



## ***DACA at the Supreme Court: Oral Argument Recap and What Comes Next***

*Updated November 13, 2019*

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On September 5, 2017, then Attorney General Sessions announced that DACA would be rescinded.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 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). The 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 a 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

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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 month's 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 Government's Rebuttal:** Petitioner dismissed any concerns about whether the government is taking accountability for terminating DACA, saying "we own this" (89:8). The Nielsen Memo supports two reasons for the rescission of the DACA policy: (1) the legality question and (2) sound reasons of enforcement policy. On the issue of reliance interests, Petitioner cited the memo's dismissal of the reliance interests (89-90).

## **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 while this litigation is pending. Please consult with an immigration attorney if you need legal advice.

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### **Can I apply for DACA for the first time?**

No, USCIS will reject any applications from first-time DACA applicants. Only people who have had DACA at some point previously may submit a renewal application.

### **I have DACA. Does my status change?**

No, current DACA recipients keep their deferred action status and work permits until they expire.

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

Yes. If you have been granted DACA before, you may submit an application to renew DACA as long as you meet the following requirements:

- You must not have left the country on or after August 12, 2012 without first having been granted advance parole.
- You must have resided continuously in the U.S. since the time you first submitted a request for DACA until the present.
- You must not have been convicted of a felony, a significant misdemeanor, or three or more misdemeanors. You must not otherwise pose a threat to national security or public safety.

### **My DACA has expired. Can I renew my DACA?**

Yes. However, the application process changes depending on when your DACA expired or will expire. Please contact an immigration attorney for advice.

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

No, USCIS is currently not accepting advance parole applications through DACA.

**When will the Supreme Court make a decision?** Next year, and possibly not until June 2020.

## **WHAT DO THE BRIEFS SAY?**

**The Government:** In a [brief](#) filed by Solicitor General Noel Francisco on August 19, 2019, the administration argues that (1) DACA's rescission is not judicially reviewable under the Administrative Procedure Act (APA) and (2) that DACA's rescission is lawful because of DHS' doubts regarding DACA's lawfulness and its additional policy concerns.

The administration argues that DACA's rescission is not subject to review as to whether it is arbitrary and capricious under the APA because APA Section 701(a)(2) exempts from arbitrary-and-capricious review agency action that is "committed to agency discretion by law." According to the administration, its decision to rescind a policy of nonenforcement is an action within its absolute discretion that neither the Immigration and Nationality Act (INA) nor any other federal statute limits. The administration refutes lower courts' decisions holding that Section 701(a)(2)

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does not apply to DACA's rescission because DHS' decision was based solely on its determination that DACA was unlawful. It argues that, "an otherwise unreviewable agency action does not become reviewable due to the reasons that an agency provides" and also points to the [additional policy grounds submitted by Kirstjen Nielson](#), the former secretary of homeland security, after the DACA rescission decision was made.

Even assuming that the rescission was reviewable under the APA, the administration points to what it considers to be independently sufficient grounds for rescinding DACA: first, that DHS was concerned that DACA was similar to other policies held to be unlawful by the Supreme Court such as Deferred Action for Parents of Americans (DAPA); second, that DHS wanted to terminate a legally questionable policy and leave the creation of such policies to Congress; and third, that DHS reasonably concluded that DACA is unlawful.

**The Respondents:** The Respondents include individuals in the DACA program, universities, unions, cities, and counties. [In separate briefs](#), they argue collectively that the administration's DACA rescission is subject to judicial review and invalid under the APA and, further, that the administration's additional policy reasons cannot salvage the rescission decision.

First, Respondents argue that the DACA rescission is subject to judicial review because it was a decision based solely on DACA's unlawfulness. APA Section 701(a)(2)'s exception for agency action committed to agency discretion cannot apply when the agency's stated reason for the decision is that the law left the agency with no discretionary choice to make. Further, a decision to end a far-reaching policy like DACA is not traditionally the type of decision committed to agency discretion by law.

Second, Respondents argue that DHS' claim that DACA is unlawful and that the administration lacks authority to maintain the program is incorrect because the executive branch has broad authority to set policies and priorities and to exercise discretion in enforcing immigration laws. Respondents argue that the rescission decision was arbitrary and capricious because, in making the decision, DHS did not adequately explain why DACA is unlawful based on the Fifth Circuit's decision regarding DAPA nor address the differences between the two policies. Respondents point out that DACA is part of a long tradition of discretionary relief for certain people, it applies to a carefully defined class of young people who are likely to present compelling cases for discretionary relief, it allows the agency to consider DACA applicants individually while preserving its discretion to deny relief and it provides stability for DACA recipients, their families and their communities. Respondents argue that, contrary to DHS' assertion, the INA does not prohibit DHS from continuing DACA, nor does it require DHS to do so.

Third, Respondents argue that the additional policy grounds submitted by Nielsen are insufficient to support the rescission decision and that they should not be considered by the Supreme Court because agency action must be judged in light of its original rationale, not a new rationale for an old decision.

## What do the amicus briefs say?

Numerous groups and individuals filed amicus or “friend of the court” briefs in support of each party. [One group of academics filed a brief](#) in support of neither party providing more background on judicial review of discretionary agency action under the APA. Seven groups have filed briefs in support of the government. Several of these groups, including [the Center for Constitutional Jurisprudence](#), [Citizens United](#) and the [CATO Institute](#) argue that DACA is illegal and unlawful because it was not authorized by the INA and pushed the boundaries of appropriate prosecutorial discretion. Some groups further argue that DACA was a violation of the APA’s procedural notice-and-comment rules. [The group of Texas and other states filed a brief](#) arguing that the executive’s decisions both to create and rescind DACA are subject to judicial review and that the rescission decision was not arbitrary and capricious.

Thirty-five groups have filed briefs in support of the respondents, including a group of current and former Congress members, former homeland security officials, education organizations, unions, the American Civil Liberties Union, and religious organizations. [Tim Cook of Apple filed a brief](#) attributing the success of Apple’s revolutionary products to its diverse workforce including 443 DACA recipients who embody Apple’s innovation strategy. [Current and former prosecutors and law enforcement leaders filed a brief](#) explaining how DACA fosters effective law enforcement by promoting trust, respect and cooperation between police and communities because victims of crimes are more likely to cooperate with police when they do not fear removal consequences. The [Mexican government filed a brief](#) pointing out that the United States has agreed to protect DACA recipients as part of its international obligations under the International Covenant on Civil and Political Rights and that the DACA program strengthens the U.S. economy and its foreign policy relations with Mexico. [The National Queer Asian Pacific Islander Alliance and other organizations focused on LGBTQ rights filed a brief](#) explaining the risks of criminal penalties, discrimination and violence that LGBTQ DACA recipients would face if removed to their countries of birth. A [group of immigration law scholars, joined by Professor Wadhia, filed a brief](#) explaining the executive branch’s longstanding use of prosecutorial discretion and category-based deferral in setting priorities for immigration enforcement and how DACA is a lawful exercise of discretion consistent with such longstanding practice.

## 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*.
- [2019-2020 Supreme Court Preview panel](#) hosted by the American Constitution Society.
- [Home is Here](#): a coalition fighting to protect DACA recipients

For more information on applying for DACA renewal, visit the [National Immigration Law Center website](#).

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