

DOJ Petitions Supreme Court to Take Up DACA Cases Now

PRESIDENTS' ALLIANCE | ON HIGHER EDUCATION AND IMMIGRATION

November 6, 2018

Dear Presidents' Alliance Members,

Yesterday afternoon, in a highly unusual move, the Department of Justice (DOJ) asked the Supreme Court to bypass three appellate courts (2nd, 9th, and D.C. Circuits), and immediately review the DACA cases this term. Below is more information on this important DACA development, as well as on recent developments related to international students.

DACA/Dreamers

- **The DOJ petitions the Supreme Court to bypass the three appellate courts and take up the DACA cases for "immediate review."** As background, two and half weeks ago, the DOJ filed a letter to the 9th Circuit Court of Appeals requesting the court take up the DACA case by October 31, or the DOJ would petition the Supreme Court (SCOTUS) to consider the case and rule on the nationwide injunction that is still in place. The 9th Circuit did not do so, and yesterday afternoon, the DOJ petitioned SCOTUS to consolidate the DACA cases in all three circuit courts for immediate review (with the goal to rule the termination of DACA lawful).
 - **Why the push from the DOJ?** The longer it takes for a DACA ruling to be issued by the circuit courts, the less likely it is that the SCOTUS will be able to take up an appeal this term, making it more likely that a SCOTUS DACA decision will be delayed till far later in 2019. From yesterday's DOJ letter: "By virtue of the district courts' orders, DHS is being required to maintain a discretionary policy of non-enforcement sanctioning an ongoing violation of federal law by more than half a million individuals . . . absent prompt intervention from this Court, there is little chance this dispute will be resolved for at least another year."
 - **It still would be highly unusual for SCOTUS to bypass ordinary judicial review.** As you may remember, DOJ had asked the Supreme Court last January to bypass the 9th Circuit, but SCOTUS refused to do so. It did order the 9th Circuit to move "expeditiously." The 9th Circuit heard oral arguments in the case back in May 2018 (see the NILC DACA litigation timeline).
 - **What are the next steps?** Most immediately, continue to encourage and support those who are eligible to renew DACA to do so if they have not done so already (see the social media graphic below). The DOJ move may also renew pressure on Congress to act to pass legislation to protect DACA and Dreamers (and TPS recipients), as only Congress can enact a solution that will permanently protect undocumented students and provide them a pathway to citizenship.

- **Future amicus brief opportunity.** As discussed [previously](#), we will work with Jenner & Block to coordinate an opportunity for educational institutions to sign on to a future amicus brief in support of DACA.
- **Polling continues to show strong support to pass legislation protecting Dreamers from deportation.** In a November 1, 2018 [POLITICO/Morning Consult poll](#), 59% of respondents indicated that “passing a bill that grants young people who were brought to the United States illegally when they were children, often with their parents, protection from deportation” was a **top or important priority**, while only 16% indicated a bill should not be passed.

International Students

- **The legal challenge to the Unlawful Presence (ULP) policy is underway.** Four colleges and a student association [filed a federal suit](#) in the U.S. District Court for the Middle District of North Carolina to halt the new unlawful presence policy. (This is the litigation led by Paul Hughes of Mayer Brown, and the institutions include Presidents’ Alliance members.)
 - As discussed in prior communications, in August, DHS put into effect changes in the ULP policy that could impose 3- and 10-year reentry bars on thousands of international students who inadvertently fall out-of-status. It impacts not only members of campus communities, but also imposes new, unpredictable liability on higher education institutions.
 - While we do not anticipate new developments in the case for a while, we will update you as this case proceeds, including sharing possible opportunities to join an amicus brief to support this legal challenge.
 - Another effort is also underway to work with states’ attorney generals to bring comparable legal challenges to the ULP policy in other federal district courts. If you have an interest in finding out more about this other effort, you can email [Miriam](#) to be connected with the appropriate individuals.
- **Tracking the legal challenges to OPT (Optional Practical Training).** The Administration has continued to signal that it will seek to enact regulatory changes to the OPT program, which could result in the reduced availability of OPT and/or STEM OPT for international students. In the meanwhile, the “Washington Alliance of Technology Workers” (Washtech), represented by an anti-immigration group, Immigration Reform Law Institute, filed a case challenging OPT which is proceeding in federal court. If the lawsuit by Washtech succeeds, that could end all OPT, including STEM OPT.
 - **Industry intervenes in support of OPT in the Washtech case.** On October 18, the National Association of Manufacturers, the U.S. Chamber of Commerce, and the Information Technology Industry Council (ITIC) [filed a motion](#) to intervene in the Washtech case, citing the importance of the OPT program as a “crucial bridge” between the student visa status and employment and longer term immigration status. The business groups are arguing that their interests are not being “adequately represented” by the government, which has already taken steps to consider a revision of the program (Paul Hughes of Mayer Brown submitted the motion on behalf of NAM, the Chamber and ITIC).
 - **Why does OPT matter?** The opportunity to participate in OPT has become a key recruitment attraction for international students coming to study in the U.S.. It serves as a “buffer” and “holding tank” for international students graduating from U.S. colleges and universities who want to stay and work in the U.S. and apply for

H-1B status (William Kerr, *Gift of Global Talent*, 2018, p.88). The increase in students participating in OPT in recent years has been tremendous, especially with the expansion of STEM-OPT.

- **New data on OPT participation.** In 2010, according to Open Doors [data](#), there were 76,031 international students in OPT. In 2017, as detailed in recently released [data from SEVP](#) (Student and Exchange Visitor Program), there were [328,305 OPT students](#), including 89,839 STEM-OPT students, along with 105,351 CPT (Curricular Practical Training) students. SEVP also released new data that lists the top 200 Employers for [OPT students](#) and for [CPT students](#), along with the top [500 schools](#) with F-1 students, and top [100 schools](#) with students participating in OPT (see more at the [SEVP website](#)).
- Given the array of policies that are targeting international students, It is more important than ever for higher education leaders to share the positive contributions and benefits that international students, scholars, and alumni bring to our campuses and communities.

We hope this update was useful. Please do not hesitate to contact Miriam if you need additional information or other resources.

Sincerely,

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Presidents' Alliance Team

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3 Things You Should Know About DACA & the DOJ Petitions



Stay empowered by staying informed:

- 1 DACA renewal applications are still being accepted for those currently eligible.
- 2 On November 5th, DOJ filed petitions to bypass three federal courts. DOJ is attempting to expedite DACA to the Supreme Court where their ultimate goal is to end the program once and for all.
- 3 The Supreme Court will decide whether or not to hear this case in early 2019. For the time being, DACA renewals remain open. Due to uncertainty, if you have DACA or have had DACA in the past, check with an attorney and consider renewing today!

For more information go to informedimmigrant.com

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