



# Practice Alert

## DACA Under Threat August 23, 2017

In a [June 15, 2012 memorandum](#), the Obama Administration announced the Deferred Action for Childhood Arrivals (DACA) initiative. Since USCIS began accepting applications, almost [800,000 initial DACA applications](#) have been approved, and [thousands of](#) DACA recipients have been able to go to college, buy houses and cars, and obtain better paying jobs. Eliminating DACA would cost the U.S. [\\$433.4 billion](#) in lost GDP over a decade, and reduce Social Security and Medicare tax contributions by [\\$24.6 billion](#). However, despite its value to both Dreamers and our country, the DACA program is currently in jeopardy. This practice pointer explains the source of these threats.

### Background on the Trump Administration and DACA

President Trump pledged to end the DACA program as part of his campaign platform, and after his inauguration, a *draft* Executive Order titled [Ending Unconstitutional Executive Amnesties](#) was leaked in [news reports](#). The draft Order, which has not been signed by the President, would rescind the 2012 DACA memo, halt approval of initial and renewal DACA applications, allow current employment authorization documents (EADs) to remain valid until they expire, and stop the issuance of Advance Parole to DACA recipients.

Since then, however, President Trump and his Administration have continued adjudicating both initial and renewal DACA applications.<sup>1</sup> The President and his spokespersons have also made some positive statements about Dreamers, including his statement that he plans to “show great heart” when dealing with the issue of DACA.<sup>2</sup> As a result, people with DACA have been in limbo since the beginning of this Administration – not knowing whether their applications for deferred action and work authorization would be granted or renewed and unable to fully plan for their futures.

### Looming Legal Threats to DACA

In addition to the uncertainty surrounding the Trump Administration’s intentions for DACA, the program faces two separate legal threats.

#### 1. Texas and Other States Demand That DACA Be Rescinded (*United States v. Texas*)

On December 3, 2014, a number of states filed a lawsuit in a U.S. District Court for the Southern District of Texas alleging that the Deferred Action for Parents of Americans (DAPA) program

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<sup>1</sup> As of August 23, 2017, there have been no formal changes to the DACA program. USCIS continues to process both initial and renewal Forms I-821D and accompanying Forms I-765.

<sup>2</sup> For more information see AILA’s [Practice Alert: Advising Clients on the Future of DACA](#) (AILA Doc. No. 16111439), and [Bite-Sized Ethics: Advising Clients and Potential Clients on DACA](#) (AILA Doc. No. 17070338).

and expanded DACA (DACA+) program announced in a [November 20, 2014 memorandum](#) issued by the Obama Administration was unconstitutional.<sup>3</sup> Notably, the lawsuit excluded the 2012 DACA program. The case was assigned to Judge Andrew Hanen, who granted a preliminary injunction, halting implementation of DAPA and DACA+ nationwide. The case made its way to the Supreme Court, and on June 23, 2016, the Court announced they were equally divided (4-4) and could not reach a decision on the case, thus affirming the Fifth Circuit's decision and effectively upholding the lower court's injunction. On June 16, 2017, [DHS issued a press release](#) stating that the Administration was rescinding DAPA and DACA+ memo, because "there is no credible path forward to litigate the currently enjoined policy." The press release explicitly stated that the [2012 DACA memorandum](#) would remain in effect.

On June 29, 2017, [Texas and nine other states sent a letter to Attorney General Jeff Sessions](#) requesting that DHS "phase out" the DACA program by rescinding the 2012 DACA memo and ceasing approval of any new or renewal DACA grants. The letter states that the plaintiffs will voluntarily dismiss the lawsuit if the DACA memo is rescinded. If it is not rescinded, they will amend the lawsuit to challenge the DACA program. On July 28, 2017, the Mexican American Legal Defense and Educational Fund (MALDEF) asked Judge Hanen to dismiss the case, arguing that the lawsuit is moot given that the DAPA memo has been rescinded. Judge Hanen stayed the proceedings until September 5, 2017.

As a result of the June 29, 2017 letter, Trump could reconsider his decision to keep DACA in place, and affirmatively rescind the 2012 DACA memo, ending the program. If he does not rescind DACA, and the state Attorneys General follow through on their threat to amend the lawsuit, the question of DACA's constitutionality would be before Judge Hanen. It is also possible that the states would request a preliminary injunction to stop implementation of the DACA program while the amended lawsuit was being heard by the courts. Additionally, if the lawsuit is amended, then the defense of DACA would be left up to a Department of Justice (DOJ) led by Attorney General Jeff Sessions. In the past, Sessions [has stated](#) that the constitutionality of DACA is "questionable."

## **2. Solicitor General to Weigh In On Whether Supreme Court Should Consider Case Involving Constitutionality of DACA (*Arizona Dream Act Coalition v. Brewer*)**

On November 29, 2012, the Arizona Dream Act Coalition (ADAC) sued the state of Arizona, alleging that the state's policy of denying driver's licenses to individuals with DACA was unconstitutional.<sup>4</sup> The U.S. District Court for the District of Arizona permanently blocked the state from implementing this policy, a decision that was [subsequently upheld](#) by the Ninth Circuit. In its briefing to the Ninth Circuit, however, Arizona argued – for the first time – that DACA was unconstitutional. The Ninth Circuit held that this issue was not properly before the court.

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<sup>3</sup> For more information on *U.S. v. Texas*, see AILA's [Resources on the Lawsuit Challenging DAPA and DACA Expansion](#) (AILA Doc. No. 14122946).

<sup>4</sup> For more information on *ADAC v. Brewer*, see NILC's website at <https://www.nilc.org/issues/drivers-licenses/adac-v-brewer-daca-dl/>, <https://www.nilc.org/issues/drivers-licenses/adac-what-comes-next/>.

In March 2017, Arizona appealed the Ninth Circuit's decision to the Supreme Court, again arguing that DACA is unconstitutional. On June 26, 2017, the Court asked the Solicitor General to issue an opinion on whether the Court should hear the case. There is set no due date for that response, but it is expected to come in the fall 2017.

We do not know whether the Solicitor General will recommend that the Supreme Court take the case. However, even if the Solicitor General does recommend that the Supreme Court hear *ADAC v. Brewer*, it does not mean that the Court will decide the constitutionality of DACA. The court could agree with the Ninth Circuit that the issue is not properly before the court, or could decide that case on other legal issues.