No. 17-1003

IN THE

Supreme Court of the 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 OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AND JANET NAPOLITANO, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA, IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1252(g), which prohibits judicial review of decisions to "commence proceedings, adjudicate cases, or execute removal orders" in individual immigration cases, bars judicial review of a programmatic decision by the Acting Secretary of the Department of Homeland Security to rescind the Deferred Action for Childhood Arrivals (DACA) program.

2. Whether the Acting Secretary's decision to terminate the DACA program based on an assessment of its legality is a decision "committed to agency discretion by law" and therefore immune from judicial review under the Administrative Procedure Act.

3. Whether the district court abused its discretion by issuing a narrowly-tailored preliminary injunction enjoining aspects of the rescission of DACA pending adjudication on the merits, considering (a) the likelihood, based on the incomplete administrative record supplied by Petitioners, that the rescission would be set aside as arbitrary and capricious under the Administrative Procedure Act; (b) the irreparable harm to DACA recipients and Respondents should the program be rescinded; and (c) the absence of countervailing equities given Petitioners' stated support for DACA.

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INTRODUCTION

Petitioners ask this Court to take the extraordinary step of granting certiorari before judgment, even though no court of appeals has yet considered, let alone decided, the questions presented in the petition. In the very rare instances—the last almost 30 years ago—in which the Court has granted certiorari before judgment in this situation, it has done so in response to an urgent, overwhelming need for immediate resolution of a legal issue. Nothing in this case approaches the kind of emergency that existed in cases such as *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), *United States v. Nixon*, 418 U.S. 683 (1974), *Dames & Moore v. Regan*, 453 U.S. 654 (1981), or *Mistretta v. United States*, 488 U.S. 361 (1989). Indeed, Petitioners make no serious effort to demonstrate the existence of any such emergency and have not sought a stay from any court.

For the reasons explained in this brief and the district court's opinions, the district court correctly rejected Petitioners' jurisdictional arguments and acted within its discretion in granting a carefully-tailored preliminary injunction. Petitioners disagree, but they have the opportunity to obtain prompt review of these issues in the court of appeals, which has granted Petitioners' request for interlocutory review under 28 U.S.C. 1292(b), consolidated that appeal with Petitioners' appeal of the preliminary injunction, and ordered expedited briefing. In these circumstances, the Court should allow the normal process of judicial review to occur, and decline to take the rare and extraordinary step of granting certiorari before judgment.

STATEMENT

1.a. Since 1956, every presidential administration has exercised its authority to set "national immigration enforcement policies and priorities" by adopting deferred action programs that programmatically protect certain categories of otherwise removable immigrants from deportation. 6 U.S.C. 202(5); Dkt. 111 at Addendum A (summarizing 17 pre-DACA deferred action programs).[1] These programs recognized that the government lacks sufficient resources to "enforce all of the [immigration] rules and regulations presently on the books," and that "[i]n some situations, application of the literal letter of the law would simply be unconscionable and would serve no useful purpose." Dkt. 121-1 at 2. The legality of such programs was commonly accepted, none was challenged in court, and Congress recognized and incorporated deferred action in several amendments to the Immigration and Nationality Act. See, *e.g.*, 8 U.S.C. 1227(d)(2) (U visa and T visa applicants are eligible for "deferred action"); 8 U.S.C. 1154(a)(1)(D)(i)(II) (petitioners under the Violence Against Women Act were eligible for "deferred action and work authorization"); 8 U.S.C. 1151 note (certain immediate family members of certain United States citizens "shall be eligible for deferred action").

In 2012, the Department of Homeland Security established the Deferred Action for Childhood Arrivals (DACA) program. Pet. App. 95a. Under DACA,

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

"certain young people who were brought to this country as children and know only this country as home" are able to apply for discretionary relief from removal if they (1) came to the United States under the age of sixteen; (2) continuously resided in the United States since June 15, 2007, and were present in the United States on June 15, 2012 and on the date they requested DACA; (3) are in school, have graduated from high school, have obtained a GED, or have been honorably discharged from the United States military or Coast Guard; (4) do not have a significant criminal record and are not a threat to national security or public safety; (5) were under the age of 31 as of June 15, 2012; and (6) do not have lawful immigration status. Pet. App. 95a-96a. Eligible applicants, who are evaluated on a case-by-case basis, are required to provide the government with sensitive personal information, including their home address and fingerprints, submit to a rigorous DHS background check, and pay a substantial application fee. Dkt. 121-1 at 230, 247-248, 250.

Since 2012, close to 800,000 young people have received deferred action under DACA, which confers life-changing benefits, including freedom from deportation, so long as they comply with the conditions of the program. Dkt. 1 at 8. Once DACA status is granted, recipients may, pursuant to preexisting regulations, obtain employment authorization and social security numbers. See 8 C.F.R. 274a.12(c)(14); Dkt. 111 at 16. In addition to permitting recipients to legally work—a benefit that has increased wages by 69% and resulted in a 91% employment rate, Dkt. 111 at 23—these documents unlock access to other important benefits, including driver's licenses, medi-

cal insurance, and tuition benefits, as well as bank accounts, credit cards, and the ability to purchase homes and cars. See *id.* at 17. DACA recipients also no longer accrue "unlawful presence" for purposes of the INA's bars on re-entry, see 8 U.S.C. 1182(a)(9)(B)-(C), and receive favorable consideration for advance parole, allowing them to lawfully travel abroad. See 8 C.F.R. 212.5(f); Dkt. 121-1 at 183-184.

b. No court has ever held DACA unlawful, and, until September 2017, the government consistently defended the program. In a 2014 opinion, the Office of Legal Counsel memorialized the advice it provided prior to the promulgation of DACA "that such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis." AR 21 n.8.[2] The government argued in court that DACA was "a valid exercise of the Secretary's broad authority and discretion to set policies for enforcing the immigration laws." Br. of United States as Amicus Curiae in Support of Appellees at *1, *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957 (9th Cir. 2017) (No. 15-15307), 2015 WL 5120846. And in February 2017, then-Secretary of Homeland Security John Kelly issued a memorandum reordering DHS's enforcement priorities but maintaining DACA unchanged. AR 230.

