



U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

November 5, 2018

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: United States Department of Homeland Security, et al. v. Regents of the University of California, et al., No. 18-__;
Donald J. Trump, President of the United States, et al. v. National Association for the Advancement of Colored People, et al., No. 18-__;
Kirstjen M. Nielsen, Secretary of Homeland Security, et al. v. Martin Jonathan Batalla Vidal, et al., No. 18-__

Dear Mr. Harris:

The government is today filing three petitions for a writ of certiorari before judgment in the above-captioned cases. The petitions seek the Court's review of the reviewability and the lawfulness of a decision by the Department of Homeland Security (DHS) to rescind a discretionary policy of non-enforcement of the immigration laws against some 700,000 aliens. The government does not intend to seek expedited consideration of these petitions because there is sufficient time for the Court to consider the petitions in the ordinary course and set the cases for argument this Term. But in lieu of seeking expedition—and in light of the importance of the questions presented for review and the urgent need for their prompt resolution—the government writes to oppose any extensions of time for the respondents to file their briefs in opposition or responses to the government's petitions.

These cases concern the policy of immigration enforcement discretion known as Deferred Action for Childhood Arrivals (DACA). In 2016, this Court affirmed, by an equally divided Court, a decision of the United States Court of Appeals for the Fifth Circuit holding that two related DHS deferred-action policies—including an expansion of the DACA policy—likely violated the Administrative Procedure Act (APA) and were contrary to the Immigration and Nationality Act (INA), and therefore should be enjoined. See *United States v. Texas*, 136 S. Ct. 2271 (per curiam). In September 2017, in light of those decisions, the former Acting Secretary of Homeland Security determined that the original DACA policy was unlawful, and would likely be struck down by the courts on the same grounds as DAPA and expanded DACA. Accordingly, DHS instituted an orderly wind-down of the DACA policy.

As a result of nationwide preliminary injunctions issued by the District Courts in the Northern District of California and the Eastern District of New York, DHS has been required to keep the DACA policy in place, now more than a year since the agency's decision. Days after the first of these injunctions was issued in January, the government filed with this Court a petition for a writ of certiorari before judgment. See *Department of Homeland Security v. Regents of the University of California*, 138 S. Ct. 1182, 1182 (2018). On February 26, 2018, the Court denied the government's petition "without prejudice," but the Court also stated that it "assumed that the Court of Appeals will proceed expeditiously to decide this case." *Ibid.* That has not happened. Although the Ninth Circuit heard oral argument on May 15, it has yet to issue its decision.¹ And while similar decisions granting nationwide relief barring the rescission are also on appeal in the Second and District of Columbia Circuits, neither court is scheduled to even hear argument in those cases before January 2019.

Accordingly, the government today is filing petitions for writs of certiorari before judgment to the Second, Ninth, and D.C. Circuits to review the decisions pending before those courts. As this Court's previous order recognized, prompt consideration of these cases is essential. By virtue of the district courts' orders, DHS is being required to maintain a discretionary policy of non-enforcement sanctioning an ongoing violation of federal law by more than half a million individuals. No one contends that the policy is required by federal law. And DHS has correctly decided that the policy is unlawful and regardless should be adopted only by legislative action, not unilateral executive action. Yet, absent prompt intervention from this Court, there is little chance this dispute will be resolved for at least another year.

In filing the petitions today, the government seeks to provide the Court with the opportunity to consider this dispute during the current Term without any need for expedition. Under the Court's distribution schedule, if respondents file their responses to the government's petitions within the 30 days allotted by Rule 15, the government's petitions will be distributed on December 19, 2018, for consideration at the January 4, 2019 Conference—providing ample time for the Court to consider the petitions, for the parties then to provide plenary briefing if the Court's grants review, and for the Court to hear the cases during its April argument session. Any extensions of time for the respondents, however, would impede the Court's opportunity to consider these petitions at the January 4, 2019 Conference and thereby jeopardize its ability to address this important dispute this Term.

In lieu of a motion to expedite consideration of these petitions, the government therefore writes to oppose any extensions of time for the respondents to file their briefs in opposition or responses to its petitions in these cases. The government has made considerable effort in these cases to ensure a speedy and comprehensive resolution of this dispute—including filing briefs well in advance of court-ordered deadlines, seeking expedition of briefing schedules before the district courts and courts of appeals, seeking certifications for interlocutory appeal of the district courts' dispositive rulings, and seeking consolidation before the courts of appeals. The government now respectfully requests that the Court maintain the briefing schedule provided by its rules for briefing

¹ On October 17, 2018, the government informed the court of appeals that, "in order to ensure review by the Supreme Court during its current Term," it intended to file a petition for a writ of certiorari before judgment if the court of appeals did not issue its judgment by October 31.

on the government's petitions, and thereby ensure that the Court will be able to consider providing a timely and definitive resolution of this dispute in the current Term.

Sincerely,

Noel J. Francisco
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cc: See Attached Service List

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