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Immigration

Trump Bid to Leapfrog 9th Cir. in DACA Case an Uphill Climb

The Trump administration has turned to the U.S. Supreme Court following a congressional stalemate over extending an Obama-era immigration program, but there are doubts about whether the justices will intervene in the issue that triggered a partial federal government shutdown.

Such requests to leapfrog lower courts—known as petitions for certiorari before judgment—are rarely granted, Aaron Bayer, of Wiggin and Dana LLP, Hartford, Conn., told Bloomberg Law. Bayer has written about the procedure.

And this “case doesn’t fit neatly into the categories of cases in which cert before judgment has historically been granted,” he said about the administration’s Jan. 18 request for the court to hear the politically charged dispute over the Deferred Action for Childhood Arrivals program, also known as DACA.

Still, “there has been some deference when the government is making the request,” Bayer said.

Here, the Justice Department wants intervention before the U.S. Court of Appeals for the Ninth Circuit can weigh in on a lower court’s decision that put the brakes on the Homeland Security Department’s efforts to start winding down DACA. It also asked the justices to decide the case this term, which is scheduled to end in June.

The administration announced last fall that it would end DACA, which has deferred deportation for nearly 700,000 immigrants who were brought to the country illegally when they were children.

Judge William Alsup of the U.S. District Court for the Northern District of California concluded Jan. 9 that the Trump wind-down rationale was based on a “flawed legal premise”—that the Obama administration initiated the program unlawfully.

A partisan divide over Democratic demands to restore DACA’s protections derailed Senate efforts at week’s end to pass a temporary spending measure to fund the government, prompting a government shutdown. The government reopened late Jan. 22 based in part on a promise that the Senate will soon address the DACA issue.

No Emergency Paul Bender of Arizona State University’s Sandra Day O’Connor College of Law in Phoenix joined Bayer in skepticism over high court intervention now.

He said any deference to the government likely won’t be enough to push the Supreme Court into this very difficult and politically charged issue.

The court typically only grants such requests once every couple of terms, and typically only when there is a kind of emergency, Bender said. Such grants are warranted only where there is some reason not to wait the months, or even years, for the court of appeals to decide the case.

Moreover, the court typically only grants such petitions “when they involve foreign affairs, serious separation of powers issues (generally when there are questions about the executive branch’s assertion of power), or when a companion case is already before the Court,” Bayer said.

For example, the court thought the situation in 1952 warranted expedited review in *Youngstown Sheet & Tube Co. v. Sawyer*, Bender said. Known as the Steel Seizure Case, the court there invalidated President Harry Truman’s order to take possession of most of the country’s steel mills as he attempted to avoid a nationwide strike.

Shown an Interest But the litigation over DACA doesn’t fit neatly into those categories, Bayer said.

The district court decision actually keeps the status quo, and effectively removes any emergency surrounding the program, Bender said.

Indeed, Trump’s planned wind-down procedure wouldn’t have shut down DACA all at once, Bender noted. Instead, it would have simply stopped new renewals of deportation deferrals. In that sense, nothing really bad is going to happen if the administration isn’t allowed to immediately begin dismantling the program, he said.

Bayer agreed. “I’m not sure the government’s desire, on the other side, to end DACA quickly rather than allowing the normal appellate process to play out will be seen as compelling,” he said.

Moreover, its unclear how the administration’s animus toward the Ninth Circuit might factor into the justices’ decision to leapfrog the circuit. Trump and Attorney General Jeff Sessions have been critical of courts in the circuit following losses over his travel ban and sanctuary cities.

Still, the Supreme Court has already shown an interest in getting involved in this case, Bayer said.

“In response to a discovery order by the district court requiring the government to provide additional documents for the record,” the government asked the Supreme Court to step in.

“The court initially stayed the district court’s discovery order,” and then later vacated the order “and re-

manded the case, requiring the district court to consider the government's arguments," Bayer said.

"Given that the Supreme Court was willing to intervene in a discovery dispute, perhaps it will be willing to take up the preliminary injunction ruling before judgment as well," he said.

The court Jan. 23 also intervened to expedite consideration of the petition for cert. before judgment. But because the parties agreed to the expedited briefing schedule, the move tells court watchers less about how the justices feel about sidestepping the normal appellate process in this case.

The court could just simply wait out the storm over DACA, Bender said.

If the Supreme Court just drags its feet long enough, the other branches of government may just make the issue go away, Bender said.

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