Yet in June 2017, Administration officials, including Attorney General Sessions, began communicating with several state attorneys general who had

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[2] "AR" refers to the administrative record filed by the government in the district court. Dkt. 64-1.

challenged a different deferred action program, which never went into effect, known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). Dkt. 124 at 80-82. Those discussions culminated in a June 29, 2017 letter from ten states to Attorney General Sessions, demanding that the government "phase out the DACA program" by September 5, 2017, or else they would seek to amend their DAPA lawsuit to also challenge DACA. AR 239.

On September 4, 2017, Attorney General Sessions sent a one-page letter to then-DHS Acting Secretary Elaine Duke, advising that DHS "should rescind" DACA because it was "effectuated * * * without proper statutory authority" and "was an unconstitutional exercise of authority by the Executive Branch." AR 251. The letter stated summarily that DACA "has the same legal and constitutional defects" as the DAPA program, which had been preliminarily enjoined in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016). But because the *Texas* plaintiffs had challenged only DAPA (and certain DACA expansions proposed in connection with DAPA, which were not specifically addressed in the case), the *Texas* court did not address the legality of the original DACA program. *Ibid.* It is also unclear what "constitutional defects" the Attorney General might have been referring to, since neither *Texas* nor any other case has ever found deferred action programs unconstitutional.

The next day, Attorney General Sessions held a press conference announcing the rescission of DACA. Dkt. 121-2 at 11. In addition to reiterating the con-

clusions from his letter, the Attorney General asserted, without evidence, that DACA "contributed to a surge of unaccompanied minors on the southern border"; "denied jobs to hundreds of thousands of Americans by allowing those same jobs to go to illegal aliens"; was a failure to enforce the immigration laws that "has put our nation at risk of crime, violence, and even terrorism"; and that rescission of DACA would "make[] us safer and more secure" and "further economically the lives of millions who are struggling." *Id.* at 11-12.

Minutes after the Attorney General's press conference, Acting Secretary Duke issued a short memorandum formally rescinding DACA. The rescission memorandum instructed DHS to immediately stop accepting new DACA applications; to immediately stop accepting advance parole applications; to accept renewal applications only from individuals whose current deferred action would expire before March 5, 2018, and to accept such renewals only through October 5, 2017; and to thereby force DACA grants to expire on a rolling basis beginning March 5, 2018. Pet. App. 115a-116a.

2. The University of California, four states, and other Respondents brought actions in the United States District Court for the Northern District of California alleging that the Acting Secretary's abrupt decision to rescind DACA was unlawful. Pet. App. 19a-22a. Respondents brought claims under the Administrative Procedure Act (APA), alleging that the decision to rescind DACA was arbitrary and capricious and failed to follow the APA's notice-and-comment rulemaking procedures. See, *e.g.*, Dkt. 111

at 24-43. Respondents also challenged the constitutionality of Petitioners' decision to rescind DACA, contending that the rescission violated the Fifth Amendment's guarantee of procedural due process. Dkt. 1 at 17-18. Certain Respondents also alleged that DACA's rescission violated their substantive due process rights, the Equal Protection Clause, and principles of equitable estoppel. Pet. App. 22a.

Because the administrative record is the foundation of an APA case, the parties agreed at the initial case management conference that the government would produce the administrative record swiftly. Dkt. 52-1 at 17-18. Yet on October 6, 2017, the government produced a record consisting solely of 14 publicly-available documents totaling 256 pages. See Dkt. 64-1. Every court to review the record has concluded that it is incomplete; for instance, it excludes communications between the government and the state attorneys general whose litigation threat purportedly required the rescission of DACA. See, *e.g.*, Dkt. 79; *In re United States*, 875 F.3d 1200, 1205 (9th Cir.), *cert. granted, judgment vacated*, 138 S. Ct. 443 (2017); *Batalla Vidal v. Duke*, 2017 WL 4737280, at *1-5 (E.D.N.Y. Oct. 19, 2017); *In re Nielsen*, No. 17-3345, slip op. at 1 (2d Cir. Dec. 27, 2017). On review of an earlier mandamus petition, this Court ordered the record issues to be deferred while the district court resolved the government's threshold justiciability arguments. See *In re United States*, 138 S. Ct. 443 (2017).

Petitioners moved to dismiss all five complaints pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6). Under Rule 12(b)(1), the government

raised jurisdictional arguments under the APA and INA. Pet. App. 26a. Under Rule 12(b)(6), the government moved to dismiss Respondents' complaints for failure to state a claim. *Id.* at 77a. Respondents opposed the motion to dismiss and moved for a preliminary injunction, seeking to restore the status quo as it existed before September 5, 2017. See Dkt. 111 at 10; Dkt. 205.

3. On January 9, 2018, the district court denied the government's Rule 12(b)(1) motion and granted Respondents' motion for a preliminary injunction, tailoring its order to prohibit the government from rescinding DACA for existing recipients pending resolution of the case, while limiting the administrative burden on DHS and preserving its flexibility to address renewal applications on a case-by-case basis. Pet. App. 66a-69a.

The district court held that it had jurisdiction under the APA to review DACA's rescission. The court found that the rescission did not fall within 5 U.S.C. 701(a)(2), which eliminates judicial review for decisions "committed to agency discretion by law." The court observed that the jurisdictional bar in section 701(a)(2) is "very narrow" and only "applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." Pet. App. 26a (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)). The court found that "there *is* law to apply," because the rationale for ending DACA was its alleged illegality. Pet. App. 30a. The court explained that "major policy decisions" like DACA are not akin to "day-to-day agency nonenforcement decisions" that

might be immune from review. Pet. App. 28a (quoting *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 496 (D.C. Cir. 1988)). The court also held that 8 U.S.C. 1252(g), which bars judicial review of "the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders," does not apply here, as "plaintiffs do not challenge any particular removal but, rather, challenge the abrupt end to a nationwide deferred-action and work-authorization program." Pet. App. 30a-31a. The court likewise found that the majority of plaintiffs had standing. *Id.* at 33a-41a.

