

## The Current State of DACA: Challenges Await in Litigation and Rulemaking

### *What is DACA?*

Deferred Action for Childhood Arrivals ([DACA](#)) is a deferred action policy created and implemented by the Obama administration, via executive action, in 2012. It is aimed at protecting qualifying young undocumented immigrants who came to the U.S. as children, who are commonly referred to as “Dreamers.” DACA temporarily shields them from deportation and provides them work authorization with possible renewal every two years.

Other benefits that derive from having DACA and a work permit include the ability to lawfully obtain a Social Security number and state identification cards or driver’s licenses. Additionally, DACA recipients may be able to apply for temporary permission to leave the U.S. for work, educational, or emergency reasons and then re-enter, even though they normally would not be able to re-enter lawfully. However, DACA does not provide lawful status and it does not provide a pathway to permanent status, such as a green card or citizenship. Because DACA was created via executive action and not legislation, the DACA policy generally can be revoked by further executive action. DACA recipients and those who are DACA eligible but have not yet received DACA are left in a perpetual legal limbo and continue to lack legal status and a pathway to permanent residency and citizenship. Finally, DACA’s origin as an executive branch policy (as opposed to legislation) has also made it subject to legal challenges, with recent court decisions rendering its future uncertain.

### *Trump Administration’s Unsuccessful Attempts to End or Scale Back DACA*

DACA has faced numerous challenges since its inception, with growing concerns in recent years that Dreamers could lose their protections. The Trump administration was [vocal](#) about its intention to end DACA. On September 5, 2017, Elaine Duke, acting secretary of the Department of Homeland Security (DHS), announced a “[wind down](#)” of DACA by rescinding the 2012 DACA policy in a [short memorandum](#) that asserted the policy was likely to be found unlawful (“Duke memorandum”).

In accordance with the Duke memorandum, DACA recipients whose employment authorization documents (EADs) were due to expire before March 5, 2018 (six months from the rescission date), were allowed to renew their EADs and protections if they applied by October 5, 2017. Those DACA recipients whose EADs expired on or after March 6, 2018, would not be allowed to renew and once their DACA and work permits expired, they would not retain any immigration benefit. The terms of the rescission also prevented new DACA applications from being received, preventing thousands of Dreamers from accessing DACA protections even if they met all other eligibility requirements. Numerous legal challenges to the rescission were brought in U.S. district courts.

Ultimately, various challenges to the Trump administration’s rescission of DACA in the Duke memorandum were joined and heard by the U.S. Supreme Court in the [Department of Homeland Security v. Regents of the University of California](#).

In that case, in a 5-4 decision authored by Chief Justice John Roberts, the Court [ruled](#) on June 18, 2020 that the Trump administration failed to provide a well-reasoned explanation for ending DACA, in violation of the Administrative Procedure Act (APA). The court held that the Duke memorandum was inadequate, as it did not examine potential alternatives to ending DACA in its entirety and failed to consider the harms that terminating the policy would create

for DACA recipients. In finding the DHS memorandum ending DACA to be “arbitrary and capricious,” the court held that DHS should have at least considered whether it could preserve DACA’s protections against deportation while terminating work authorization and related benefits. Because DHS failed to examine this alternative, the Duke memorandum was lacking. The court also faulted DHS for failing to address Dreamers’ “legitimate reliance” on DACA.

The Supreme Court declined to consider a subsequent 2018 memorandum from DHS that provided additional policy rationales for the termination decision, noting that accepting belated, distinct explanations of the earlier agency actions risked upholding the termination based on an impermissible after-the-fact rationalization. Finally, the court rejected the argument that the Trump administration was driven by racial animus in attempting to terminate DACA, in violation of the constitutional guarantee of equal protection.

The narrow 5-4 decision allowed DACA to continue and allowed first-time applications to be filed by eligible Dreamers. However, the Supreme Court made clear that the Trump administration and future administrations retain the authority to end DACA provided they follow proper procedures, including providing reasoned explanations for such a decision. In this instance, the Trump administration had the authority to end DACA– it just failed to properly justify the decision to do so. Also of note, the majority opinion did not rule on the legality of DACA itself – only on the process used by the Trump administration in attempting to end it.

