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DACA's Legality, Rollback Focus Of 9th Circ. Arguments

By **Nicole Narea**

Law360 (May 15, 2018, 7:58 PM EDT) -- The Ninth Circuit heard oral arguments Tuesday in a case challenging the Trump administration's attempted rescission of the Deferred Action for Childhood Arrivals program, with both sides focusing on the government's assertion that the initial implementation of the program was unlawful.

The federal government claimed that it exercised its prosecutorial discretion to roll back the program after finding that it was likely unlawful and posed significant risk of legal challenges. The plaintiffs in the case — including the state of California, the University of California and individual DACA recipients — countered that the government's conclusion about the legality of the program was incorrect and that it is up to the courts to review.

"The rescission of DACA was a discretionary enforcement decision that the [Immigration and Nationality Act] did not in any way constrain," Deputy Assistant Attorney General Hashim Mooppan said, arguing for the federal government. "That rational enforcement decision is committed to agency discretion by law and in any event, it was not arbitrary and capricious or otherwise unlawful."

Mooppan argued that Elaine Duke, acting secretary of the U.S. Department of Homeland Security, had justified the rescission of DACA by taking into consideration Attorney General Jeff Sessions' opinion that the program should be invalidated. She also looked to the U.S. Supreme Court's decision in June 2016 to strike down Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA, a parallel Obama-era program that offered immigration relief to parents of those legally residing in the United States.

He asserted that there is no substantive difference between DACA and DAPA, indicating that both programs are unlawful and that, if left intact, DACA would continue to pose a litigation risk.

Responding to questioning from Circuit Judge Kim McLane Wardlaw, Mooppan proffered that the decision to end DACA constituted a broad enforcement policy of prosecutorial discretion that is not reviewable. He cited the 1985 Supreme Court case Heckler v. Chaney, in which the justices unanimously found that the U.S. Food and Drug Administration's decision not to employ its enforcement authority was unreviewable, arguing that the "decision to enforce, just like the decision not to enforce, is committed to agency discretion by law."

Moreover, he pointed out that the plaintiffs in the case had relied on cases that they claim show that broad enforcement decisions are reviewable, but asserted that they are "misreading those cases."

California Deputy Solicitor General Michael Mongan, representing the plaintiffs, asserted that Mooppan's reliance on the asserted legal conclusion that DACA is unlawful is the "key feature" of the case. He urged the court to review the conclusion, which is "inadequately explained and incorrect," under the Administrative Procedure Act and hold that the plaintiffs are likely to succeed on their claims.

"They told the courts and the country that our hands are tied by the law," Mongan said. "They can't turn around and say that the courts are barred from reviewing that legal conclusion and untying their hands if it's incorrect."

He also claimed that the federal government's assertion that the rescission of DACA was a discretionary decision is "fundamentally incorrect." He argued that, when an agency finds that it lacks the statutory authority to maintain a particular program, it is not making a discretionary decision to end it, but rather claiming that the law deprives it of such discretion.

Additionally, Jeffrey Davidson, counsel for the plaintiffs, argued that the administration failed to provide proper justification for its rescission of the program, embedding the argument about its potential litigation risk into a single phrase — saying that the program "should" be set aside — in the September memo announcing the program's termination.

"It's just too heavy of an analysis to hang on the single word 'should,'" he said.

Davidson also said that the preliminary injunction entered by the district court in the case was appropriate given the insufficient justification advanced by the government.

"The injunction was correctly entered because the government's rescission of DACA was based on an incorrect conclusion of law, and it's the quintessential role of the courts to review those conclusions of law and make sure that agencies are abiding by them," he said.

The DACA program, put in place by former President Barack Obama in 2012, provides deportation relief and work permits to unauthorized immigrants who came to the U.S. as children. DACA has benefited almost 800,000 immigrants, according to recent government statistics.

In January, a trial judge in California sided with the plaintiffs in the case, issuing a nationwide injunction preventing President Donald Trump's administration from proceeding with its plan to roll back the program and allowing its beneficiaries to reapply for work authorization and deportation protection.

Soon afterward, before the appellate process had fully played out, the government appealed that ruling directly to the Supreme Court. But the justices refused to hear the case, sending it back to the Ninth Circuit for review.

The University of California is represented by Jeffrey M. Davidson, Mónica Ramírez Almadani, Erika Douglas, David S. Watnick, Breanna K. Jones, Robert A. Long, Mark H. Lynch, Alexander A. Berengaut, Megan A. Crowley and Ivano M. Ventresca of Covington & Burling LLP.

San Jose is represented by Justin T. Berger, Brian Danitz and Tamarah Prevost of Cotchett Pitre & McCarthy LLP.

The individuals are represented by Nicole A. Saharsky, Matthew S. Rozen, Haley S. Morrisson, Theodore J.

Boutrous Jr., Ethan D. Dettmer, Kirsten Galler, Jonathan N. Soleimani and Kelsey J. Helland of Gibson Dunn & Crutcher LLP, Mark D. Rosenbaum, Judy London and Malhar Shah of Public Counsel Opportunity Under Law, Luis Cortes Romero of Barrera Law Group PLLC, Laurence J. Tribe of Harvard Law School, Erwin Chemerinsky of the University of California, Berkeley School of Law and Leah M. Litman of the University of California, Irvine School of Law.

Santa Clara County is represented by Stacey M. Leyton, Eric P. Brown and Andrew Kushner of Altshuler Berzon LLP and James R. Williams, Greta S. Hansen, Laura S. Trice and Marcelo Quinones of the Santa Clara County Office of the County Counsel.

The government is represented by Thomas G. Pulham, Mark B. Stern and Abby C. Wright of the U.S. Department of Justice.

The case is UC Regents et al. v. U.S. et al., case number 18-15133, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Dipti Coorg.

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