The court further found that Respondents had satisfied the requirements for a limited preliminary injunction. The court held that Respondents had demonstrated a likelihood of success on the merits on their claim that the rescission was arbitrary and capricious, reasoning that the agency's decision to rescind DACA was based on the flawed legal premise that DHS lacked the authority to implement the program, and that the government's alternative post hoc rationale for the rescission—that DHS's decision was made out of fear of litigation risk—was equally arbitrary and capricious. Pet. App. 54a, 63a.

The court also held that Respondents had satisfied the remaining factors for preliminary injunctive relief, including that they would suffer irreparable harm absent the court's intervention. Pet. App. 62a-66a. The court relied on Respondents' overwhelming and undisputed demonstration of irreparable harm, which included showing that the rescission of DACA would threaten almost two hundred thousand U.S.-citizen children with the terrifying prospect that

their parents might soon be deported. Respondents also showed that the rescission of DACA would result in $215 billion in lost economic activity and $60 billion in lost federal tax revenue. They also showed that many DACA recipients would soon lose the ability to lawfully work, preventing many from attending school or supporting their families, and rendering even highly skilled DACA recipients, such as doctors and lawyers, unable to practice their professions. See Dkt. 111 at 13-14, 19; Dkt. 219 at 11.

Accordingly, the court issued a carefully-tailored injunction, ordering the government to "allow[] DACA enrollees to renew their enrollments" under the terms applicable prior to the rescission. Pet. App. 66a. For each renewal application, the district court permitted the government to "take administrative steps to make sure fair discretion is exercised on an individualized basis for each renewal application." *Id.* at 66a-67a. The district court made clear that nothing in its order prohibited 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." *Id.* at 67a. The court did not require DHS to process DACA applications from individuals who had not previously received deferred action. *Id.* at 66a.

Although the court recognized that the issues it decided under Rule 12(b)(1) are reviewable on appeal of its preliminary injunction, it certified those issues for interlocutory appeal under 28 U.S.C. 1292(b) "to avoid any problem concerning scope of review." Pet. App. 70a.

4. On January 12, 2018, the district court issued a separate order granting in part and denying in part the government's motion to dismiss under Rule 12(b)(6). *Id.* at 76a-94a. That order dismissed Respondents' notice-and-comment rulemaking, Regulatory Flexibility Act, procedural and substantive due process, and equitable estoppel claims, while sustaining Respondents' substantive APA and equal protection claims. *Id.* at 93a. The court again certified its rulings for interlocutory appeal under 28 U.S.C. 1292(b). *Id.* at 94a.

5. The government appealed the court's January 9 order granting a preliminary injunction. The government also petitioned for an interlocutory appeal of certain aspects of the district court's January 9 and January 12 orders granting in part and denying in part the government's motion to dismiss. Pet. 2. Respondents did not oppose the government's 1292(b) motion and on January 22, 2018, petitioned to certify the district court's dismissal of their notice-and-comment claim. Other Respondents petitioned to certify the dismissal of their substantive due process claim. The Ninth Circuit granted all the petitions for interlocutory appeal, consolidated those appeals with the preliminary-injunction appeal, and ordered expedited briefing commencing with the government's opening brief on February 13, 2018. *Regents of the Univ. of Cal. v. Dep't of Homeland Security*, No. 18-15068, Dkt. 21 (9th Cir. Jan. 26, 2018).

6. On January 18, 2018, the government filed a petition for a writ of certiorari before judgment in this Court, asking this Court to immediately review, and reverse, the district court's order granting a pre-

liminary injunction and denying in part the government's motion to dismiss.

REASONS FOR DENYING THE PETITION

I. Certiorari Before Judgment Is Not Warranted.

Petitioners ask this Court to take the "extremely rare" step of granting certiorari before any court of appeals has decided or even considered the questions at issue. *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers). Such a writ "will be granted 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. This case does not even approach that standard.

A. Grants Of Certiorari Before Judgment Are Extremely Rare.

This case does not resemble the handful of cases in which the Court has taken the extraordinary step of granting certiorari before judgment. These prior cases often involved situations where the question presented had been decided by a court of appeals, was pending before this Court, and the Court granted certiorari in a related case to facilitate complete review. See, *e.g.*, *United States v. Booker*, 543 U.S. 220, 229 (2005); *Gratz v. Bollinger*, 539 U.S. 244, 259-60 (2003); see also 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, 297-308. That is not the situation here. To date, *no* court of appeals has ruled on the questions presented. Instead, the issues are pending before the Ninth Circuit, which has granted the government's petition for interlocutory appeal, consolidated the government's preliminary-injunction appeal and the interlocutory appeals, and set an expedited briefing schedule—with the opening brief due in less than two weeks.[3]

The other cases in which the Court has granted certiorari before judgment presented an overwhelming need for immediate resolution of a question of extraordinary national importance—often during wartime or in situations implicating national security or separation of powers concerns. See, *e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (seizure of national steel industry); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (power of United States to fulfill its obligations under agreement with Iran to resolve hostage crisis); *Ex parte Quirin*, 317 U.S. 1 (1942) (challenge to jurisdiction of military

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[3] A federal district court in New York has also certified the government's jurisdictional issues for immediate appeal to the Second Circuit. See *Batalla Vidal v. Duke*, Nos. 16-4756, 16-5228, 2018 WL 333515, at *1 (E.D.N.Y. Jan. 8, 2018). The Second Circuit is holding the government's petition for interlocutory appeal in abeyance pending the district court's resolution of the motions for injunctive relief and dismissal. *Nielsen v. Batalla Vidal*, Nos. 18-122, 18-123 (2d Cir. Jan. 31, 2018).