The Trump administration’s attempts to limit DACA protections continued. On July 17, 2020, DHS acting secretary Chad Wolf issued an updated [memorandum](#) (“Wolf memorandum”) which significantly altered DACA. This memo allowed DACA recipients to renew their protections and EADs, but only for one year, instead of two years. Because there is no available fee waiver for DACA applications, DACA recipients now had to pay the \$495 USCIS filing fee annually, rather than biannually. The Wolf memorandum also halted new applicants, instructing USCIS to no longer accept first-time DACA applications. It also ordered an end to consideration of all pending and future requests for advance parole by DACA recipients, which would permit those Dreamers to travel outside the United States and reenter lawfully.

The Wolf memorandum was also found to be invalid, but on entirely separate grounds than the Duke memorandum. Due to a paperwork error, several acting DHS officials in the Trump administration [were found to have been improperly appointed](#), bringing the legality of their actions into question and prompting multiple lawsuits. One such lawsuit, a class action filed in the Eastern District of New York, challenged the validity of the Wolf memorandum. In a November 14, 2020, opinion, that court determined that acting secretary Wolf was not appointed to his position properly and invalidated the Wolf memorandum. Accordingly, the court “[certified](#) a class of those eligible for DACA under the 2012 Memo and a subclass of those whose DACA applications were pending between June 30, 2020 and July 28, 2020, and were not or would not be adjudicated under the 2012 Memo.” Subsequently, in December 2020, the court ordered DACA to be fully reinstated to its original 2012 terms.

Because new DACA applicants had been barred from filing for much of the Trump administration, the invalidation of the Wolf memorandum (along with the impending inauguration of President Biden) gave hope to young Dreamers who had aged into eligibility for the policy. There was a significant push in the advocacy community to file first-time DACA applications, both for this population, as well as other Dreamers who had previously opted not to file for other reasons. In FY2021, USCIS received [94,388](#) initial DACA requests, a large increase above FY2020 (4,295 initial requests), FY2019 (1,570) and FY2018 (2,060).

## *Legal Challenges to DACA*

Despite the Trump-era legal victories for Dreamers, legal challenges to DACA continued. A group of Republican state attorneys general (AGs) [threatened federal litigation](#) challenging DACA in 2017, helping prompt the Duke memorandum. The litigation, which was eventually filed in 2018 in the Southern District of Texas, was largely paused as [Department of Homeland Security v. Regents of the University of California](#) made its way to the Supreme Court. The state AGs' lawsuit, which sought a complete end to DACA, resumed following the June 2020 Supreme Court decision.

On December 22, 2020, U.S. District Judge Andrew Hanen heard arguments in the state AGs' lawsuit. There, Texas and other states argued that DACA violated federal law, was promulgated without following proper rulemaking procedures, and imposed costs on the states. During this time, USCIS continued to receive initial and renewal DACA applications.

On July 16, 2021, Judge Hanen [issued a ruling](#) holding DACA to be unlawful, granting a permanent injunction vacating the original 2012 DACA memorandum, and preventing USCIS from approving new DACA applications. Hanen reasoned that DACA failed to follow formal notice and comment rulemaking processes under the APA. He also held that it was inconsistent with statutory immigration law set forth under the Immigration and Nationality Act (INA). However, noting the reliance interest of current DACA recipients, Hanen temporarily stayed the injunction "[as to individuals who obtained DACA on or before July 16, 2021](#)," which in practice permits DACA renewals. The Biden administration appealed Judge Hanen's decision to the U.S. Court of Appeals for the Fifth Circuit, where the appeal remains pending.

A supermajority of the judges serving on the Fifth Circuit were appointed by [Republican presidents](#) and the circuit has a noted [conservative](#) tilt, particularly as relating to immigration, having ruled against another Obama-era deferred action immigration policy – [Deferred Action for Parents of Americans](#) (DAPA) ([affirming](#) an earlier adverse decision by Judge Hanen). Accordingly, there is a strong likelihood that the Fifth Circuit will rule against DACA, either upholding Judge Hanen's decision, lifting Judge Hanen's stay protecting current DACA recipients, and/or potentially leading Judge Hanen to subsequently lift the stay himself. Lifting the stay would prohibit DACA renewals, and potentially halt existing protections.

On January 20, 2021, months before the Hanen decision, President Biden issued a [presidential memorandum](#) calling on DHS to take all actions appropriate to "preserve and fortify DACA." Subsequently, on March 26, 2021, DHS secretary Alejandro Mayorkas issued a [statement](#) announcing that DHS would initiate formal rulemaking to enshrine DACA in federal regulation, consistent with the January 2021 presidential memorandum.

