

No. 17-72917

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

In re UNITED STATES OF AMERICA, *et al.*,

Petitioners.

UNITED STATES OF AMERICA; DONALD J. TRUMP, President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; and ELAINE DUKE, Acting Secretary of Homeland Security,

Petitioners-Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondent,

REGENTS OF THE UNIVERSITY OF CALIFORNIA; JANET NAPOLITANO, President of the University of California; STATE OF CALIFORNIA; STATE OF MAINE; STATE OF MARYLAND; STATE OF MINNESOTA; COUNTY OF SANTA CLARA; SEIU LOCAL 521; CITY OF SAN JOSE; DULCE GARCIA; MIRIAM GONZALEZ AVILA; SAUL JIMENEZ SUAREZ; VIRIDIANA CHABOLLA MENDOZA; NORMA RAMIREZ; and JIRAYUT LATTHIVONGSKORN,

Real Parties in Interest-Plaintiffs.

REAL PARTIES IN INTEREST'S OPPOSITION TO PETITIONERS' STATEMENT OF RELATED CASES

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OPPOSITION TO STATEMENT OF RELATED CASES

The government identifies *In re Thomas E. Price*, No. 17-71121, as a related case, but that case does not satisfy any of the criteria for related cases under Ninth Circuit Rule 28-2.6.

The government in this case raises numerous issues and arguments that are entirely distinct from those raised in *In re Thomas E. Price* and that will not be decided in that case. These include: (i) the government's claim that the district court should dismiss the case for either lack of jurisdiction under 8 U.S.C. §1252(g) or because the decision at issue is an unreviewable exercise of prosecutorial discretion (Pet. at 15-16); (ii) the government's claim that depositions of high-ranking government officials are categorically inappropriate (Pet. at 21-22); (iii) the government's complaint about the particular balancing conducted by the district court in overruling the government's assertion of deliberative process privilege as to certain documents (Pet. at 22-23); (iv) the district court's finding that the government waived the attorney-client privilege as to materials bearing on DACA's legality (Pet. at 23-24); (v) the district court's rejection of the government's claims of executive privilege as to certain documents (Pet. at 24); (vi) the government's claim that discovery should be limited with respect to claims of discriminatory motive (Pet. at 24-26); and (vii) the government's claim that special consideration should be given because this case implicates White House

decision-makers (Pet. at 17, 26). None of these issues is raised in the *In re Thomas E. Price* case.

Any similarity between the issues concerning how to approach the administrative record in the two cases (Pet. at 5-6), is not reason to relate the cases. First, there is no factual overlap in the two cases—the plaintiffs, federal defendants, facts, and legal claims are distinct. Second, any similarity in legal issues is overwhelmed by the distinctions discussed above. Third, the analysis in each case will turn on the unique states of the respective administrative records that were before each of the district courts and, in particular, on the sources of the record materials. The administrative proceeding at issue in *In re Thomas E. Price*—although lengthy and scientifically complex—was a conventional FDA proceeding, of the sort the FDA routinely conducts under its regulatory authority, to decide whether to approve the introduction of a new type of food (genetically engineered salmon) into interstate commerce. Here, by contrast, the decision to rescind DACA was the result of a highly unusual process. The decision was made in a highly-publicized effort led by the White House, in which the Attorney General provided legal advice to the Acting Secretary of DHS, who then issued the formal memorandum rescinding DACA. Fourth, unlike *In re Thomas E. Price*, this case involves constitutional claims, which alters the nature of the analysis

because the documents at issue with respect to the administrative record will be subject to being produced through discovery.

Finally, no argument has been set in *In re Thomas E. Price*, so no efficiency would be gained by treating the cases as related given the emergency nature of the government's motion here and the expedited scheduling order under which this case is proceeding in the district court.

Dated: October 23, 2017

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SIGNATURE CERTIFICATION

Pursuant to FRAP Circuit Rule 25-5(e), I hereby attest that all other signatories listed, and on whose behalf this filing is submitted, concur in the filing's content and have authorized this filing.

DATED: October 23, 2017

COVINGTON & BURLING LLP

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CERTIFICATE OF COMPLIANCE

I hereby certify that this opposition brief complies with the page limit of Ninth Circuit Rule 21-2(c) because the brief does not exceed 30 pages, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2016 in a proportionally spaced typeface, 14-point Times New Roman font.

DATED: October 23, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2017, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service has been accomplished via e-mail to the following counsel:

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The district court has been provided with a copy of this opposition.

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