Texas and other state amici incorrectly suggest the Court should view this case as a companion to *Brewer v. Arizona Dream Act Coalition*, No. 16-1180. *Brewer* concerns the wholly separate question of the preemptive effect of DACA on state law, not the legality of its rescission.

tribunal during World War II); *United States v. Nixon*, 418 U.S. 683 (1974) (subpoena for recordings of presidential conversations). It has been nearly 30 years since the Court granted certiorari before judgment without the benefit of a court of appeals ruling on the question presented, and in that situation there was an urgent need for the Court to address the chaos in daily criminal sentencing that had been caused by divisions in the district courts regarding the constitutionality of the U.S. Sentencing Guidelines. See *Mistretta v. United States*, 488 U.S. 361 (1989).

B. This Case Does Not Meet The Criteria For Certiorari Before Judgment.

In this case, there is nothing like the sort of public emergency that created an urgent, overwhelming need to bypass the ordinary appellate process in cases like *Youngstown* or *U.S. v. Nixon*. Indeed, the government makes no serious effort to demonstrate the existence of such a compelling need.

First, the government itself faces no immediate, irreparable harm if certiorari before judgment is denied. The Ninth Circuit has granted the government's petition for interlocutory appeal, consolidated the interlocutory appeals with the government's appeal of the preliminary injunction, and ordered expedited briefing. Cf. *Aaron v. Cooper*, 357 U.S. 566 (1958) (per curiam) (denying petition for certiorari before judgment where Court had "no doubt that the Court of Appeals will recognize the vital importance of the time element in this litigation"); *United States v. Clinton*, 524 U.S. 912 (1998) (denying petition for

certiorari before judgment where "[i]t is assumed that the Court of Appeals will proceed expeditiously to decide this case"). There is no compelling need to relieve the government of the modest burden of proceeding with its own expedited, interlocutory appeal. For example, the district court has not ordered the government to complete the manifestly inadequate administrative record, or to provide additional discovery, while the Ninth Circuit considers the government's threshold jurisdictional arguments.

Second, the government has not suggested that certiorari before judgment is necessary to protect the public. As the district court emphasized, the government retains full authority to remove any DACA recipient determined to pose a threat to public safety. See Pet. App. 67a. The injunction merely enables DACA recipients previously granted deferred action to apply for a renewal of that grant, which the government may adjudicate "on an individualized basis." *Ibid.* The injunction thus maintains the status quo that prevailed from 2012 through September 2017.

Third, Petitioners' own statements and actions undercut any argument that there is an urgent need for immediate review by this Court. The government allowed DACA to remain in place for the first nine months of the current presidential administration, despite changes to other programs. See AR 230. Even when it rescinded DACA, the government did not immediately terminate individual DACA grants, instead allowing certain individuals to apply for renewals until October 5, 2017, thus potentially extending their DACA status for another two years. In addition, the President has repeatedly expressed

support for protecting DACA recipients. See Pet. App. 65a ("In September, President Trump stated his support for DACA, tweeting: 'Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military? Really! . . . .' He has also called upon Congress to ratify DACA, tweeting, 'Congress now has 6 months to legalize DACA (something the Obama Administration was unable to do). If they can't, I will revisit this issue!'"). Similarly, in recent congressional testimony, the DHS Secretary stated that DACA recipients would not be an enforcement priority following DACA's rescission.[4] Ron Nixon, *Homeland Security Pick Defends Her Experience Amid Democrats' Questions*, N.Y. Times (Nov. 8, 2017), *available at* https://goo.gl/hi645R. The actions and statements of the President and other Executive Branch officials thus indicate that there is no urgent need to bypass review by the court of appeals.

Fourth, even if Petitioners could demonstrate that the preliminary injunction posed some extremely serious risk, the appropriate judicial remedy would be a stay of the injunction pending appellate review, not a writ of certiorari before judgment issued by this Court. Petitioners have not sought a stay of the injunction from any court, and indeed have committed not to do so. Pet. 12-13; Dkt. 243 at

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[4] Although the Secretary does not view DACA recipients as enforcement priorities, those individuals stand to lose their work authorizations, which will impose catastrophic and irreparable harm on them, for example rendering them unable to support their families or sustain their schooling. Dkt. 111 at 20-22.

4. A stay request would have required the government to demonstrate irreparable harm in the absence of a stay, and to show that the balance of hardships favors a stay, a standard it cannot meet here.[5] See Pet. App. 62a-63a. Petitioners have not articulated any harm, let alone irreparable harm, from allowing this litigation to proceed in an orderly fashion. Instead, Petitioners offer the unconvincing explanation that they have not sought a stay to "*avoid* the disruptive effects on all parties of abrupt shifts in the enforcement of the Nation's immigration laws." Pet. 12. But it was Petitioners who created disruptive effects by rescinding DACA.

Petitioners also assert that immediate review is warranted because a stay "would not address the institutional injury suffered by the United States of being embroiled in protracted litigation over an agency decision" that Petitioners contend is non-reviewable. Pet. 12-13. But federal agencies frequently assert that their actions should not be subject to judicial review. The requirement that federal agencies litigate such arguments before Article III courts is a basic aspect of our constitutional structure, and so is not a valid "institutional injury." It certainly is not a valid basis for certiorari before judgment.

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[5] Petitioners do not dispute Respondents' overwhelming demonstration of irreparable harm from the rescission of DACA. See, *e.g.*, Dkt. 111 at 19-24, 44-46. Nor do Petitioners acknowledge that the government's submission of an obviously incomplete administrative record, and its refusal to add even a single document to that record, have made it impossible for the courts to enter a final judgment prior to the government's original March 5, 2018 deadline.

