



## **Litigation on DACA Rescission: Summary and Next Steps**

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DACA or Deferred Action for Childhood Arrivals was announced by former President Barack Obama on June 15, 2012, and implemented by then Secretary of Homeland Security Janet Napolitano. The policy 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 nearly 800,000 people in the United States. On September 5, 2017, Attorney General Jeffrey Sessions announced a decision to end DACA. Secretary of Homeland Security Kirstjen M. Nielsen published a letter, the press release, and the Q&A stating that it will phase out DACA accordingly. Following the September 5 announcement, several lawsuits were filed to challenge the rescission of DACA.

On January 9, 2018, the [federal district court for the Northern District of California](#) issued a nationwide preliminary injunction and ordered DHS to continue the DACA program. The court first described the history of deferred action and use of discretion in immigration cases. Next, the court described the history of DACA and DAPA and the factors leading up to the rescission of DACA on September 5, 2017.

The impression by the court is summarized richly in the following excerpt from the decision:

“In short, what exactly is the part of DACA that oversteps the authority of the agency? Is it the granting of deferred action itself? No, deferred action has been blessed by both the Supreme Court and Congress as a means to exercise enforcement discretion. Is it the granting of deferred action via a program (as opposed to ad hoc individual grants)? No, programmatic deferred action has been in use since at least 1997, and other forms of programmatic discretionary relief date back to at least 1956. Is it granting work authorizations coextensive with the two-year period of deferred action? No, aliens receiving deferred action have been able to apply for work authorization for decades. Is it granting relief from accruing ‘unlawful presence’ for purposes of the INA’s bars on reentry? No, such relief dates back to the George W. Bush Administration for those receiving deferred action. Is it allowing recipients to apply for and obtain advance parole? No, once again, granting advance parole has all been in accord with pre-existing law. Is it combining all these elements into a program? No, if each step is within the authority of the agency, then how can combining them in one program be outside its authority, so long as the agency vets each applicant and exercises its discretion on a case-by-case basis? Significantly, the government makes no effort in its briefs to challenge any of the foregoing reasons why DACA was and remains within the authority of the agency. Nor does the government challenge any of the statutes and regulations under which deferred action recipients obtain the foregoing benefits.”

**Reviewability:** On reviewability, the court relied on administrative law principles to conclude that DACA rescission memo is both reviewable by a court and also based on a mistake of law. Citing *Overton Park* and *Chaney*, the court held that DACA is different from a situation where is "no

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meaningful standard against which to judge the agency's exercise of discretion.” Also, the court noted that ending a program for more than 600,000 is distinguished from refusing to enforce the law. The court further held that the Immigration and Nationality Act does not prohibit the court to review the decision to end DACA. While the court acknowledged the statutory preclusion of decisions “to commence proceedings, adjudicate cases, or execute removal orders,” the court distinguished DACA by concluding that current recipients of DACA are not yet in the removal proceedings.

**Standing:** On standing, the court concluded that most of the plaintiffs had standing to bring a legal challenge both under Article III of the United States Constitution and under the Administrative Procedure Act’s “zone of interests” test. The injuries claimed by the plaintiffs included the loss of resources of employers who invested in hiring and training, the reduced tax revenues, harms on university (UC), and negative impacts on public health.

**Scope of the Ruling:** The ruling is nationwide and means that DACA should continue as it was before the decision to end DACA, including allowing DACA enrollees to renew their applications. The court listed three exceptions: First, new application from applicants who have before received deferred action need not be processed. Second, the advance parole feature need not be continued for the time being for anyone. Third, defendants may take administrative steps to make sure fair discretion is exercised on an individualized basis for each renewal application. The court also stated that DACA recipients can still be subject to removal proceedings.

**Should I apply for DACA renewal now?** The court ordered United States Citizens and Immigration Services (USCIS) to notify the public when it begins to receive DACA renewal applications and also to prescribe a process. Whether to apply for DACA renewal now depends on the circumstances of each case and the risk barometer of the applicant. As of this writing it is unknown whether USCIS will accept or reject application before a process has been prescribed. Any person considering applying for a renewal of DACA should see an immigration attorney beforehand.

**What Comes Next?** The administration is likely to appeal the decision to the Ninth Circuit Court of Appeals. Possibly, the appellate court will reverse the ruling or stay the decision of the district court pending its decision. Separately, there are several pending legal challenges to the DACA rescission that may be decided in the coming weeks. If additional courts rule in favor of the plaintiffs and are later appealed, this could lead to a request that the Supreme Court hear the case.

**Where can I find more resources?**

- [Penn State Law’s Center for Immigrants’ Rights Clinic](#)
- [National Immigration Law Center](#)
- [Twitter Thread](#) of Shoba Sivaprasad Wadhia

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