



## ***DACA at the Supreme Court: Decision Day***

*Updated June 18, 2020*

On November 12, 2019, the Supreme Court of the United States [heard oral arguments](#) in the case of [Department of Homeland Security v. Regents of the University of California](#), consolidated with [Trump v. NAACP](#) and [McAleenan v. Vidal](#), to decide whether the Department of Homeland Security (DHS) can lawfully rescind the Deferred Action for Childhood Arrivals policy (DACA). The Supreme Court had asked both parties to answer the following questions:

- (1) Whether DHS' decision to wind down DACA is judicially reviewable; and
- (2) Whether DHS' decision to wind down DACA is lawful.

### **What is DACA?**

DACA was announced by former President Barack Obama on June 15, 2012 and implemented by then Secretary of Homeland Security Janet Napolitano. The policy has enabled people who came to the United States before the age of 16 to apply for “deferred action,” a form of prosecutorial discretion, and a work permit. The program has protected over 700,000 people in the United States. On September 5, 2017, then Attorney General Sessions announced that DACA would be rescinded. Following that announcement, several litigants have challenged the rescission in the courts and the cases have been consolidated for Supreme Court review. For more information on DACA's litigation history, see the Penn State Law Center for Immigrants' Rights Clinic's [previous fact sheet](#).

### **What did the Supreme Court Decide?**

On June 18, 2020, the [Supreme Court of the United States](#) held 5-4 that the decision by the DHS to terminate DACA was reviewable in federal court and also “arbitrary and capricious” under the Administrative Procedure Act (APA). On the merits, the Court reasoned that the “agency must defend its actions based on the reasons it gave when it acted” and further that DHS failed to consider “reliance” interests such as a broader renewal period for DACA recipients or a more accommodating termination date. The Court said that while DHS was not required to consider all of the policy alternatives, “it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.” The Court remanded all three (consolidated) cases for further proceedings. The Court rejected the claim that the rescission of DACA was motivated by animus in violation of the Equal Protection Clause of the U.S. Constitution.

The decision was authored by Chief Justice Roberts, joined by Justice Ginsburg, Justice Breyer, and Justice Kagan. Justice Sotomayor concurred in the judgement in part, dissenting in part, and finding that the Court “prematurely” rejected the equal protection claim “by overlooking the strength of their complaints.” Justice Thomas, joined by Justice Alito, and Justice Gorsuch, dissented. Justice Kavanaugh issued a separate dissent.

*The goal of this document is to provide general information and is not meant to act as a substitute to legal advice from an attorney.*

## **What did the parties argue in oral argument?**

**The Government Petitioners:** Solicitor General Noel Francisco argued that DACA rescission is not subject to judicial review because it represents the administration’s discretionary enforcement power and compared that power to prosecutors’ discretion to enforce or not enforce certain policies, such as the death penalty. (5:24 - 6:1-8). Petitioner urged the court to address the ultimate legality question but also argued, on a separate and independent basis, that there were sound policy reasons to rescind DACA, in response to Justice Ginsburg’s first question about how to square the administration’s seemingly conflicting views that it had the discretion to end DACA and, at the same time, that it had no choice but to end the unlawful policy (6:9-8:3). He cited [policy memorandum issued by Secretary Kirstjen M. Nielsen](#) (“The Nielsen Memo”) (12:4-22) several times throughout his argument and concluded by referencing it. Several justices, including Justice Breyer highlighted reliance interests further supported by the numerous friend-of-the-court briefs and the Court’s writing in *Fox*, when an agency’s “prior policy has engendered serious reliance interests, it must be taken into account” (23: 4-12). Petitioner argued that, since DACA’s protection extends in two-year increments, no one could reasonably expect that the program would last in perpetuity and that the administration mitigated any harm resulting from reliance interests by giving DACA recipients six months-notice before the program would end (20:1-20).

**The Private Respondents:** Ted Olson argued on behalf of private Respondents, who include individuals in the DACA program, universities, unions and other non-state Respondents. Respondent distinguished the discretionary enforcement power of the administration from a prosecutors’ where the creation of the DACA policy triggered significant reliance interests when it invited and caused individuals to come forward to participate in the program (47:6-48:1). For this reason, Respondent argued that the government must provide an adequate explanation for the policy shift for DACA and, in response to a barrage of questions from Justice Kavanaugh, specified that the government needs to provide a rational explanation responding to the reliance interests (58-59). Additionally, Respondent argued the Nielsen Memo was insufficient because it did not qualify as an independent and contemporaneous decision when it was bound to the preceding decision issued by the Attorney General (59-60). Respondent wants the government to take ownership of its decision and say: “We want to take responsibility for throwing these people out of work, removing people that came here when they were maybe two-years-old” (64:5-25).

**The State Respondents:** Michael Mongan, the solicitor general of California argued on behalf of a coalition of state Respondents that challenged DACA’s rescission. On the issue of reviewability, Respondent reasoned DACA was distinguished as a different type of agency action from *Chaney*, a precedential decision, because the granting of deferred action is itself not a flat nor final non-enforcement decision. (72:14-18). Furthermore, Respondent addressed the reviewability question posed by Justice Kagan: whether or not DACA is the same type of agency action as *Chaney*, it would be presumptively reviewable regardless because “[t]he reasoned explanation requirement is meant to facilitate judicial review and inform the public” (80:18-21). Both respondents echoed one another in the value a remand would serve, for the government to take “ownership of a discretionary choice to end this policy” (86:12-17).

*The goal of this document is to provide general information and is not meant to act as a substitute to legal advice from an attorney.*

## WHAT YOU NEED TO KNOW ABOUT THE STATUS OF DACA

Below is some information about what you need to know about the status of DACA. Please consult with an immigration attorney if you need legal advice.

### **Does Today's Decision Mean the DACA Can Never End?**

No. Today's decision is limited to how the DHS ended DACA in 2017. Specifically, the Court found that DHS failed to provide a reasonable explanation for ending DACA. How and if DHS chooses to proceed in the future (i.e., retaining DACA, issuing a new memorandum/explanation ending DACA, etc.) remains to be seen.

### **Did the Supreme Court Make a Decision About Whether DACA is Lawful?**

No. The Court did not decide if DACA is lawful or a good policy. The decision is limited to "whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action."

### **Can I submit an application for DACA for the first time?**

The Supreme Court's decision means that DACA should be fully reinstated, allowing for first time DACA requests. With that said, DHS will need to reopen the DACA policy for new requests consistent with today's decision. However, this may not happen immediately.

### **I have DACA. Can I renew my DACA?**

Yes. If you have been granted DACA before, you should be able to submit an application to renew DACA.

### **I have DACA. Can I apply for advance parole that allows me to return to the country after traveling outside it?**

The Supreme Court's conclusion that DACA was terminated unlawfully means that advance parole should be reinstated. DHS will need to reopen the DACA policy for advance parole requests consistent with today's decision. However, this may not happen immediately.

## WHERE CAN I FIND MORE RESOURCES?

For more information on DACA at the Supreme Court, visit:

- [Penn State Law Center for Immigrants' Rights Clinic](#) website
- [SCOTUS Blog page](#) on *Department of Homeland Security v. Regents of the University of California*.
- [United We DREAM](#)
- [2019-2020 Supreme Court Preview panel](#) hosted by the American Constitution Society.
- [Home is Here](#): a coalition fighting to protect DACA recipients

*The goal of this document is to provide general information and is not meant to act as a substitute to legal advice from an attorney.*