

JUNE 2020

DACA SUPREME COURT CASE SUMMARY & PRACTICE UPDATE

THE U.S. SUPREME COURT'S DECISION IN *DEPARTMENT OF HOMELAND SECURITY V. REGENTS OF UNIVERSITY OF CALIFORNIA* AND ITS IMPLICATIONS.

BACKGROUND

On September 5, 2017, the Department of Homeland Security (DHS) issued a memorandum to terminate Deferred Action for Childhood Arrivals (DACA) – a program fought for by immigrant youth and implemented by the Obama administration in 2012 that protects over 700,000 undocumented young immigrants from deportation and allows them to work lawfully.

That same month, several DACA recipients and a variety of stakeholders including states, universities, and corporations challenged DHS' decision to terminate DACA in different federal courts throughout the country. As a result, three U.S. district courts issued nationwide injunctions allowing people who had previously received DACA to continue renewing their DACA while the litigation continued. In many cases, the government sought and was granted an appeal from the district courts straight to the U.S. Supreme Court. Subsequently, three of those cases—*Department of Homeland Security v. Regents of University of California*; *Trump v. National Ass'n for the Advancement of Colored People*; and *Wolf v. Batalla Vidal*—were consolidated for U.S. Supreme Court review and oral argument on November 12, 2019.¹

WHAT DID THE U.S. SUPREME COURT DECIDE?

On June 18, 2020, the U.S. Supreme Court decided that DHS' termination of DACA did not comply with federal law. It found the termination "arbitrary and capricious" because it failed to consider important aspects of the DACA program, including that DACA recipients, educational institutions, employers, and others have come to rely on the DACA program.² Accordingly, the Court **vacated** the September 5, 2017 memorandum terminating DACA and sent the matter back to DHS to reconsider.³ **This means that the DACA program is restored, and U.S. Citizenship and Immigration Services (USCIS) should accept both initial and renewal DACA applications.**

Specifically, the U.S. Supreme Court held that:

1. The claims arguing that the DACA termination was arbitrary and capricious were reviewable by the Court.⁴
2. The termination of the DACA program by the DHS was arbitrary and capricious because it **did not** consider:
 - a. DHS' original decision to defer the deportation of DACA recipients when it terminated the program; or
 - b. the reliance interests of DACA recipients, who have relied on DACA to earn a livelihood, and those of other entities, such as their educational institutions and employers, who have invested time and money in training and educating DACA recipients.⁵
3. The claim that the DACA termination violated the Equal Protection Clause of the Fifth Amendment did not raise a plausible inference that the rescission was motivated by racial animus.⁶

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DOES THIS MEAN THAT DACA IS HERE FOR GOOD?

Not necessarily. The U.S. Supreme Court did not decide that the DACA program itself was legal or that it was *impossible* for DHS to terminate DACA. All parties acknowledge that DHS has the authority to terminate the DACA program. Rather, the Court decided that DHS' termination of DACA was unlawful for the reasons stated above. This leaves open the possibility that DHS could terminate DACA again, this time addressing the issues identified by the U.S. Supreme Court. However, DACA is widely supported by the general public, and many stakeholders would quickly mobilize again if the program were threatened.

WHAT DOES THIS MEAN MOVING FORWARD?

DACA is safe for now, and the U.S. Supreme Court's decision should mean that DHS will reopen the DACA program in its entirety, including initial DACA applications and advance parole applications, neither of which have been available since the September 2017 termination memorandum.

WHAT CAN ADVOCATES DO?

The U.S. Supreme Court vacated the memorandum terminating DACA, and restored the program in its entirety, which means that advocates can continue to submit renewals, and that USCIS should begin accepting requests for initial DACA and advance parole. Presently, it is much clearer that DACA renewal applications are still being processed, and it remains unknown how USCIS will process initial applications or requests for advance parole. Advocates should note that there is no need to wait for new guidance on DACA before preparing and submitting an initial request, but some have opted to wait to get more clarity. Because of the uncertainty surrounding initial requests, it is important that potential DACA recipients are screened thoroughly to assess individual risks associated with applying for DACA. Thorough screenings are especially important for applicants who seek to apply for advance parole and travel outside the country.⁷

Those who choose to move forward with DACA initial requests should do an individualized assessment to assess not only their client's eligibility for DACA and/or advance parole but also whether the client is at risk for enforcement. Some of the risks associated with submitting a DACA initial request can be greater than submitting a renewal, since current DACA holders have shared information with DHS in the past. Advocates who move forward with an initial DACA request should cover several important elements during the initial discussions with the client. At an initial consultation, advocates should explain the guidelines/requirements of DACA, that the request will require them to disclose otherwise confidential, personal information, and any risks associated with a denial and being issued a Notice to Appear (NTA). Specifically, it is wise to note that although DACA recipients should not be issued an NTA unless they have been convicted of certain criminal offenses, including fraud, or pose a threat to national security, the Trump administration has expanded enforcement.⁸

Additionally, DACA recipients seeking to travel on advance parole should be made aware of the risks associated with travel and what can happen when they seek to be paroled into the country. While advance parole permits a person to enter the U.S., CBP will screen travelers for admissibility and may question a traveler's entire immigration history. Before moving forward on a request for advance parole, advocates need to discuss and learn the applicant's immigration history and possibly suggest that the client obtain a background check.

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It is essential to determine if the person's immigration history, such as a prior removal order that might be executed when the person departs, unlawful presence bars and the permanent bar that might be triggered upon departure, and other inadmissibility grounds under INA § 212 that could present risks to reentering successfully.

Advocates should make sure to visit the ILRC's website at <https://www.ilrc.org/daca> and NILC's website at <https://www.nilc.org/issues/daca/> for updates on the program and practice tips.

TAKEAWAYS

- As a result of the U.S. Supreme Court's ruling, the DACA program should be restored in its entirety.
- It is unclear what steps the Trump administration might take to limit DACA or try to terminate it again.
- Individuals considering applying for DACA should **consult with an attorney or accredited representative**, who can identify any red flags that might put the applicant at risk of being denied DACA or even deported and whether they are eligible for another more permanent form of status.
- It is especially important to consult with an attorney if individuals have **prior removal orders, past contact with law enforcement, pending immigration court cases, or plans to travel on advance parole**.

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Endnotes

1. See National Immigration Law Center (NILC) *Litigation Related to Deferred Action for Childhood Arrivals* available at <https://www.nilc.org/issues/daca/litigation-related-to-the-daca-program/> for more information on the cases.
2. *Dep't of Homeland Security v. Regents of Univ. of Cal.*, 591 U.S. ____ (2020) (slip op., at 26).
3. *Id.* at 29 n.7. (noting that the Court has affirmed the *NAACP* case from below, which vacated the DACA termination).
4. *Id.* at 9-13.
5. *Id.* at 13-26.
6. *Id.* at 27-29.
7. Advance Parole is a benefit in immigration law that allows DACA recipients to travel outside the country and reenter on advance parole.
8. See USCIS, Notice to Appear Policy Memorandum, <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0161-DACA-Notice-to-Appear.pdf> and *Guidance for Referral of Case and Issuance of Notices to Appear (NTAs) When Processing a Case Involving Information Submitted by a Deferred Action for Childhood Arrivals (DACA) Requestor in Connection with DACA Request or a DACA-Related Benefit Request (Past or Pending) or Pursuing Termination of DACA* (June 28, 2018), <https://www.uscis.gov/legal-resources/notice-appear-policy-memorandum>