



## DACA, Major Questions, Gundy, and the Non-Delegation Doctrine

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Ilya Shapiro and I filed an [amicus brief](#) on behalf of the Cato Institute and Professor Jeremy Rabkin in *DHS v. Regents of the University of California*. We filed the brief "in support of DACA as a matter of policy but [the government] as a matter of law." The caption caused quite a kerfuffle on social media. You should not judge a brief by its cover, we explained in a new [SCOTUSBlog symposium essay](#):

Most Supreme Court amicus briefs are predictable. Groups that favor outcome A argue that the law supports outcome A. Groups that favor outcome B argue that the law supports outcome B. Occasionally, groups file cross-ideological briefs in which people of opposite political stripes unite to support a specific cause. But even these briefs fall into the same pattern: Regardless of ostensible ideological labels, all the groups on the brief support the policy outcome that the brief's legal theory advances. . . .

We affirmatively support as a matter of policy normalizing the immigration status of individuals who were brought to this country as children and have no criminal records. (See [Cato's immigration work](#) if you have any doubts.) Moreover, as a matter of first principle, people shouldn't need government permission to work. But the president cannot unilaterally make such a fundamental change to our immigration policy — not even when Congress refuses to act.

Inside the brief, we advance an argument that was not presented, directly at least, by the government's briefing in this case.

The attorney general reasonably determined that DACA is inconsistent with the president's duty of faithful execution. Admittedly, the attorney general's letter justifying the rescission is not a model of clarity. But it need not be. This executive-branch communication provides, at a minimum, a reasonable constitutional objection to justify DACA rescission. Specifically, it invokes the "major questions" doctrine — outlined by Justice Neil Gorsuch in dissent in *Gundy v. United States* — which is used "in service of the constitutional rule" that Congress cannot delegate legislative power to the executive branch.

Much to our pleasant surprise, after we filed the brief, President Trump addressed our position in his own inimitable way:

[@realDonaldTrump](#)

....have the discretion to end the program that President Obama began in his discretion. That program was unlawful to begin with. I think it's very unlikely that the SCOTUS is going to issue an order reinstating what it believes is an unlawful program. DACA Is unlawful." .....

....President Obama never had the legal right to sign DACA, and he indicated so at the time of signing. But In any event, how can he have the right to sign and I don't have the right to "unsigned." Totally illegal document which would actually give the President new powers.

To be sure, the tweet has factual mistakes. For example, President Obama didn't sign the "totally illegal document." The Secretary of Homeland Security implemented DACA. But for once, the President's social media account actual bolsters his case in court. He wrote that DACA "would actually give the President new powers." In other words, DACA relied on a reading of the INA that would delegate legislative powers to the executive that he lacks. Stripped of all legal formalities, the presidential tweet concisely explains why DACA was inconsistent with the president's duty of faithful execution. And it comes right from the commander in chief.

Candidly, this tweet is far more descriptive than the attorney general's letter, which dances around the issue of what DACA' "constitutional defects" are. In our brief, we offer a suggestion to the Court:

Here, the executive branch is on the same page: the previous administration's reading of federal law that supports DACA would render parts of the INA unconstitutional. For that reason, the attorney general recommended, and the secretary decided, to rescind DACA. The Court should hesitate before reaching an alternate holding, in which the attorney general and the secretary of homeland security, as well as the solicitor general, were simply mistaken about the executive's faithful execution. The better understanding is that the reference to DACA's "constitutional defects" was framed in terms of the major questions and non-delegation doctrines, as Justice Gorsuch recognized in *Gundy*. But if there is any doubt about this important question, the government should be asked to represent its position about DACA's "constitutional defects."

With, or without the tweet, the record amply provides enough ground to justify the rescission of DACA.

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