

ALERT

9th Circuit Upholds District Court's Injunction Requiring Government to Accept DACA Renewals

U.S. SEEKS SUPREME COURT REVIEW OF INJUNCTIONS MAINTAINING DACA

NOVEMBER 9, 2018

Two recent major events affect the lawsuits challenging the Trump administration's attempt to end the Deferred Action for Childhood Arrivals, or DACA, program. First, on Monday, November 5, 2018, in an unusual and rare procedural move known as "cert. before judgment," the government filed three petitions with the U.S. Supreme Court requesting that the Court review all three U.S. district court decisions requiring the government to partially maintain DACA. Second, on Thursday, November 8, 2018, the Ninth Circuit Court of Appeals issued an [opinion](#) upholding the preliminary injunction issued by the U.S. District Court for the Northern District of California¹ — one of the three court orders requiring the government to partially maintain the DACA program.

Background

Three separate U.S. district courts have issued orders requiring the government to partially keep the DACA program in place: the U.S. District Court for the Northern District of California (N.D. Cal.) issued a preliminary injunction in January 2018; the U.S. District Court for the Eastern District of New York (E.D.N.Y.) issued a preliminary injunction in February 2018; and the U.S. District Court for the District of Columbia (D.D.C.) issued a permanent judgment in April 2018 to completely vacate the DACA termination, but subsequently partially stayed its order to bring it in line with the other two injunctions.

As a result, U.S. Citizenship and Immigration Services (USCIS) is required to continue accepting and processing DACA applications from individuals previously granted deferred action through DACA, but USCIS is not required to consider applications from individuals who have never before benefited from DACA or requests for advance parole.

The government appealed each of the three district court decisions granting injunctions to their respective U.S. courts of appeal, the Ninth Circuit, the Second Circuit, and the D.C. Circuit. The Ninth Circuit heard oral argument in May 2018, and oral argument is tentatively scheduled for January 2019 in the Second Circuit case.

Nov. 5, 2018: Government makes highly unusual request for "cert. before judgment"

On October 17, 2018, the government filed a letter with the Ninth Circuit informing the court that it intended to seek certiorari from the Supreme Court if the Ninth Circuit did not

¹ <http://cdn.ca9.uscourts.gov/datastore/general/2018/11/08/18-15068 Opinion.pdf>.

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issue its decision on the preliminary injunction appeal by October 5, 2018. On Monday, November 5, 2018, the government followed through with its threat and made a highly unusual request to ask the Supreme Court to review — without waiting for the courts of appeal to weigh in — the district courts’ decisions enjoining the administration from terminating DACA. This kind of request, called a petition for certiorari (or “cert.”) before judgment — is rarely made and is granted even more rarely.² In the normal course of events, a decision is appealed first to the court of appeals and then to the Supreme Court only after the court of appeals has issued an opinion.

In its papers filed with the Supreme Court, the government said that it wants the appeal to be heard this Supreme Court term, for a likely decision by June 2019. The plaintiffs in each of the three pending appeals have 30 days to respond to the government’s request. The Supreme Court is not required to hear the case and may decline to do so.

The Supreme Court denied a similar request in the N.D. Cal. case in February 2018, opting at that point to wait for the Ninth Circuit Court of Appeals to rule.

Nov. 8, 2018: Ninth Circuit upholds U.S. district court’s preliminary injunction requiring the government to keep the DACA program partially in place

On Thursday, November 8, 2018, the Ninth Circuit issued its opinion in the N.D. Cal. case. All three judges determined that the preliminary injunction is lawful and should be kept in place. The majority determined that the plaintiffs are likely to prevail on their claim that the Trump administration’s attempt to terminate DACA was “arbitrary and capricious” and therefore unlawful.

From here, the government could decide to formally withdraw the requests for cert. before judgment and file a new (more routine) request for the Supreme Court to hear an appeal of the Ninth Circuit’s decision, or it may ask that the Supreme Court simply construe its prior petition as a request for regular certiorari as to the Ninth Circuit opinion and cert. before judgment for the other decisions. Either way, the Supreme Court will have to decide whether to hear an appeal on the challenge(s) to the termination of DACA this term or wait to hear the appeal until after the Second and D.C. Circuits have ruled.



THE BOTTOM LINE: USCIS is still accepting and processing DACA renewal applications from people who had previously received deferred action and work permits through DACA.

We encourage individuals who have benefited from DACA to consult with a lawyer and consider filing to renew as soon as possible. For more information on how to apply for DACA renewal today, see our [Frequently Asked Questions: USCIS Is Accepting DACA Renewal Applications](#).³

² For more information on “cert before judgment” and how it has been used in the past, see Kevin Russell, “Overview of Supreme Court’s cert. before judgment practice,” *SCOTUSblog*, Feb. 9, 2011, www.scotusblog.com/2011/02/overview-of-supreme-court%E2%80%99s-cert-before-judgment-practice.

³ www.nilc.org/faq-uscis-accepting-daca-renewal-applications/.