacking the district court's decisions on the merits. Pet. 15-32. This brief in opposition is not the place to respond to those arguments at length. We answer briefly, however, in order to make clear that petitioners' merits arguments do not themselves provide any basis for their extraordinary request for certiorari before judgment.

A. The Decision to Rescind DACA Is Subject to Judicial Review

Petitioners' threshold arguments for dismissal have been rejected by every lower court to consider them in this or a similar context—including the Fifth Circuit decision in the *Texas* case that (as petitioners otherwise emphasize) this Court affirmed by an equally divided vote.

1. Section 1252(g) of Title 8 does not strip the courts of jurisdiction to review petitioners' decision to terminate DACA. *See* Pet. 21-24. In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (*AADC*), this Court rejected the "unexamined assumption that § 1252(g) covers the universe of deportation claims." *Id.* at 482. Instead, it "applies only to three discrete actions": a "'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders." *Ibid.* As the district court properly concluded, petitioners' decision to end the DACA program is not any of those actions. Pet. App. 31a-32a.[8]

[8] Additionally, petitioners offer no explanation why section

Petitioners argue that the termination of DACA is "a step toward the commencement of removal proceedings." Pet. 23; *see id.* at 22 ("ingredient in" commencement); *see* Pet. App. 32a. But in *AADC*, this Court made clear that the narrow phrasing of section 1252(g) is not just "a shorthand way of referring to all claims arising from deportation proceedings." 525 U.S. at 482. The provision does not apply, for example, to "decisions to open an investigation" or "to surveil the suspected violator." *Ibid.* An ultimate decision to grant or deny deferred action to a particular individual might be subject to section 1252(g). *See* Pet. 22. But petitioners identify no support for their theory that its limitations apply to challenges to broad programs or policies involving deferred action. Both district courts that have considered the issue in this specific context have rejected that theory. Pet. App. 30a-33a; *Batalla Vidal*, 2017 WL 5201116, at *12-13. So did the Fifth Circuit's decision in the DAPA litigation. *Texas*, 809 F.3d at 164-165; *see also* Texas Amicus Br. 23-26. While petitioners are free to present the argument in the Ninth Circuit, it provides no justification for immediate review here.

2. Nor are petitioners correct (Pet. 16-21) that their decision to terminate DACA is one "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). That is a "very narrow exception," *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), to the "strong presumption that

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1252(g) would bar judicial review of claims by the States and other plaintiffs that are bringing claims on their own behalf, not "on behalf of any alien." 8 U.S.C. § 1252(g); *see, e.g.*, *Texas*, 809 F.3d at 164-165 (section 1252(g) did not apply to state suit challenging DAPA because "the states are not bringing a 'cause or claim by or on behalf of any alien'"); *Batalla Vidal*, 2017 WL 5201116, at *13 (same with respect to state suit challenging DACA termination).

Congress intends judicial review of administrative action," *Traynor v. Turnage*, 485 U.S. 535, 542 (1988).[9] The district court correctly concluded that it does not apply here. Pet. App. 26a-30a.

Petitioners liken their termination of DACA to discretionary agency actions such as the one at issue in *Chaney*, which involved a decision not to initiate enforcement proceedings. Pet. 16-17. Those decisions are unreviewable because, among other things, they "require 'a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise,'" such as how best to direct agency resources and what activities suit the agency's policy goals. *Id.* at 16 (quoting *Chaney*, 470 U.S. at 831). But the explanation petitioners gave for ending DACA involved no balancing of resource concerns or policy considerations. The September 5 rescission memorandum makes clear (Pet. App. 115a)—and petitioners repeatedly emphasize (Pet. I, 6, 8, 12, 16, 26, 31)—that the Executive Branch chose to frame the termination as legally compelled. Petitioners insist that they *lacked* discretion to maintain DACA, because the Attorney General and the Acting Secretary had concluded that the program was "unlawful." *Id.* at 31.

