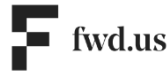


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DACA's Precarious Future: A Conversation with Legal Experts and Advocates Summary and Notes from the Conversation with Legal Experts

[LINK TO RECORDING AND RESOURCES](#)

June 8, 2022

2 pm ET/11 am CT

Why is DACA in a precarious position if the Texas case currently pending Fifth Circuit appeal goes before the Supreme Court?

Concerns regarding the potential outcome in the Fifth circuit are related in part to the 2016 Supreme Court decision which upheld a preliminary injunction against the DAPA (Deferred Action for Parents of Childhood Arrivals) initiative and DACA's expansion. Many of the legal issues are similar (if not the same) with respect to this previous challenge to DACA. The key issues are around whether the federal government has the legal authority to implement an initiative like DACA, whether states have standing to bring a lawsuit, and whether this exercise of discretion is permissible under the Immigration and Nationality Act and the Administrative Procedure Act. Legal observers predict that the outcome will be the same, e.g. a negative decision at the Fifth Circuit that will be affirmed by the Supreme Court, a decision that will likely order the federal government to wind down the program. Legal advocates are also pushing new theories in light of recent SCOTUS decisions that may provide a path forward for DACA to exist, but these efforts are still uncertain especially given the current make-up of the Supreme Court. Judge Hanen was the judge assigned to the earlier case and is assigned to the current case. In July 2021 he granted summary judgment to Texas and other states, essentially deciding no trial was necessary to resolve factual disputes, and that he could conclude (without resolving those factual disputes) that Texas had standing and its contention about the illegality of DACA were correct. In this recent case, Judge Hanen stayed his decision that DACA is unlawful at least with respect to renewal, which permitted current DACA recipients to continue to renew as the case goes through appeal.

Speaker Notes

Thomas A. Saenz, President and General Counsel, MALDEF

- Many are concerned or even expecting a negative decision to come out of the currently pending Fifth Circuit appeal. But can you tell us about the legal arguments that MALDEF is making, especially those around the concept of "standing," that you feel may provide an avenue for the courts to issue a positive decision?

We feel strongly that as a result of new Supreme Court decisions on standing, the Fifth Circuit or even SCOTUS may find that Texas does not have "standing" to bring this lawsuit, e.g. they are not sufficiently injured or impacted, which may lead to the lawsuit being dismissed.

- What do we expect in terms of the timeline for the decision from the Fifth Circuit? How does that timeline look if there is a request for Supreme Court review?

The Texas case will be argued before a panel of the 5th Circuit on July 6th. Once the 5th circuit receives the argument they will submit the case, but the timing of the decision is up to the judges which could take many months. Depending on the panel's decision, the party that loses could choose to either

- (1) Seek broader review within the 5th circuit (ask all active judges in the 5th circuit to review the case vs. judges on the panel) or;*
- (2) Bypass further review by the 5th circuit and seek review through a petition with the U.S. Supreme Court.*

When it comes to the U.S. supreme court, the key is when that petition arrives during the Supreme Court's term because they take the summer months off. Whenever the Court hears the argument in a particular term, it will render a decision by the end of June. This could be June 2023, 2024 or even 2025.

Shoba Sivaprasad Wadhia, Professor and Director, Center for Immigrants' Rights Clinic; and Presidents' Alliance Legal Advisory Council Member

- What are some of the different legal challenges and responses to the DACA policy?
Legal challenges include challenges on whether the administration needed to initially follow the Administrative Procedure Act to end the program (the Trump administration) or the APA to have initially created the initiative. Legal questions also involve whether the DACA initiative is truly discretionary in nature or whether the administration automatically approves all petitions.

- What is the relationship between DACA and prosecutorial discretion? What are the limits of prosecutorial discretion? How has the history of prosecutorial discretion informed the legal landscape of DACA?

DACA is a subset of prosecutorial discretion (PD). PD does not provide a roadmap to citizenship or, in some cases, even employment authorization. DACA is built upon a long history of PD, including previous uses of PDs such as "deferred action," "stays of removal" and decisions not to arrest, detain, or deport certain individuals.

- How would a negative decision on DACA impact the broader use of prosecutorial discretion in the immigration system? Do you think discretion in the immigration system will survive intact?

Hopefully it does not come to that, but it is our hope that PD would remain separate from DACA and that administrations can continue to use PD in a variety of ways.