Following the July 2021 Hanen decision, DHS proceeded with this rulemaking, [using formal](#) notice and comment process, an effort to satisfy the APA-related procedural objections raised by Hanen. The [proposed rule was published](#) in the Federal Register on September 28, 2021 to preserve DACA. Public comments on the proposed rule closed on November 29, 2021, with DHS receiving [15,931](#) comments and submissions during the period. Under the APA, the federal government is required to review every comment and submission before issuing a final rule. It is anticipated that a final rule may be published in the spring or summer of 2022.

Even if the Biden administration's use of formal rulemaking addresses the procedural concerns raised in Judge Hanen's opinion, a final rule may still fail to satisfy the opinion's substantive concerns with DACA. In addition to saying that DACA did not comply with the APA, Judge

Hanen held that DACA is inconsistent with the INA and that the DACA policy exceeds statutorily permitted authority outlined in the INA. It is far from clear that the final rule will be able to satisfy the strict substantive criteria set out by Judge Hanen. While it is possible that the final rule could be interpreted to satisfy Judge Hanen's procedural concerns, it seems more likely it will face skepticism from Hanen and/or the Fifth Circuit. And if the new rule fails to satisfy the substantive concerns laid out by Judge Hanen, it seems likely that either Hanen or the Fifth Circuit (depending on timing and developments in the litigation) may lift the stay currently protecting current DACA recipients.

Further, if the Texas-led DACA case makes its way back to the Supreme Court, it will likely face more skepticism than it did in the 2019-20 term. While the Supreme Court allowed DACA to survive in 2020, it only did so by a narrow 5-4 margin, and in a way that did not address the underlying legality of the policy. This time, with the make-up of the Supreme Court having shifted in late 2020 [with the appointment of Justice Amy Coney Barrett](#), a decision directly addressing the legality of DACA may lead to the policy being halted.

### *Where Does DACA Stand Now?*

Because of late 2020 [court decision](#) on the Wolf memorandum, DACA recipients are currently eligible to apply for renewals in 2-year increments. Current DACA recipients can apply for [advanced parole](#) in the specific scenarios originally permitted for DACA recipients (educational opportunities, work reasons, and emergency humanitarian reasons). Initial DACA applicants may still submit their applications to USCIS, but, because of the subsequent Hanen decision, USCIS cannot act on them.

The Biden administration has vocally [supported](#) DACA and has repeatedly called on Congress to pass legislation to protect DACA recipients and other Dreamers. The administration is expected to publish the final DACA rule in the coming months, which, as discussed above, is likely to face further legal challenges.

### *What Happens If DACA Ends?*

Another area of ambiguity is what will happen to DACA recipients if the courts lift the Hanen stay and strike down the policy entirely. It is unclear whether DACA recipients would lose their protections and work authorization overnight, or if there will be a "wind down" period – likely the remaining duration of the EADs with no renewals.

The reliance interest DACA recipients have on the policy's protections is likely to be a key consideration in determining the "wind down" of the policy because, as Chief Justice Roberts noted in his 2020 decision in *Regents*, "[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." Many DACA recipients are entering their tenth year of DACA and have built their careers, finances, families, and lives around their ability to lawfully work in the U.S. and remain free from removal. They have a significant reliance interest in maintaining DACA.

In the event DACA is halted by the courts, DACA recipients and other Dreamers who otherwise would become eligible to initially apply for DACA should consult with an attorney or [DOJ-accredited representative](#) to assess if they have any other available options for relief outside of DACA.

*Conclusion:*

Although the Supreme Court permitted DACA to survive in 2020, its legal future is more uncertain than ever. With an adverse decision from Judge Andrew Hanen in 2021 and the Fifth Circuit and U.S. Supreme Court appearing likely to uphold key elements of Hanen's ruling on appeal, DACA may already be on life support. Even with the Biden administration's upcoming issuance of a final rule to address Hanen's objections to the process used to create the policy in 2012, it is unlikely that the rule will satisfy his substantive objections to the rule.

Ultimately, the solution lies with Congress, as congressional action is needed to provide permanent status for DACA recipients and other Dreamers. In the absence of congressional action, DACA recipients stand to lose work authorization and possibly their protections from deportation if the policy ends. Support for permanent status is supported across the political spectrum and is solid common-sense policy. With the courts preparing to end DACA, Congress needs to step up and provide a legislative solution.