Fifth, Congress and the President currently are considering proposed legislative solutions with respect to DACA. It is possible that these efforts may make it unnecessary for this Court to decide the questions presented in the Petition. See, *e.g.*, *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 that legislative action could effectively preclude review of questions presented to the Court before it was able to render a decision). Alternatively, a decision by this Court to grant certiorari before judgment could make it less likely that Congress would enact legislation while review is pending. In any event, it is desirable for this Court to avoid taking the extraordinary step of granting certiorari before judgment to allow additional time for the coordinate branches of government to consider the issues.

For all these reasons, the Court should decline to grant certiorari before judgment and should instead follow an orderly judicial review process while the status quo is maintained.

C. The Importance Of This Case Does Not Warrant Certiorari Before Judgment.

This case does present "important" questions, Pet. 14, especially for the hundreds of thousands of DACA recipients who face devastating repercussions from the rescission of DACA. However, merely identifying questions of importance is not a sufficient basis for certiorari before judgment. See, *e.g.*, *Klayman v. Obama*, 134 S. Ct. 1795 (2014) (denying petition for certiorari before judgment in case concerning legality of NSA's bulk digital surveillance activities). If

that were not so, the federal courts of appeals would be relegated to considering only unimportant cases, with this Court becoming a first-instance court of appeal rather than a court of final review. Accordingly, this Court repeatedly has denied petitions for certiorari before judgment, even in cases presenting important issues likely to require eventual resolution by this Court. See, *e.g.*, *Baldwin v. Sebelius*, 562 U.S. 1037 (2010) (constitutionality of the "individual mandate" provision of the Affordable Care Act); *Coal. for Prot. of Marriage v. Sevcik*, 133 S. Ct. 2885 (2013) (constitutionality of Nevada constitution and statute defining marriage as union of a man and a woman); *Hamdan v. Rumsfeld*, 543 U.S. 1096 (2005) (whether Guantanamo Bay detainees could be tried before military commissions). Indeed, the importance of the issues presented counsels adherence to the normal appellate process, so as to ensure the fullest possible development of the arguments on all sides.

D. In Its Present Posture, This Case Is A Poor Vehicle For Deciding The Questions Presented.

1. Petitioners ask this Court to decide whether the rescission of DACA was lawful, but the Court cannot resolve that question at this stage of the litigation. The district court has made only an interlocutory determination that Respondents are likely to succeed on one of their claims—that the DACA rescission was arbitrary and capricious. See *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (statement of Scalia, J., respecting denial of petition for a writ of certiorari before judgment) ("We gener-

ally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

A final judgment on Respondents' APA claims will require, *inter alia*, a complete administrative record. But none has yet been provided, as every court to consider the issue has concluded. It is not possible to finally resolve APA claims without a complete administrative record. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (requiring a complete administrative record). For example, Respondents claim that Petitioners' proffered reason for rescinding DACA—that it is illegal or posed intolerable "litigation risk"—is pretextual, and that the actual reasons were (i) unsupported assertions that DACA recipients are taking jobs away from non-immigrant Americans and present risks of crime and even terrorism, see Dkt. 121-2 at 11-13, and (ii) a legislative strategy to imperil DACA in order to bargain for concessions from Congress on other aspects of immigration policy, see Dkt. 124 at 34-53. Although Respondents have already introduced substantial evidence of pretext, Dkt. 111 at 38-40, this claim cannot be resolved until the administrative record is complete. Indeed, if this Court were to address the lawfulness of the rescission based on the current record, its decision could subsequently be overtaken by later evidence of pretext. In addition, Respondents have appealed from the dismissal of their notice-and-comment claim. If resolved in Respondents' favor, that claim would likewise result in reinstatement of DACA regardless of the Court's disposition of the present petition.

Whether the DACA rescission was lawful also depends on resolving the constitutional claims of certain Respondents, such as claims that the rescission was driven by anti-Latino animus and violates substantive due process. Those claims were not addressed by the district court's preliminary injunction order, are not the subject of the petition for certiorari before judgment, and thus cannot be resolved by this Court at this stage of the proceedings. Pet. 13 n.4 (explaining that "this petition is focused on the validity of " the district court's preliminary-injunction order).

Similarly, the first question presented in the petition does not offer the Court an opportunity to resolve this case. Even if the Court were to accept Petitioners' justiciability defenses to Respondents' APA claims, Respondents' constitutional claims still could proceed. See *Webster v. Doe*, 486 U.S. 592, 603-04 (1988). Petitioners' justiciability argument with respect to section 701(a)(2) of the APA likewise does not apply to Respondents' notice-and-comment claim, see *infra* n.7 (citing *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993)). Without an opportunity to bring final resolution to this controversy, this Court should deny the extraordinary petition for certiorari before judgment.

2. Finally, this Court's consideration of this case would be premature. The Ninth Circuit is proceeding towards an expedited but orderly resolution of Petitioners' arguments and should be afforded an opportunity to complete its work. See *Regents of the Univ. of Cal. v. Dep't of Homeland Security*, No. 18-15068, Dkt. 21 (9th Cir. Jan. 26, 2018) (order expediting ap-

peals). Challenges to the rescission of DACA are likewise pending within other circuits. *Batalla Vidal*, No. 16-4756 (E.D.N.Y.); *Casa de Maryland v. U.S. Dep't of Homeland Security*, No. 17-2942 (D. Md.); *Trustees of Princeton Univ. v. United States*, No. 17-2325 (D.D.C.). The decisions of these courts are likely to offer insight into the issues that could inform this Court's ultimate decision. *See Va. Military Inst.*, 508 U.S. at 946.

II. The District Court's Decision Is Correct.

The government's primary argument is that the district court erred in rejecting the government's jurisdictional arguments and granting a preliminary injunction. But that alone is not a sufficient basis for certiorari, let alone certiorari before judgment. Moreover, the district court's decision is correct.

A. The Rescission Of DACA Is Subject To Judicial Review.

The government asserts that it had unreviewable authority to rescind the DACA program, a step that will inflict extraordinary harm on nearly 700,000 current DACA beneficiaries. It argues that judicial review is precluded by the INA in 8 U.S.C. 1252(g) and by the APA in 5 U.S.C. 701(a)(2). Neither provision applies.

