

U.S. Supreme Court Rules Deferred Action for Childhood Arrivals Program May Continue

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In a 5-4 decision written by Chief Justice John Roberts, the U.S. Supreme Court has ruled that the Administration acted improperly under the Administrative Procedures Act (APA) in terminating the Deferred Action for Childhood Arrivals (DACA) program, thus allowing the program to continue. *Department of Homeland Security v. Regents of the University of California*, No. 18-587 (June 18, 2020).

The DACA program was instituted in 2012 by the Obama Administration. Since 2017, when the Trump Administration attempted to rescind DACA, the program's more than 700,000 current beneficiaries have been in limbo. Uncertainty, litigation, and injunctions proliferated. (See our article, [Supreme Court Hears Argument on Deferred Action for Childhood Arrivals Policy](#).)

With the Court's decision, DACA beneficiaries do not face immediate risk of losing status, allowing them to continue to live and work in the United States under the DACA program. The case was decided on narrow grounds and the opinion made clear that, while the Administration could have rescinded DACA, it did not do so consistent with the requirements of the APA and applicable law. Justice Roberts wrote, "The dispute before the Court is not whether DHS [Department of Homeland Security] may rescind DACA. All parties agree that it may. The dispute instead is primarily about the procedure the agency followed in doing so."

After rejecting the Administration's arguments that the decision to eliminate DACA was unreviewable, the majority went right to the heart of the case. Was the rescission of DACA arbitrary and capricious in violation of the APA? The Court concluded that there was a violation of the APA because the DHS has not shown that it engaged in "reasoned decisionmaking." To determine that, the Court looked to the explanation for the rescission provided by then-Acting Secretary of DHS, Elaine Duke. Secretary Duke attempted to end DACA based upon a letter from then-Attorney General Jeff Sessions in which he stated that DACA was unconstitutional. During the litigation over the rescission, the new Secretary of DHS, Kirstjen Nielsen, issued a further explanation, nine months after the original, supposedly expanding on the original justification. But the Court found that Secretary Nielsen's explanation bore "little relationship to that of her predecessor" and that her explanation was essentially an impermissible *post hoc* rationalization. In this way, the DACA decision is similar to the [Court's decision in the U.S. census case](#), *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). In both cases, the Court's majority opinion was authored by Chief Justice Roberts and held that a lack of reasoned decision-making cannot be overcome by a *post hoc* explanation.

In the majority opinion, the Chief Justice cited to the various reliance interests: the facts that DACA recipients are enrolled in schools, have established careers, have purchased homes, and started businesses and families. He also noted that these interests "radiate[d] outwards" to U.S. children, schools, and employers — in addition to the possible loss of \$215 billion in economic activity associated with DACA beneficiaries. The Chief Justice made clear that the DHS could have determined that "other interests and policy concerns outweigh[ed] any reliance interests." He emphasized that the DHS should have at least considered the reliance interests:

We do not decide whether DACA or its rescission are sound policies. "The wisdom" of those decision "is none of our concern." ... We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. 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.

The question now is whether Congress will make the program permanent or will the Administration try again to rescind the program.

During the litigation, current DACA beneficiaries were able to continue to renew their DACA status, but

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new applications were not being accepted. For now, DACA beneficiaries may continue to renew their statuses when necessary and new beneficiaries may apply.

For more information about the decision and its consequences, please reach out to your Jackson Lewis attorney.

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