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# NATIONAL REVIEW

## Let's Settle the Legality of DACA Now

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Almost immediately after President Trump announced that he would wind down the policy known as Deferred Action for Childhood Arrivals — which shields from deportation nearly a million “Dreamers,” aliens brought to the U.S. as children — lawsuits were filed across the country.

These courts are soon expected to issue nationwide injunctions against the president, which will trigger the now-familiar rat race: The government will be forced to seek emergency stays from the Courts of Appeals (which will be denied), followed by a frantic appeal to the Supreme Court. There is a smarter approach: The government should urge the Supreme Court to hear a related case from Arizona this term. Doing so would settle this important constitutional question now and shortcut the inevitable defeats in the lower courts.

In 2012, Arizona determined that the state would not issue driver’s licenses to DACA recipients, because they were protected only by exercises of prosecutorial discretion. Last year, the Ninth Circuit Court of Appeals ruled that Arizona could not deny licenses to the Dreamers because that state practice would conflict with federal law. Remarkably, however, the court did not reach the essential question of whether DACA itself was legal. As Judge Alex Kozinski noted in dissent, “the lawfulness of the President’s policies is an issue that the panel bends over backward not to reach.” If DACA is illegal, then Arizona’s policy can continue. Moreover, if DACA is illegal, then President Trump’s decision to wind down the program is justified and cannot be stopped by the courts.

Here the Trump administration can shift from defense to offense. In June 2017, the Supreme Court asked the solicitor general — the executive branch’s top lawyer — to weigh in on the Arizona case. There are three possible responses. First, the solicitor general could suggest that the Court deny review, and let the Ninth Circuit’s decision — and its implicit endorsement of DACA — stand undisturbed.

Second, the solicitor general could tell the Court that the case is moot, because DACA is being wound down. Alas, sending the case back to the Ninth Circuit is a risky gambit, as they could uphold DACA on other grounds. The third option is the most promising: The solicitor general

should encourage the justices to hear the case now, and settle — once and for all — whether DACA is lawful.

This approach has three significant benefits. First, it could circumvent the lower courts from issuing a spate of nationwide injunctions against the president. Indeed, one judge in Brooklyn has already deplored Trump’s initiative as “heartless.” If the solicitor general submits his brief in December — the customary time for such filings — the Supreme Court could grant review by January and hear arguments in March. At that point, the Justice Department can ask the lower courts to put their proceedings on hold. Second, the Arizona case is a far better vehicle to consider the legality of DACA than are the recently filed lawsuits. A victory for the state will result in the revocation of a relatively small number of driver’s licenses. It would not result, directly at least, in rendering the Dreamers subject to deportation.

The Supreme Court is far more likely to rule for the Trump administration than would courts in New York or California. Third, and most important, the Supreme Court is far more likely to rule for the Trump administration than would courts in New York or California. Recall that in 2016, the high court split 4–4 on the constitutionality of President Obama’s related 2014 executive action, which shielded from deportation the parents of citizens and lawful permanent residents. As even the Obama administration’s Office of Legal Counsel acknowledged in a cryptic footnote, DACA, which does not require applicants to have any relation to a U.S. citizen, is on shakier legal grounds.

Sooner or later, the justices will have to weigh in on the constitutionality of this executive action. The Trump administration should ask the Court to do so now, and settle this core question about the separation of powers.

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