POTENTIAL SCENARIOS
Legal Threats to DACA

JULY 31, 2017

THE PROGRAM ESTABLISHED BY THE JUNE 15, 2012, Deferred Action for Childhood Arrivals (DACA) memorandum,[1] which provides employment authorization and protection from deportation for hundreds of thousands of immigrants who came to the United States without authorization as children, now faces a legal threat from states whose leaders argue that its establishment was not within the president's legal power. Currently, there are two looming legal cases in which developments could threaten the DACA program: *United States v. Texas* and *Arizona Dream Act Coalition* (*ADAC*) *v. Brewer*.

United States v. Texas

In U.S. v. Texas, Texas and a number of other states challenged the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and *expanded* Deferred Action for Childhood Arrivals (DACA+) programs, which the U.S. Department of Homeland Security (DHS) had announced in November 2014.[2] This lawsuit did not include a challenge to the original DACA program, however. Judge Andrew Hanen of the Federal District Court for the Southern District of Texas issued an order temporarily blocking nationwide the implementation of DAPA and DACA+, and the Fifth Circuit Court of Appeals affirmed Hanen's decision.

The case ultimately was appealed to the U.S. Supreme Court, and in June 2016 the Court announced that it had been unable to reach a decision in the case, since the justices' vote on it was 4-4. This meant that the lower court's decision temporarily blocking DAPA and DACA+ from being implemented remained in effect. The case then returned to Judge Hanen, where it remains paused ("stayed"), while the parties try to come to agreement on next steps.

On June 15, 2017, DHS Secretary John Kelly issued a memorandum that rescinded, in large part, the (Nov. 2014) DAPA and DACA+ programs but that also allowed the original (June 2012) DACA program to remain in effect.

On June 29, 2017, the Texas attorney general, along with attorneys general and one governor from nine other states, sent a letter to U.S. Attorney General Jeff Sessions, threatening to amend the *U.S. v. Texas* lawsuit to add a challenge to the original DACA program unless "the Executive Branch agrees [by Sept. 5, 2017] to rescind the June 15, 2012

[1] https://www.nilc.org/wp-content/uploads/2015/11/PD-children-Napolitano-memo-2012-06-15.pdf.

[2] For more information about *U.S. v. Texas*, see www.nilc.org/united-states-v-state-of-texas/.

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DACA memorandum and not to renew or issue any new DACA or Expanded DACA permits in the future…."[3]

Below are some potential future scenarios related to *U.S. v. Texas*:

❖ The federal government decides by September 5, 2017, to rescind the June 15, 2012, DACA memorandum

If the federal government decides to rescind the DACA memorandum, it would likely be on the terms laid out in the June 29, 2017, letter to Attorney General Sessions from Texas and nine other states (see above). In that case, after the memorandum is rescinded, U.S. Citizenship and Immigration Services (USCIS) would issue no new grants or renewals of DACA, and existing grants of DACA and accompanying work permits would expire on their current expiration dates.

❖ The federal government does not rescind the June 15, 2012, DACA memorandum

In their June 29, 2017, letter to Attorney General Sessions, Texas and nine other states said that if the federal government does not agree by Sept. 5, 2017, to rescind the June 15, 2012, DACA memorandum, they will seek to amend their complaint in *U.S. v. Texas* to add a legal challenge to DACA. Texas and its partner states may also seek to have the DACA program preliminarily enjoined (halted) while their challenge winds its way through the courts. Judge Hanen previously granted Texas's requested preliminary injunction against the DAPA and DACA+ programs, indicating that he may be receptive to a similar request with respect to the original DACA program.

It is unclear how long it would take for the court to hear and rule on such a request. It is also unclear whether, as before, Judge Hanen would issue a preliminary injunction that is nationwide in scope or how an injunction would affect current DACA recipients.

❖ The MALDEF intervenors seek to have *Texas v. United States* dismissed

On July 28, 2017, the Mexican American Legal Defense and Educational Fund (MALDEF), which formally entered the case (intervened) on behalf of individuals who would have been eligible for DAPA, asked the court in the Southern District of Texas to dismiss the case. MALDEF argues that because DAPA and DACA+ have been officially rescinded, there is nothing left in this case to litigate and Texas should not be allowed to amend it to include a challenge to the DACA program.

