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What You Need To Know As 9th Circ. Hears DACA Challenge

By **Nicole Narea**

Law360 (May 11, 2018, 9:19 PM EDT) -- The Ninth Circuit will hear oral arguments Tuesday in a challenge to the Trump administration's attempted rescission of the Deferred Action for Childhood Arrivals program while members of Congress push to bring legislative replacements for the program to the floor for a vote. Here is what you need to know.

What's at Issue?

In short, the Ninth Circuit must evaluate the legality of the Trump administration's decision to terminate the program put in place by former President Barack Obama in 2012, which 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.

To qualify for DACA, an applicant needs to have reached the U.S. before their 16th birthday, have been present in the country and under the age of 31 in June 2012, be a high school graduate or attending school, not have been convicted of felonies or significant misdemeanors, and not be deemed a threat to public safety or national security.

In January, a trial judge in California sided with the plaintiffs in the case, issuing a nationwide injunction preventing the administration from proceeding with its plan to roll back the program and allowing its beneficiaries to reapply for work authorization and deportation protection. In reaching the conclusion to revive DACA, U.S. District Judge William Alsup relied on a tweet from President Donald Trump praising the program — a practice that has become commonplace in courts charged with reviewing this administration's immigration policies.

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

What Is the Plaintiffs' Argument?

The plaintiffs in the case — which include the University of California, individual DACA recipients, the city of San Jose and Santa Clara County — assert that the administration's move to end the program violated the Administrative Procedure Act and the equal protection clause of the Constitution.

"Our case and its companion cases in other districts aren't about politics but, again, based on the law of how government decisions are supposed to be made," Alexander Berengaut, a partner at Covington & Burling LLP and counsel for the plaintiffs, said in a press call.

Jeffrey Davidson, also a partner at Covington and counsel for the plaintiffs, said in a press call that the Trump administration acted arbitrarily and capriciously in deciding end the program, which is prohibited by the APA. The APA requires the government provide notice and solicit public comment on most types of administrative decisions, which the Trump administration failed to do in terminating DACA, he said.

Davidson also dismissed the argument that DACA was illegal when it was enacted, saying that the program was premised on enforcement authority that is in the Immigration and Nationality Act and is well within the precedent of deferred action programs that date back to the Eisenhower administration. Moreover, he pointed out that the federal government has strongly defended the legality of DACA in court over the past two years.

"The government's 180-degree turn saying DACA was unlawful just can't be sustained," he said.

Moreover, the individual plaintiffs have claimed that the administration unlawfully targeted Latinos, the predominant beneficiaries of the DACA program, in deciding to rescind it. Citing the president's public statements deriding individuals of Mexican descent, they have claimed that the move to end the program was motivated by anti-Latino animus.

What's the Government's Argument?

In its briefs before the appeals court, the administration argues that its decision to rescind DACA was meant to preempt what it saw as imminent challenges to the program's legality. It likened the program to 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 U.S. but was struck down by the U.S. Supreme Court in June 2016.

The government asserts that the decision to rescind the program is not a judicially reviewable action but rather an "exercise of enforcement discretion" that has long been enjoyed by the agency under the APA. Additionally, it claimed that the decision to roll back the program was not arbitrary and capricious, as the plaintiffs had suggested, but rather that it was not obligated to provide any reasoning for the decision under the Immigration and Nationality Act.

And finally, the administration claims that it did not rescind the program as a way to target Latinos, arguing that the policy is "not subject to challenge based on the common circumstance that it has a greater impact on members of certain ethnicities than others."

How Does the Case Relate to Other DACA Suits?

There are four total suits relating to the rescission of DACA, with three federal judges, appointed by both Democratic and Republican administrations, ruling against the government.

A New York federal judge issued an injunction identical to that of Judge Alsup and a D.C. federal judge has similarly found the rescission of the program to be unlawful. A Maryland federal judge, however, upheld the administration's decision, saying it is not the role of the judiciary to hash out what should be a political debate.

Another suit, filed by Texas and six other states last week, challenges the Obama administration's authority to implement the program in the first place, rather than wading into the Trump administration's ability to terminate it. The case has been assigned to the same judge that struck down DAPA.

The Texas plaintiffs argue that they are not targeting the other cases challenging the administration's decision to terminate DACA, tackling an entirely different aspect of the program.

But Berengaut said he isn't convinced. He said federal law bars a district court from entering an injunction that interferes with injunctions previously entered by other district courts.

"It's clear that Texas is taking aim at the work of other district courts that are handling these cases," he said.

What Else Could Come Up?

Davidson said that the plaintiffs are likely to continue to cite President Donald Trump's public statements in illuminating his motivations for terminating DACA. Courts have historically refrained from considering the public statements of elected officials, but in the course of litigation over DACA and Trump's travel ban on nationals of certain countries, the practice has become commonplace.

Davidson said that Trump's statements refute the government's argument that it ended the program as a means of preempting possible legal challenges.

"The tweets tell quite a different story," he said. "The president has explicitly said after the injunctions that he wants to bargain DACA in exchange for a border wall and other immigration measures that might not have otherwise have passed."

While courts have wrestled with the idea of whether to consider such statements, Davidson said they are definitely relevant in this case.

"They are public statements of the president of the United States, and although they're informal in their nature, they convey important information about why Trump and the government are doing what they're doing," he added.

The government does not comment on pending litigation.

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 Brian Baresch and Katherine Rautenberg.

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