Petitioners' termination of DACA thus bears no resemblance to an agency's discretionary decision not to undertake particular enforcement actions, *see Chaney*, 470 U.S. at 823, 831-835, or not to reconsider a prior decision, *see ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 277-281 (1987), or about how to spend a lump-sum appropriation, *see Lincoln v. Vigil*, 508 U.S. 182, 192-194 (1982). *Cf.* Pet. 16. Those decisions are

[9] Despite petitioners' suggestion to the contrary (Pet. 18), this Court has "consistently applied" the presumption in favor of judicial review in the immigration context, as in others. *Kucana v. Holder*, 558 U.S. 233, 251 (2010).

not analogous to petitioners' elimination—based on their own assertion of illegality—of an entire program providing a channel and framework for individualized deferred action decisions for a defined category of potential applicants. Moreover, as the district court recognized (Pet. App. 30a), where the sole stated basis for the termination decision was a legal one, this is not a case where there is no "'law to apply.'" *Chaney*, 470 U.S. at 834.[10]

Once again, the district court's rejection of this threshold argument is consistent not only with the only other decision addressing the point with respect to the termination of DACA, but also with the Fifth Circuit's rejection of a similar contention in the DAPA case. *See Batalla Vidal*, 2017 WL 5201116, at *9-12; *Texas*, 809 F.3d at 165-170. There is no basis for immediate review.

B. The District Court Properly Entered A Preliminary Injunction

There is likewise nothing extraordinary about the district court's preliminary injunction ruling that could justify immediate review by this Court. Agency action must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The agency must "'examine the relevant data and articulate a satisfactory explanation for its action,'" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009)—one that is "based on consideration of the relevant factors" and

[10] Agency decisions that have traditionally been viewed as unreviewable action do not "become[] reviewable" when "the agency gives a 'reviewable' reason" for the action. *Locomotive Eng'rs*, 482 U.S. at 283; *see* Pet. 21. But there is no tradition of viewing the creation or termination of an entire program regarding deferred action as unreviewable. *See Texas*, 809 F.3d at 165-170; *Batalla Vidal*, 2017 WL 5201116, at *9-12; Pet. App. 26a-30a.

does not "fail[] to consider an important aspect of the problem," *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 43 (1983). It must also "supply a reasoned analysis for [a] change" in agency position. *Id.* at 42; *see Fox Television*, 556 U.S. at 516; *id.* at 535-537 (Kennedy, J., concurring). Applying that standard, the district court correctly concluded that respondents are likely to succeed on their claim that petitioners' decision to rescind DACA was arbitrary and capricious. The court did not abuse its discretion in holding that a preliminary injunction was appropriate here based on that conclusion and its weighing of the equities.

1. Petitioners contend that the decision to terminate DACA was based on a legal determination that continuing the program "would itself have been unlawful." Pet. 31; *see* Pet. App. 115a. But neither the memorandum rescinding DACA nor the Attorney General's one-page letter underlying it offers any adequate explanation for that change in the government's position. *Cf. Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.").

The only authorities cited by the memorandum are the decisions in the *Texas* litigation and Attorney General Sessions' one-page letter (Pet. App. 111a-115a), which itself relies only on the *Texas* decisions (D.Ct. Dkt. 64-1 at 251). *See also* Pet. I, 5, 25-29, 32. Those decisions affirmed a preliminary injunction based in part on a conclusion that the Texas plaintiffs were likely to succeed in an APA challenge to DAPA. *Texas*, 809 F.3d at 146; *but see id.* at 188-219 (King, J., dissenting).[11] But an interlocutory decision by one court

[11] Those plaintiffs also sought to enjoin "expanded DACA" (*i.e.*, a

of appeals does not resolve the legality of a federal program—let alone that of a different program not directly before the court. Nor does this Court's affirmance of such a decision by an equally divided vote. *See, e.g.*, *Neil v. Biggers*, 409 U.S. 188, 192 (1972). That is particularly true where, as here, the decision only sustained the grant of a preliminary injunction—meaning that an unexplained affirmance could have been based on a wide range of prudential, equitable, or legal factors. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

The rescission memorandum and the Attorney General's letter include no discussion of the considerations supporting the Executive Branch's prior conclusions that DACA and similar programs are lawful. As the district court explained, those prior conclusions were correct. *See* Pet. App. 42a-48a. At a minimum, it was arbitrary and capricious for petitioners to reach a new and different conclusion about the legality of DACA without explaining why they had changed their minds. For example, neither the Acting Secretary nor the Attorney General addressed the material differences between DACA and DAPA (*see id.* at 50a-54a), or the fact that the Fifth Circuit's *Texas* decisions (and this Court's unelaborated affirmance) involved only a

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2014 decision to broaden eligibility criteria and expand the period of deferred action from two to three years). *See* Pet. 25. The Fifth Circuit addressed expanded DACA only by specifying that it was including it in the term "DAPA" for purposes of its opinion. *Texas*, 809 F.3d at 147 n.11. The Fifth Circuit's decision did not pertain to the legality of the original DACA program, at issue here.

preliminary assessment of the merits and consideration of equitable factors relevant to interim relief.[12]

Petitioners now argue at some length about why the Fifth Circuit's decision should be viewed as controlling the issues in this case. *See, e.g.*, Pet. 26-29. But none of those arguments is reflected in the rescission memorandum or the administrative record. The "*post hoc* rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action." *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 539 (1981); *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). And they certainly provide no sound basis for this Court to grant certiorari before judgment.

