

SUPREME COURT DENIES TRUMP ADMINISTRATION'S "CERT BEFORE
JUDGMENT" DACA APPEAL

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The Supreme Court declined to hear the Trump Administration's appeal of the nation-wide injunction that prohibited the termination of the Deferred Action for Childhood Arrivals ("DACA") immigration policy. The Court noted, however, that "[i]t is assumed that the Court of Appeals will proceed expeditiously to decide this case."¹ The order indicates that the denial of the petition can be attributed to the fact that no appellate court has yet ruled on the issue.²

On January 9, 2018, United States District Judge, William Alsup, based in San Francisco, California, issued a nation-wide preliminary injunction³ which ordered that DACA protections for "Dreamers" must remain in place while litigation challenging the legality of the administration's rescission of the program is completed.⁴ The DACA program allows young, unauthorized immigrants who grew up in the United States to obtain work authorization and social security numbers (which makes it possible, in many states, to also obtain a driver's license) while "effectively grant[ing] a 'stay' of deportation that is renewable . . . every two years."⁵ This injunction prompted the Trump Administration to take an

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¹ Dept. of Homeland Sec. v. Board of Regents of Univ. of Cal., No. 17-1003 (U.S. Feb. 26, 2018) (order denying, without prejudice, petition for writ of certiorari before judgment) ("The petition for a writ of certiorari before judgment is denied without prejudice. It is assumed that the Court of Appeals will proceed expeditiously to decide this case."), order list available at https://www.supremecourt.gov/orders/courtorders/022618zor_j426.pdf [hereinafter *The Order*].

² *Id.*; Amy Howe, *Justices add three cases to merits docket, but deny review in DACA-termination case*, SCOTUSBLOG (Feb. 26, 2018, 1:21 PM), <http://www.scotusblog.com/2018/02/justices-add-three-cases-merits-docket-deny-review-daca-termination-case/> ("Today the justices denied that request, apparently opting to wait to see what happens in the U.S. Court of Appeals for the 9th Circuit.").

³ On February 13, 2018, a second nation-wide injunction was ordered by a United States District Judge, Nicholas Garaufis, based in Brooklyn, New York. Alison Frankel, *Days before SCOTUS meets on DACA petition, new injunction complicates debate*, REUTERS (Feb. 14, 2018, 3:38 PM), <https://www.reuters.com/article/us-otc-daca/days-before-scotus-meets-on-daca-petition-new-injunction-complicates-debate-idUSKCN1FY32B>.

⁴ Frankel, *supra* note 3.

⁵ Brief of Pamela Resendiz, Carolina Canizalez, and The University Leadership Initiative as Amici Curiae in Support of Defendants, *Crane v. Napolitano*, 920 F. Supp. 2d 724

uncommon approach by appealing to both the United States Court of Appeals for the Ninth Circuit and directly to the Supreme Court itself without waiting for the Ninth Circuit to issue a decision.⁶ This procedure is known as “certiorari before judgment”⁷ and it is frequently denied by the Supreme Court. As University of Texas Law Professor Stephen Vladeck noted: “The justices have not granted such a request since 2004, but the government claimed that the urgency of settling the legal status of DACA, and the potential for nationwide confusion, justified such an extraordinary measure.”⁸ Federal law provides that the Supreme Court may accept a petition for certiorari “at any time before judgment,” once a case has been docketed in the court of appeals.⁹ Supreme Court Rule 11, however, warns that a petition for certiorari before judgment should be a rarity.¹⁰ The Rule states that such petitions 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.”¹¹

The order states that the appeal is “denied without prejudice,” meaning that there has not been a decision on the merits and that a petition will be accepted in the future after being considered by the lower court.¹² The appeal in the Ninth Circuit is still pending.¹³ However, the denial by the Supreme Court has thwarted the government’s attempt to bypass a ruling by the Ninth Circuit—a court known for its liberal leanings.¹⁴ The government must now await the Ninth Circuit, which the Supreme Court

(2013) (No. 3:12-CV-3247-0), at 13, http://www.maldef.org/assets/pdf/AmicusBrief_050613.pdf.

⁶ Howe, *supra* note 2.

⁷ Kevin Russell, *Overview of Supreme Court’s cert. before judgment practice*, SCOTUSBLOG (Feb. 9, 2011, 1:38 PM), <http://www.scotusblog.com/2011/02/overview-of-supreme-court%e2%80%99s-cert-before-judgment-practice/>.

⁸ Ariane de Vogue and Tal Kopan, *Supreme Court won’t hear Trump bid to end DACA program*, CNN (Feb. 26, 2018, 11:32 AM), <https://www.cnn.com/2018/02/26/politics/daca-supreme-court/index.html>; Howe, *supra* note 2.

⁹ Leah M. Litman, *The Exceptional Circumstances of Johnson v. United States*, 114 MICH. L. REV. FIRST IMPRESSIONS 81, 92 (2016). See SUP. CT. R. 11. See also 28 U.S.C. § 2101(e) (2012).

¹⁰ SUP. CT. R. 11. See 28 U.S.C. § 2101(e) (2012).

¹¹ SUP. CT. R. 11.

¹² *The Order*, *supra* note 1.

¹³ Pete Williams, *In blow to Trump, Supreme Court won’t hear appeal of DACA ruling*, NBC NEWS (Feb. 26, 2018, 12:31 PM), <https://www.nbcnews.com/politics/politics-news/supreme-court-won-t-hear-daca-case-n851186>.

¹⁴ Domenico Montanaro, *Supreme Court Declines To Take DACA Case, Leaving It In Place For Now*, NPR (Feb. 26, 2018, 9:52 AM), <https://www.npr.org/2018/02/26/588813001/supreme-court-declines-to-take-up-key-daca-case-for-now>.

urged to “proceed expeditiously.”¹⁵ The *Cumberland Law Review Online* will continue to monitor the appeal before the Ninth Circuit and provide updates on its decision.

¹⁵ *The Order*, *supra* note 1.