1. Section 1252(g) does not preclude judicial review of Respondents' challenge to the rescission. Jurisdiction-stripping provisions like section 1252(g) are construed narrowly, and only "upon a showing of clear and convincing evidence of a contrary legisla-

tive intent should the courts restrict access to judicial review." *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 718 (9th Cir. 2011) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967) (internal quotation marks omitted)). Applying these principles, this Court has concluded that section 1252(g) "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (*AADC*) (quoting section 1252(g)). The district court correctly concluded that Respondents' claims do not challenge any of these enumerated actions and therefore section 1252(g) does not apply. See Pet. App. 31a.

Petitioners attempt to revive the broader reading of section 1252(g) that this Court rejected in *AADC*. They insist that the rescission is unreviewable because it is an "ingredient" or "step toward the commencement of removal proceedings against an alien." Pet. 23. But this Court dismissed a nearly identical argument in *AADC*. There, the government asserted, as it does here, that section 1252(g) "covers the universe of deportation claims" and "that it is a sort of 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review.'" 525 U.S. at 482. The Court, however, adopted the "much narrower" construction of section 1252(g) as covering only the three actions listed in the statute. *Ibid.*; *see also id.* at 485 n.9 (describing section "1252(g)'s explicit limitation to specific steps in the deportation process"). The Court further noted that decisions like opening an investigation and surveil-

ling the suspected violator—which undoubtedly are "step[s] toward the commencement of removal proceedings," Pet. 23—would not be rendered unreviewable by section 1252(g)'s bar. *AADC*, 525 U.S. at 482.[6]

By its terms, section 1252(g) addresses only decisions to "commence proceedings, adjudicate cases, or execute removal orders," and therefore it does not preclude judicial review of the decision to rescind DACA.

2. a. The district court was also correct to conclude that judicial review of the rescission is permitted by the APA. The APA "manifests a congressional intention that it cover a broad spectrum of administrative actions." *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988) (citation omitted). It provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. 702; see *id.* 704. This Court has observed repeatedly that the APA's "'generous review provisions' must be given a 'hospitable' interpretation." *Bowen*, 487 U.S. at 904 (citation omitted). There is thus a "strong presumption favoring judicial review of administrative ac-

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[6] In a footnote, Petitioners suggest for the first time that, even if section 1252(g) does not expressly preclude review, Congress intended the INA's review scheme to "be exclusive." Pet. 22 n.6. They offer no support for such a sweeping bar to judicial review, and their claim is not properly presented for the first time here. Cf. *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1170 (2017) (Supreme Court is "court of review, not of first view").

tion," which the government "bears a heavy burden" to overcome. *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1651 (2015) (internal quotation marks omitted).

Consistent with the "strong presumption" favoring judicial review, the exception for actions "committed to agency discretion by law," 5 U.S.C. 701(a)(2), is "very narrow" and applies only in "rare instances," *Overton Park*, 401 U.S. at 410. Review is precluded only where a court "would have no meaningful standard against which to judge the agency's exercise of discretion," *i.e.*, where there is "no law to apply." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).[7]

Where there *is* "law to apply"—such as when there are "statutes, regulations, established agency policies, or judicial decisions that provide a meaningful standard against which to assess" agency action, *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868 (9th Cir. 2003)—agency actions are reviewable. Contrary to Petitioners' suggestion that statutes are the only source of "law to apply," see Pet. 18, this Court has recognized that the "law to apply" may derive from other sources as well. See, *e.g.*, *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) (concluding that irra-

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[7] Even in the narrow circumstances in which it applies, section 701(a)(2) limits review only of substantive APA claims, not procedural APA claims such as Respondents' notice-and-comment claim. See *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993) ("We next consider the Court of Appeals's holding, quite apart from the matter of substantive reviewability, that before terminating the Program the Service was required to abide by the familiar notice-and-comment rulemaking provisions of the APA.").

tional departure from INS policy limiting discretion could be arbitrary and capricious). Moreover, the fact that a decision contains discretionary elements does not mean it is "committed to agency discretion by law." To the contrary, the APA explicitly authorizes review for "abuse of discretion." 5 U.S.C. 706(2)(A); *Pinnacle Armor*, 648 F.3d at 719 ("[T]he mere fact that a statute contains discretionary language does not make agency action unreviewable.").

b. The district court found that there was "law to apply" because the Acting Secretary's decision to rescind DACA rested upon a legal determination that a certain type of enforcement discretion is unlawful. See, *e.g.*, Pet. App. 28a-29a. Such a legal interpretation is a quintessential decision that is subject to APA review. See, *e.g.*, *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993) (holding agency's "Enforcement Policy Statement" reviewable because its "interpretation has to do with the substantive requirements of the law; it is not the type of discretionary judgment concerning the allocation of enforcement resources that *Heckler* shields from judicial review"). Indeed, Petitioners conceded in the district court that where "the agency's interpretation of a statute is embedded in a non-reviewable enforcement policy, the former may be reviewable as such." Dkt. 218 at 12 n.4; see also Pet. App. 28a (relying on Petitioners' concession).

The government relies heavily on *Heckler v. Chaney*, but that decision illustrates why judicial review is not precluded in this case. *Chaney* focused on "an agency's refusal to take requested enforcement action" regarding the use of certain pharmaceuticals

in executions. 470 U.S. at 831. It did not address the creation or rescission of a program or an interpretation of law. The Court in *Chaney* stressed that the case involved a decision *not* to commence enforcement; it distinguished a decision *to* enforce, whereby the agency exerts "coercive power over an individual's liberty or property rights," as providing an appropriate "focus for judicial review." *Id.* at 832. This case provides just such a focus: because of the rescission, DACA recipients face anew the risk that the government will exert its "coercive power" to strip them of the opportunity to be legally employed and to arrest, detain, and deport them.