2. Petitioners alternatively argue that the Acting Secretary decided to terminate DACA based on "her assessment of the risks presented by maintaining" it, including "the imminent risk of a nationwide injunction." Pet. 8, 24-25; *see id.* at 26 (describing "independent litigation-risk rationale for winding down the policy"). Even if that were a fair characterization of the September 5 memorandum (*but see* Pet. App. 55a-57a), it likewise would provide no basis for immediate review.

Any rational explanation for terminating DACA based on the mere *threat* of litigation would have had to balance that threat against the costs to be inflicted on individual DACA recipients, the government, and the overall economy by abandoning a policy that has allowed hundreds of thousands of people to obtain

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[12] The Attorney General's letter contained the additional assertion that DACA is "unconstitutional." D.Ct. Dkt. 64-1 at 251. That assertion was also an unexplained departure from the prior position of the Department of Justice, and none of the cases referenced in the letter ruled on the constitutionality of any deferred action program.

work authorization and other benefits. Pet. App. 58a. It also would have had to consider the substantial reliance interests that have built up around DACA, and the profound effects that ending DACA would have on families and communities. *Id.* at 58a-60a. And it would have had to consider the defenses, both procedural and on the merits, that would be available to defend against a threatened suit. *See, e.g., id.* at 57a. The record is bereft of any indication that petitioners ever considered such factors.

Petitioners offer the perfunctory response that DACA recipients could not reasonably have relied on continuance of the program, and that it was "respectful of the interests of existing DACA recipients" and "by far, the more humane choice" to wind down DACA rather than risk the possibility of an injunction being entered against the program. Pet. 30 & n.8. Perhaps humanity is in the eye of the beholder, but the requirements of the APA are not. Even if litigation risk was a possible basis for rescinding DACA, the district court correctly concluded that petitioners could not act on that basis without offering a better explanation, based on actual consideration of relevant factors. And again, nothing about that conclusion warrants immediate review by this Court.

3. Finally, and tellingly, petitioners say nothing at all about the equitable factors governing issuance of a preliminary injunction. *See Winter v. Nat. Res. Def. Council Inc.*, 555 U.S. 7, 20 (2008); Pet. 12-33. As the district court found, those factors weigh heavily in favor of injunctive relief. The district court's injunction partially preserves the status quo that existed before September 5, for those who had already applied for and received deferred action under DACA. Pet. App. 66a. It preserves DHS's pre-existing ability to exercise discretion on an individualized basis for each

person who applies for renewal, and to proceed to remove anyone, at any time, on any lawful ground. *Id.* at 66a-67a. Without the injunction, thousands of DACA recipients would lose their work authorization and deferred action status in March 2018 (*id.* at 65a)—and thousands more the next month, and each succeeding month, until nearly three-quarters of a million young Americans would be shunted back into the shadows of our society. As the district court found (*ibid.*), this would profoundly damage the individual plaintiffs, the States and the other entity plaintiffs, our communities, our educational institutions, our businesses, and the entire Nation.

Conversely, the only allegation of injury petitioners can muster is that the injunction interferes with their discretion and requires them to sanction "*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." Pet. 12. Among other things, it is difficult to credit this as an allegation of serious harm when petitioners themselves decided to leave DACA in place for the first seven months of the current administration, with the President proclaiming that the policy of his Administration would be "to allow the dreamers to stay." *Supra* p. 3. Even in rescinding DACA, petitioners chose to allow some recipients to continue to receive deferred action and associated benefits until 2020. Pet. 6-7. And once the preliminary injunction was put in place, petitioners apparently recognized that they had no real need—and thus no grounds—to seek a stay. *See id.* at 10 n.3; *cf. id.* at 12-13.

Under these circumstances, the district court acted well within its discretion in deciding that provisional injunctive relief was appropriate, subject of course to

immediate appellate review, and pending other continued proceedings in the courts and final resolution of the merits. Review of the preliminary injunction, along with petitioners' threshold arguments for dismissal, is already proceeding apace in the court of appeals. Petitioners offer no sufficient reason for this Court to depart from ordinary practice and instead conduct that initial appellate review by itself.

CONCLUSION

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

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