Hiroshi Motomura, Professor and Faculty Co-Director, Center for Immigration Law and Policy, UCLA; and Presidents' Alliance Legal Advisory Council Member

- Outside of DACA, what immigration trends (positive or negative) have we seen from the administration on its use of executive action and affirmative relief?

Many other executive actions have been enjoined by the courts, particularly in light of a judiciary that is no longer favorable to pro-immigrant executive actions.

- What are the limits of such executive action when it comes to helping Dreamers?
Most executive actions do not establish a path to green cards or citizenship for DACA individuals.
- What are the limits of the new DACA regulation that the administration is set to release this year?
We expect the regulation later this year and it may serve to provide additional protection in the courts by allowing the courts to divide the work permit component of DACA from the deportation protection provision, which may lead to the initiative surviving, but it is still unknown how the rule will impact DACA and the ongoing litigation.
- Advocates speak highly of initiatives like Temporary Protected Status, or TPS, as "catch alls" for DACA—but are there limitations with TPS that would not make it an acceptable substitute for DACA?
TPS is based on designated country and all nationals from that country obtain 18 months of deportation relief and work permits--unless a DACA recipient is from a country with a current or future grant of TPS, they are unlikely to receive protection. TPS also has strict statutory requirements for a designation and the administration has been hesitant to use TPS as boldly as it should during its administration.

General Notes on DACA

Importance of DACA

- **DACA has been transformative:** Reflections on how the expanded opportunities afforded by DACA helped change lives and strengthen campuses, workplaces, and the country over the past decade.
- **Contributions of all undocumented students, staff, and alumni:** Examples of the stories and successes of students, staff, and alumni with DACA as well as other undocumented students and alumni, some of whom were likely affected by the inability to apply to DACA for several years.
- **There is no question that DACA, with both its opportunities and limitations, has changed the course of hundreds of thousands of lives in the United States,** and that the futures of Dreamers and their families are deeply intertwined with the future of the DACA policy.

DACA Recipients

- In the past ten years, **DACA has brought relief to nearly 800,000 immigrants** who came to the United States as children.
- **DACA recipients are part of the fabric of our country** and deserve to be recognized as the Americans they are.
- **DACA recipients are American in all ways but on paper.** They came to the U.S. on average at the age of six, and have lived in the United States for an average of 22 years.
 - They grew up in American neighborhoods and went to American schools. Now, they are doctors, nurses, teachers, and engineers, many of whom are working in essential roles helping families and communities respond and recover from the public health and economic crisis of COVID-19.

- **Having largely grown up in the United States, nearly half (45%) of DACA recipients live in [mixed-status families](#)**, meaning at least one member of their household is not a DACA recipient or an undocumented individual.
 - Nearly [one million U.S. citizens](#) live in households with a DACA recipient.
 - Nearly [one-fifth](#) (18%) of DACA recipients are married to a U.S. citizen spouse.
 - An estimated [590,000 U.S. citizen children](#) live with parents who are DACA recipients.
- **“Dreamers” are vital members of our communities.** We must create a humane immigration system that prioritizes keeping families safe and together.

Urgent Need for Permanent Relief

- **The end of DACA would spell collateral consequences for the over 600,000 current DACA holders**, including placing them at risk for deportation, undermining access to driver's licenses, and other critical benefits
- **The end of DACA would also hurt our nation's economy**, leading to unnecessary terminations, turnover costs by employers, and chaos as hundreds of thousands of employed individuals are forced to leave their jobs.
- **We cannot wait/urgency of action:** DACA has never been the permanent goal, and it's time to build on the successes of DACA to provide a permanent way for DACA students AND undocumented immigrant students to fully participate in the country they call home. This means continuing to advocate for legislation that will include a path to citizenship for undocumented "Dreamers.”
- **DACA is an incredibly precarious legal position**, and there is a very serious risk that the Texas District Court will fully strike down DACA in the coming months
- In light of this uncertainty, **Congress must immediately enact a roadmap to citizenship for DACA-eligible individuals** and other Dreamers that is fair and does not penalize other immigrant populations.
- **A majority of undocumented students entering higher education are not eligible for DACA.**
 - Over [427,000 undocumented students](#) enrolled in postsecondary education. Of these students, **[less than half \(181,000\) are DACA-eligible.](#)**
 - Nearly [100,000 undocumented students](#) are graduating high school annually, but only [a quarter of undocumented students](#) graduating high school now are estimated to be eligible for DACA.