Briefing on this motion continues. It is unclear when the court will rule on MALDEF's motion or whether the court will deny the motion and allow Texas to add a legal challenge to the original DACA program.

Arizona Dream Act Coalition v. Brewer

In ADAC v. Brewer, DACA recipients challenged Arizona's denial of driver's licenses to DACA recipients, alleging that Arizona's policy violates DACA recipients' constitutional right to equal protection under the law as well as the principles of federal supremacy in the area of

[3] Copy of the letter available at https://www.texasattorneygeneral.gov/files/epress/DACA_letter_6_29_2017.pdf.

immigration policy and law.[4] In January 2015, a federal district court in Arizona permanently blocked Arizona's policy.

This decision was later upheld by the Ninth Circuit Court of Appeals. During the appeal process, Arizona, for the first time, argued that the DACA program is unconstitutional. The Ninth Circuit ruled that this question was not properly raised previously and that Arizona's policy violates federal law. Arizona has now asked the U.S. Supreme Court to hear the case.

In its appeal to the Supreme Court, Arizona again argues that DACA is unconstitutional. After both parties submitted their views as to whether the Supreme Court should take the case, the Court, on June 26, 2017, issued an order calling for the views of the solicitor general as to whether the Court should hear the case.[5] The solicitor general is the person within the U.S. Department of Justice who represents the U.S. government before the Supreme Court.

The Court did not impose a filing deadline for the solicitor general's brief in this case but, on average, it takes over four months for the Office of the Solicitor General to file such a brief. The Court usually follows the solicitor general's recommendations on whether to take a case.

Here are some potential future scenarios related to *ADAC v. Brewer*:

❖ The solicitor general recommends that the Supreme Court not take the case

The federal government argued to the Ninth Circuit that Arizona did not properly raise the issue of DACA's constitutionality in the federal district court and that the DACA program's creation and implementation were an exercise of the president's well-established power as enforcer of the immigration laws. The Ninth Circuit agreed with these positions.

Although the present presidential administration did not create DACA, the solicitor general may choose to adhere, at least in part, to the federal government's previous opinions and tell the Court that there are no compelling reasons for the Court to disturb the Ninth Circuit's ruling. However, it's also possible that the solicitor general might recommend, a few months from now, that the Court not take the case because the government has ended the DACA program voluntarily or because the solicitor general knows that the program will soon be terminated.

Should the Supreme Court decline to hear the case, the Ninth Circuit's ruling would stand, but the DACA program would continue to be vulnerable to a potential voluntary termination of the program by the federal government or because of other legal challenges, such as Texas's promise that it will amend the complaint in *U.S. v. Texas* (see above).

❖ The solicitor general recommends that the Supreme Court take the case

The solicitor general may recommend that the Supreme Court take the case to resolve once and for all the legal issues about DACA's constitutionality, particularly given the potential legal challenge Texas and nine states have promised to bring.

Should the Court agree to hear the case, it would be asked to decide DACA's constitutionality. Previously, the Court was unable to reach a majority decision on issues related to whether the DAPA and DACA+ programs were constitutional. At that time, the Court had only an even number of justices—eight. Since then, Justice Neil Gorsuch has

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[4] For more information about *ADAC v. Brewer*, see www.nilc.org/adac-v-brewer-daca-dl/.

[5] Such a request by the Supreme Court is called a "CVSG," which stands for "**c**all for the **v**iews of the **s**olicitor **g**eneral."

joined the Court, so it now has nine members. However, it is worth noting that even if the Court takes the case, it is unclear whether, to resolve the case, it would ultimately need to decide the question of DACA's constitutionality, since the Court could issue a decision based on other legal principles.

Finally, should the Court take the case, it is unclear when it would ultimately hear oral arguments and then decide it. It is possible that the Court would not decide the case before late June 2018, when its next term ends.