Chaney also emphasized that in that case the agency had not "refus[ed] * * * to institute proceedings based solely on the belief that it lacks jurisdiction." *Id.* at 833 n.4. Here, the Acting Secretary's decision to rescind DACA was based on her conclusion that DHS lacked power to grant deferred action under DACA. That is analogous to the type of agency action left open to review by *Chaney*—an agency decision driven by its belief that it lacks legal authority to act. See *Mont. Air Chapter No. 29 v. Fed. Labor Relations Auth.*, 898 F.2d 753, 756 (9th Cir. 1990) ("agency nonenforcement decisions are reviewable when they are based on a belief that the agency lacks jurisdiction" (citation omitted)).

Third, the non-enforcement decision in *Chaney* rested on the "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." 470 U.S. at 831. Here, in contrast, the agency's decision purported to rest solely on a legal conclusion that DACA is unlawful. Cf. *Massachusetts v.*

EPA, 549 U.S. 497, 527 (2007) (holding denials of petitions for rulemaking reviewable in part because, "[i]n contrast to nonenforcement decisions," such denials are "more apt to involve legal as opposed to factual analysis" (internal quotation marks omitted)). Even Petitioners' asserted "litigation risk" rationale for the rescission rests on a legal analysis, not a weighing of resources and enforcement priorities. Rescinding a deferred action program wholesale because it is deemed likely to be held illegal is not standardless balancing, but rather a legal determination of the type courts are well-suited to evaluate.

This Court's decisions in *Lincoln* and *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) (*BLE*), are straightforward applications of *Chaney* that do not support the government's argument. Both cases involved an agency action that had been "traditionally" unreviewable—the allocation of a lump sum appropriation in *Lincoln* and the denial of a petition to reconsider based on material error in *BLE*. See *Lincoln*, 508 U.S. at 192; *BLE*, 482 U.S. at 282. Those cases involved one-time decisions, not broad policy determinations—in *Lincoln* whether to continue funding for a specific region and in *BLE* whether to deny the petition submitted in one case. And neither case involved a determination that the agency was without power to act. Because the rescission is reviewable, this Court's statement in *BLE* that an agency action is not reviewable simply where "the agency gives a 'reviewable' reason for otherwise unreviewable action," 482 U.S. at 283, is inapposite.

Fourth, the courts of appeals have recognized that *Chaney* does not apply to programmatic deter-

minations like the rescission of DACA. See, *e.g.*, *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996) ("*Chaney* applies to individual, case-by-case determinations of when to enforce existing regulations rather than permanent policies or standards."); *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 496-97 (D.C. Cir. 1988) (an agency's "major policy decision" is "quite different from day-to-day agency nonenforcement decisions," and the "appropriate starting point" in such a case is the "APA presumption of reviewability"); *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994). Petitioners cite no case holding that section 701(a)(2) barred judicial review of a programmatic determination.

Finally, contrary to the government's suggestion, the presumption in favor of APA review applies in the immigration context no less than in others. *See INS v. St. Cyr*, 533 U.S. 289, 298-99 (2001) (applying "strong presumption in favor of judicial review of administration action" in immigration context). Indeed, the APA's very purpose was "to remove obstacles to judicial review of agency action under subsequently enacted statutes like the 1952 Immigration Act." *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955); accord *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 498-99 (1991) (the "strong presumption in favor of judicial review of administrative action is not overcome either by the language or the purpose of the relevant provisions of the" Immigration Reform and Control Act of 1986). Here, the rescission concerns an agency action impacting hundreds of thousands of individuals who have lived in the interior of the United States for decades; it does not im-

plicate national security or foreign relations concerns. Judicial review is perfectly appropriate.

B. The District Court Correctly Held The Rescission Arbitrary And Capricious.

1. a. The district court correctly determined that the rescission is unlikely to survive arbitrary-and-capricious review because the stated reason for terminating DACA—its supposed illegality—is incorrect. 5 U.S.C. 706(2)(A) (courts "shall" set aside agency action if it is "not in accordance with law"); *Massachusetts*, 549 U.S. at 532-34 (setting aside an EPA decision premised on misinterpretation of its legal authority); *Negusie v. Holder*, 555 U.S. 511, 516 (2009) (remanding for agency to "confront the same question free of [its] mistaken legal premise"). Deferred action programs like DACA are lawful exercises of DHS's broad statutory authority to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. 202(5), and to carry out the "administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens," 8 U.S.C. 1103(a)(1), including by authorizing aliens to be lawfully employed, 8 U.S.C. 1324a(h)(2). Both this Court, see *AADC*, 525 U.S. at 483-85, and multiple provisions of the INA, see, *e.g.*, 8 U.S.C. 1227(d)(2), 1154(a)(1)(D)(i)(II), have recognized that deferred action is a fixture of our immigration system. See also Br. of United States, *United States v. Texas*, at *42-64, 136 S. Ct. 2271 (2016) (No. 15-674), 2016 WL 836758. As the government has previously concluded, DACA falls within the power of DHS to employ deferred action as a means of effectuating its enforcement priorities.

See Pet. App. 95a (DACA memorandum); AR 21 n.8 (Office of Legal Counsel advice).

The *Texas* court's conclusions regarding the legality of the separate DAPA program cannot be extended to DACA. In *Texas*, the Fifth Circuit itself cautioned against conflating DACA and DAPA, 809 F.3d at 173-74, and with good reason. For example, one of the primary defects the *Texas* court identified in DAPA was that it encroached upon a congressionally enacted "intricate process for illegal aliens to derive a lawful immigration classification from their children's immigration status." *Id.* at 179. No similar argument applies to DACA because there is no statutory apparatus conferring lawful immigration status on the pool of individuals eligible for DACA—the INA simply does not speak to the DACA population. *Texas* thus does not address the legality of DACA, and to the extent the decision is read to question the legality of the program, it is in error.

