

# Summary of the U.S. Supreme Court's Decision in the DACA Cases

JUNE 24, 2020

## Background

In June 2012, the U.S. Department of Homeland Security (DHS) announced the availability of Deferred Action for Childhood Arrivals (DACA), a policy that allowed certain undocumented immigrants who had come to the U.S. as children to come forward and obtain a two-year “forbearance of removal” — an affirmative statement by the U.S. government that the individual was not a priority for removal from the U.S. and that the government did not plan to remove the person. Work authorization and several other benefits are also available to DACA recipients. More than 800,000 young people have directly benefited from DACA since its inception.

On September 4, 2017, then–Attorney General Sessions sent a one-page letter to Acting Secretary of DHS Duke concluding that DACA shared the “same legal ... defects” as a separate program, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), that had never been implemented due to court rulings. Attorney General Sessions’s letter advised that Secretary Duke “should rescind” DACA as well.

The next day, Secretary Duke issued a short memorandum terminating DACA.

Shortly after, lawsuits were filed in federal courts in California, New York, Maryland, and the District of Columbia challenging the termination. In January 2018, a U.S. district court in California issued the first order enjoining the termination, forcing DHS to keep DACA open to those who had previously been granted DACA. Other U.S. district courts issued similar orders, and the government appealed the decisions to the U.S. Supreme Court. The Supreme Court heard oral argument in November 2018 on the cases filed in California, New York, and D.C.

## Summary of the Majority Opinion

On June 18, 2020, the Supreme Court ruled (5-4) that DHS’s rescission of DACA violated the Administrative Procedure Act (APA) because the agency did not provide a reasoned explanation for its action.

Chief Justice Roberts wrote the opinion. He was joined by Justices Ginsburg, Breyer, Kagan, and Sotomayor (Sotomayor dissented from the small portion of the opinion that addressed equal protection). Justice Thomas penned a dissent that Justices Alito and Gorsuch joined. Justices Alito and Kavanaugh additionally wrote their own dissents. All of these are briefly summarized below.

LOS ANGELES (Headquarters)  
3450 Wilshire Blvd. #108 – 62  
Los Angeles, CA 90010  
213 639-3900  
213 639-3911 fax



WASHINGTON, DC  
P.O. Box 34573  
Washington, DC 20043  
202 216-0261  
202 216-0266 fax

## Reviewability

The Court concluded that it had the ability to review DHS's rescission of DACA. The Court reasoned that the Administrative Procedure Act establishes a presumption that agency actions are reviewable by the federal courts. DHS's termination of DACA did not fall into the APA exception for decisions committed to agency discretion by law because DACA is not simply a nonenforcement policy.

## Duke Memo v. Nielsen Memo

In 2017, DHS rescinded DACA through a short memo issued by DHS Acting Secretary Duke. The government urged the Supreme Court to also consider a second memo, issued by Secretary Nielsen in June 2018 prepared after the D.C. district court vacated the 2017 rescission memo and offered DHS the chance to issue a new memorandum rescinding DACA with a fuller explanation for the rescission. The Supreme Court determined that the 2018 Nielsen memo would not be considered and was improper *post hoc* rationalization. By choosing to elaborate on the reasons for the 2017 rescission instead of issuing a new rescission, Secretary Nielsen was limited to the agency's original reasons for rescinding DACA. The Court reasoned that the rule against *post hoc* rationalization serves important values of promoting agency accountability and "instill[ing] confidence that the reasons given are not simply 'convenient litigation positions.'"

## DACA Rescission Is Arbitrary and Capricious

The Court's conclusion that DHS's rescission of DACA is arbitrary and capricious, in violation of the APA, rested on two primary grounds.

First, although DHS was bound by the attorney general's legal conclusion that DACA was illegal, the agency failed to offer sufficient reasoning for rescinding DACA by failing to exercise its discretion in policy matters. Namely, DHS failed to distinguish between the protections from deportation ("forbearance from removal") — which lies at the heart of DACA — and the benefits (such as work authorization) that came with DACA. DHS did not consider whether to retain the protections from deportation, even if the benefits were terminated.

Second, the agency did not consider the consequences of rescission— and the enormous reliance interests at stake. Quoting the respondents, the Court noted:

[S]ince 2012, DACA recipients have "enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance" on the DACA program. ... The consequences of the rescission, respondents emphasize, would "radiate outward" to DACA recipients' families, including their 200,000 U.S.-citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. ... [Additionally,] excluding DACA recipients from the lawful labor force may, they tell us, result in the loss of \$215 billion in economic activity and an associated \$60 billion in federal tax revenue over the next ten years.

Although DHS could have decided to rescind DACA despite these concerns, it at least had to assess whether there were reliance interests and weigh them against competing policy concerns.

## Equal Protection

The Court (Justice Sotomayor dissented from this portion of the opinion) also determined that the equal protection claims were not sufficiently pled and do not raise a plausible inference that the rescission was motivated by racial animus.

## Holding

As a result, the Court affirms the opinion from *NAACP* (the cases filed in D.C.) and vacates former Acting DHS Secretary Duke's memo rescinding DACA. In the Court's words:

Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner. The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew.

This means that the availability of DACA stands, as established through the memo by DHS Secretary Napolitano issued in 2012.

## Summary of the Dissenting Opinions

**Justice Sotomayor** dissented only from the portion of the majority opinion on equal protection. She would have allowed the respondents to develop their equal protection claims on remand. Sotomayor took issue with the Court majority's approach, reasoning that the president's statements before and after the election helped to "create the strong perception" that the termination was "contaminated by discriminatory animus" and generally that the agency's actions had to be considered within a broader context.

**Justice Thomas**, joined by **Justices Alito** and **Gorsuch**, dissented, reasoning that DACA itself is unlawful and that therefore DHS did not need to provide additional policy reasons or consider anything else. He would have reversed the judgments below and remanded to dissolve the nationwide injunctions.

**Justice Alito** wrote one page separately to note that the Court "still does not resolve the question of DACA's rescission," instead telling DHS to "go back and try again." He noted that "the Federal Judiciary, without holding that DACA cannot be rescinded, has prevented that from occurring during an entire presidential term."

**Justice Kavanaugh** would have considered the 2018 Nielsen Memo, reasoning that the *post hoc* justification doctrine merely limited lawyers from asserting after-the-fact explanations, not agency decisionmakers. He also noted that the "Court's resolution of this narrow APA issue ... cannot eliminate the broader uncertainty over the status of the DACA recipients," which was a consequence of "Congress's inability thus far to agree on legislation."

## Additional Key Points

The Court did *not* address:

- whether DACA or its rescission are sound policies
- whether DACA itself is legal (but note that this was addressed by Justice Thomas and Justice Alito, who deemed DACA unlawful)

The Court explicitly states: “The dispute is instead primarily about the procedure the agency followed in [rescinding DACA].”

Whether nationwide injunctions are appropriate (the *NAACP* court issued a final judgment vacating the Duke memo, rather than issuing a preliminary injunction as the courts located in California and New York did.)

### What This Means for DACA Recipients

- USCIS can continue accepting and processing renewal applications.
- The Supreme Court decision requires DHS to again begin accepting first-time applications for DACA.
- But we do not know at this time whether the Trump administration will take action attempting to limit these options.

The **Home Is Here** coalition will continue to update its website with guidance as the situation unfolds.<sup>1</sup>

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<sup>1</sup> [www.dacadecision.com](http://www.dacadecision.com).