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SECOND CIRCUIT REVIEW

Expert Analysis

Deferred Action, Expedited Litigation

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When the Trump administration issued an order in September 2017 setting March 2018 as the end of Deferred Action for Childhood Arrivals (DACA), a flurry of litigation followed that reached the Second Circuit once and is headed there again.

Termination of DACA and the Present Litigation

In 2012, the Obama administration established DACA, which enabled non-citizens brought to the United States as children to apply for a renewable, two-year period of deferred action from deportation. Applicants who satisfied the Department of Homeland Security (DHS) vetting process could obtain renewable work authorization and a Social Security number. Since 2012, nearly 800,000 young people have benefited from DACA. On Sept. 5, 2017, facing threats of litigation from a group of states, Attorney General Jeff Sessions announced the termination of DACA. Acting DHS Secretary Elaine Duke concurrently issued a memorandum announcing that DHS would no longer accept DACA applications.

> The DACA cases appear set to continue traveling up and down the federal court system, with resolution by the Supreme Court likely, unless the administration rescinds its rescission order.

The following day, a coalition of 16 states led by New York filed suit in the Eastern District of New York, challenging the administration's decision to end DACA on the ground that it was driven by discriminatory animus in violation of the Equal Protection Clause of the Constitution as well as the substantive requirements of the Administrative Procedure Act and the Regulatory Flexibility Act. Plaintiffs also challenged DHS's decision to cease providing notice to DACA recipients eligible for renewal and its withdrawal of protections prohibiting federal officials from using personal information collected from DACA grantees to facilitate immigration enforcement actions against the grantees or their families.

Privilege Log Requirement

The case first reached the Second Circuit because of a discovery

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dispute. Magistrate Judge James Orenstein expedited discovery and required the Government to produce, within eight days, a privilege log identifying all documents considered within the executive branch in deciding to rescind DACA. The Government appealed Judge Orenstein's order to the district court, arguing that the privilege log requirement raised separation-of-powers concerns and exceeded the bounds of the court's authority; in any event, compliance was impossible. The Government also argued that discovery is not appropriate. After initially extending the deadline for the Government to submit its privilege log, District Court Judge Nicholas G. Garaufis narrowed the scope of the Government's burden, first restricting the log to documents considered within DHS and the Department of Justice (DOJ) and then further narrowing it to material that Attorney General Sessions or Acting Secretary Duke actually considered or that their first-tier subordinates considered. The district court denied the Government's request to stay discovery, reasoning that there would be insufficient time to reach resolution prior to March 5, 2018 and that the burdens of expedited discovery resulted from the Government's decision to terminate DACA on short notice.

On Oct. 6, 2017, the Government produced a 256-page administrative record primarily consisting of publicly available documents, to which plaintiffs objected and the magistrate judge agreed was manifestly incomplete.

Second Circuit and EDNY Play Ping Pong

On Oct. 19, 2017, the Second Circuit stayed discovery contingent on the Government timely filing a writ of mandamus. The writ claimed that the privilege log was unduly burdensome and compliance would require every full-time litigation lawyer at DHS headquarters, all electronic discovery computer resources of Customs and Border Protection, and Immigration and Customs Enforcement counsel from other cases be added to the team.

Following argument, the Second Circuit continued the discovery stay and stated that it would not reach a decision until the district court ruled on jurisdiction and justiciability. On Nov. 9, 2017, the district court concluded that it had jurisdiction and that the case was justiciable. It reasoned that the decision to eliminate DACA is not a presumptively unreviewable exercise of enforcement discretion. Moreover, §1252(g) of the Immigration and Nationality Act does not strip the court's jurisdiction because plaintiffs' challenges do not arise from one of the three enumerated actions by immigration authorities that trigger the statute's application.

Plaintiffs opposed the Government's mandamus petition. Plaintiffs argued that courts routinely order agencies to complete incomplete administrative records. The administrative record, by the Government's admission, omitted documents (1) before Acting Secretary Duke on which she did not focus, (2) developed during DHS's review, or (3) before AG Sessions.

Similar litigation in the Northern District of California reached the U.S. Supreme Court. In a December per curiam decision, the Supreme Court criticized the district court's requirement that the Government produce documents before it resolved the Government's threshold arguments on jurisdiction and justiciability; the Supreme Court also expressed concern about the breadth of the district court's definition of the administrative record (which included all DACA-

related materials considered anywhere in the Government).

On Dec. 27, 2017, the Second Circuit panel consisting of Judges Barrington D. Parker, Gerard E. Lynch, and Christopher F. Droney denied the Government's writ of mandamus and lifted the discovery stay. The Second Circuit rejected the notion that, in evaluating agency action, a court may only consider material that the Government unilaterally decides to present. The Second Circuit referenced the specific material Plaintiffs identified as missing from the record, noting, "[i]t is difficult to imagine that a decision as important as whether to repeal DACA would be made based upon a factual record of little more than 56 pages, even accepting that litigation risk was the reason for repeal." Order Denying Mandamus Petition & Lifting Stay of Discovery, *In re Nielsen*, No. 17-3345 (2d Cir. Dec. 27, 2017). The Second Circuit distinguished this case from the Northern District of California case underlying the Supreme Court's per curiam decision: (1) the district court here already rejected challenges to jurisdiction and justiciability, and (2) while the discovery order in the Northern District of California litigation included White House documents, the discovery order here was restricted to the DHS and DOJ and, therefore, did not raise separation-of-powers concerns. The Second Circuit concluded that the district court's order "plainly contemplates an orderly resolution of any claims of privilege," and expressed confidence that "the District Court will provide the Government with an opportunity to be heard on any claims of privilege it may assert." Id.

If the injunction remains, then the urgency underlying the case pending before the Second Circuit will subside.

Future Second Circuit Visits

Two additional appeals to the Second Circuit are on the horizon: (1) the district court's holding on jurisdiction and justiciability, and (2) plaintiffs' motion for a preliminary injunction.

On Dec. 28, 2017, the day after the Second Circuit issued its decision, the Government moved to certify an interlocutory appeal of the district court's holding that the case was justiciable, seeking (for the fifth time) a stay of discovery. The district court granted the stay on Dec. 30, 2017 and certified the appeal on Jan. 8, 2018. The Government noticed its appeal that same day.

On Dec. 15, 2017, while the mandamus petition was pending before the Second Circuit, Plaintiffs moved to preliminarily enjoin the termination of DACA. Numerous amicus briefs supporting the preliminary injunction motion were filed by, among others, religious and secular non-profit organizations, universities, and 114 companies detailing DACA's benefits to the U.S. economy.

Status of DACA

On Jan. 9, 2018, the district court for the Northern District of California preliminarily enjoined DACA's termination. If the injunction remains, then the urgency underlying the case pending before the Second Circuit will subside. In any event, the DACA cases appear set to continue traveling up and down the federal court system, with resolution by the Supreme Court likely, unless the administration rescinds its rescission order.