Accordingly, Petitioners committed a legal error in concluding that DACA was unlawful. Their decision to rescind DACA on the basis of that conclusion was "not in accordance with law," and must be set aside. 5 U.S.C. 706(2)(A).

b. Notwithstanding that the rescission memorandum provided a single ground for the rescission—DACA's purported unlawfulness, *see* Pet. App. 110a-115a—Petitioners argued to the district court that DACA was in fact terminated because of perceived "litigation risk" from its continuation. The administrative record does not advance this rationale; it contains a series of conclusory statements deeming

DACA illegal and asserts, without analysis, that "it is clear that the June 15, 2012 DACA program should be terminated." *Id.* at 114a-115a. The district court therefore correctly held that the "litigation risk" argument was an after-the-fact rationalization that cannot provide a basis for upholding the rescission.

Although Petitioners suggest that the "litigation risk" rationale can be found between the lines in the rescission memorandum, Pet. 24-25, agency action must be set aside unless its basis is "set forth with such clarity as to be understandable." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). The government cannot require the courts to "guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *Id.* at 197.

Even if this Court were to discern the silhouette of a "litigation risk" rationale in the rescission memorandum, it would still fail arbitrary-and-capricious review. The memo does not address the probability that the *Texas* plaintiffs would follow through on their threat to sue or that they would seek an immediate injunction terminating DACA. And even if the *Texas* plaintiffs sued and sought a preliminary injunction, the memo did not evaluate the likelihood that they would succeed—which would have required a showing of irreparable harm and overcoming a laches defense after those plaintiffs waited five years to sue. See *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (agency action is unlawful if it "entirely failed

to consider an important aspect of the problem," or "runs counter to the evidence before the agency"). Most importantly, the memo contains no evaluation of alternative policies short of rescission that might mitigate any litigation risk. The *Texas* decision had found DAPA unlawful because it did not include specific discretionary elements, such as in-person interviews or consideration at DHS field offices. 809 F.3d at 174-75. Yet the rescission memorandum contains no consideration of whether DACA could overcome any litigation risk if such elements were included. See *State Farm*, 463 U.S. at 48 ("At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment.").

The memorandum also does not consider whether the benefits of DACA to its 700,000 recipients and to the Nation as a whole might justify some degree of litigation risk. This failure illustrates the hollowness of the government's "litigation risk" rationale. If federal agencies can invoke unreviewable discretion to manage "litigation risk" as a justification for their actions, they can circumvent meaningful APA review. For this reason, the courts of appeals have been skeptical of such rationales. See *Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 44 (D.C. Cir. 2004) (litigation risk was not valid grounds upon which to act); *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015) (rejecting litigation risk rationale where "[a]t most, the Department deliberately traded one lawsuit for another").

c. As the district court recognized, the rescission of DACA was also untenable because it reversed a "prior policy [that] has engendered serious reliance interests," without giving "a reasoned explanation * * * for disregarding facts and circumstances * * * engendered by the prior policy." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009); see also *id.* at 536 (Kennedy, J., concurring).

In *Encino Motorcars, LLC v. Navarro*, the Court invalidated an agency rule that had without explanation reversed a longstanding prior rule relating to the wage-and-hour status of certain auto dealer personnel. 136 S. Ct. 2117, 2126-27 (2016) ("In light of the serious reliance interests at stake, the [agency's] conclusory statements do not suffice to explain its decision."). For the last five years, DACA recipients, who because of DACA's age requirements are generally young adults, have made profound decisions to choose careers, enroll in degree programs, start businesses, buy homes, and even marry and have children, all in reliance on DACA's promise that they could remain in the United States if they followed the rules. See, *e.g.*, Dkt. 124-2 at 1-3, Topics 1, 2, 4, 5. Likewise, employers and educational institutions have invested extensively in DACA recipients, investments that will be lost if DACA recipients become ineligible to work or are deported. See, *e.g.*, Dkt. 118 at 4-6.[8]

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[8] In support of their motion for a preliminary injunction, Respondents made an overwhelming factual demonstration of reliance and irreparable harm. See generally Dkts. 113, 117-119, 121, 124. Petitioners do not challenge this factual showing.

The government's terse rescission announcement entirely fails to acknowledge these reliance interests and the devastating consequences of the rescission on the hundreds of thousands of DACA recipients and the countless other stakeholders who have come to rely on the program. Pet. App. 110a-117a. The government's failure even to acknowledge these reliance interests—let alone weigh or consider them in articulating a basis for its action—renders the rescission of DACA arbitrary and capricious. See *Fox*, 556 U.S. at 515 (holding that "[i]t would be arbitrary or capricious to ignore" the reliance interests created by an agency's prior policy).

The government asserts that the DACA program could not create reliance interests because it was subject to revocation. That is incorrect: virtually every agency decision can be revoked, so long as it is done in accordance with law, but that does not mean that reliance interests are not created by government actions. In *Encino Motorcars*, for example, the Department of Labor was free to reinterpret the Fair Labor Standards Act, but only if it appropriately accounted for reliance interests arising from its prior interpretation. 136 S. Ct. at 2125.

The rescission of DACA, which does not consider, at all, the consequences it would carry for DACA recipients or anyone else, is likely arbitrary and capricious, as the district court correctly held.

2. Petitioners do not take issue with the district court's determinations that the risk of irreparable harm, the balance of hardships, and the public interest all support a preliminary injunction. Without a

preliminary injunction, hundreds of thousands of individuals could face irreversible, life-altering consequences, including loss of employment and educational opportunities, along with possible exile from the United States, before this case reaches final judgment. Furthermore, a preliminary injunction inflicts no harm on Petitioners, who have expressed support for the DACA program and who remain free to remove any individual who "poses a risk to national security or public safety, or otherwise deserves, in [their] judgment, to be removed." Pet. App. 67a. These factors weigh in favor of the district court's decision and against accelerated review by this Court.

CONCLUSION

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

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