

2021

How to Protect DACA & Dreamers After the United States Supreme Court's Decision in Department of Homeland Security v. Regents of the University of California, 54 UIC L. Rev. 1037 (2021)

Megan Moleski

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Human Rights Law Commons](#), and the [Immigration Law Commons](#)

Recommended Citation

Megan Moleski, How to Protect DACA & Dreamers After the United States Supreme Court's Decision in Department of Homeland Security v. Regents of the University of California, 54 UIC L. Rev. 1037 (2021)

<https://repository.law.uic.edu/lawreview/vol54/iss4/6>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

HOW TO PROTECT DACA & DREAMERS AFTER THE UNITED STATES SUPREME COURT’S DECISION IN DEPARTMENT OF HOMELAND SECURITY V. REGENTS OF THE UNIVERSITY OF CALIFORNIA

MEGAN MOLESKI*

I.	INTRODUCTION	1037
II.	BACKGROUND	1043
	A. Brief Overview of U.S. Immigration Agencies	1043
	B. Why the APA & INA Matter	1044
	C. The History of DACA & DAPA	1045
	D. Background to Regents & Key Arguments Made to the Supreme Court	1048
III.	COURT’S ANALYSIS	1054
	A. Understanding the Plurality: What was Chief Justice Roberts Talking About?.....	1055
	1. Can the Supreme Court Review the Rescission of DACA?	1055
	2. Was the Rescission Arbitrary & Capricious?	1060
	3. Were Dreamers’ Lives, Liberty, or Property at Stake?	1063
	B. Justice Sotomayor: It’s Too Early to Squash an Equal Protection Claim	1065
	C. Justice Thomas: There’s No Need to Look Any Further Than DACA’s Own Illegality	1067
	D. Justice Alito: “Our constitutional system is not supposed to work [this] way.”	1070
	E. Justice Kavanaugh: The Nielsen Memorandum Should Have Been Considered in The Plurality’s Decision.....	1071
IV.	PERSONAL ANALYSIS	1073
	A. How DACA Compares to Other Forms of Immigration Relief	1075
	B. Transforming DACA Into Statutory Law	1076
V.	CONCLUSION	1080

I. INTRODUCTION

Tired, scared, and overwhelmed – this is how two-year-old Fernanda must have felt when she and her mother finally arrived at the United States border.¹ Wearing a pink parka and matching

*Megan Moleski, Juris Doctor Candidate 2022, UIC School of Law. I would like to thank the small village that helped me write this paper. I could not have done this without the unwavering support and encouragement from my family, husband, Bryce Sakach, and Staff Editor, Stephanie Glassberg. I would also like to thank my former colleagues at Brigham & Women’s Hospital for bringing me into the world of visas and immigration and ultimately sparking my desire to go to law school and practice immigration law.

1. *Fernanda is a Dreamer*, DREAMER STORIES,

pants, Fernanda clung to her mother for security.² They were undocumented immigrants who had just made the perilous journey from Mexico to the United States; they carried their worldly possessions in a single bag.³ Saying goodbye to their family in Mexico, they set their sights on Alabama, where Fernanda's father was waiting for them.⁴ Little Fernanda was starting a better and safer life with her parents.⁵ This journey to a new life in the United States is one millions of children from around the world have made.⁶

Fernanda's parents concluded that Mexico was no longer a safe place to live after Fernanda's father had been assaulted five times and had his wedding band stolen twice.⁷ Her parents decided to move to America to give Fernanda the opportunities she deserved.⁸ Since arriving to the United States, Fernanda and her family have achieved amazing success.⁹ Her parents started four businesses which created jobs in their community, purchased two cars, and put Fernanda through college.¹⁰

However inspiring, Fernanda's story is not unique. Scores of children have been brought to the United States at a young age because their parents wanted them to live a happy, safe, and successful life.¹¹ The United States of America would not be the nation it is today without immigration.¹² This is a nation of

www.dreamerstories.com/project/fernanda-is-a-dreamer [perma.cc/U58A-YM39] (last visited Sept. 29, 2021).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Child Migration*, UNICEF DATA (April 2020), www.data.unicef.org/topic/child-migration-and-displacement/migration/ [perma.cc/BQ7Z-ZYRB]; *Immigrant Children*, CHILD TRENDS (Dec. 28, 2018), www.childtrends.org/indicators/immigrant-children [perma.cc/G82U-VN7K]. In 2017, fifty-four percent of immigrant children in the U.S. were of Hispanic origin, while sixteen percent were non-Hispanic White, nine percent were non-Hispanic Black, and seventeen percent were non-Hispanic Asian. *Id.* According to UNICEF, in 2019, the United States accounted for the largest number of child migrants at 3.5 million out of the 33 million children world-wide. *Child Migration*, *supra*.

7. *Fernanda is a Dreamer*, *supra* note 1.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Immigrant Children*, *supra* note 6. By 2017, 19.6 million children, or one in four of all U.S. children, were immigrants. *Id.* While 16.7 million of these children are second-generation immigrants, meaning they were born in the United States to immigrant parents, 2.9 million of these children are first generation immigrants. *Id.* These first-generation children were born outside of the United States and later emigrated to the U.S. *Id.*

12. AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 454 (2d ed. 2015); A.W. Geiger, *In 116th Congress, At Least 13% of Lawmakers are Immigrants or the Children of Immigrants*, PEW RSCH. CTR. (Jan. 24, 2019), www.pewresearch.org/fact-tank/2019/01/24/in-116th-congress-at-least-13-of-lawmakers-are-immigrants-

immigrants.¹³ No matter who you are or how long your family has been here, most Americans can trace their roots back to a brave ancestor who risked everything for a chance at a better life.¹⁴ Sure, some people emigrate for the excitement of a new location and new adventures, but the vast majority of people who emigrate to the United States are doing so out of necessity.¹⁵ It is not always practical, or even possible, for every immigrant to go through the normal channels of the American immigration system prior to their arrival.¹⁶

or-the-children-of-immigrants/ [perma.cc/GJ47-2KRQ]. America's Founding Fathers created a generally pro-immigrant Constitution and system of government. AMAR, *supra*, at 454. In fact, immigrants played a large role in the founding of our nation and were key figures throughout our early government. *Id.* "Seven of the thirty-nine signers of the Constitution . . . were foreign-born, as were countless thousands of the voters who helped ratify the Constitution Immigrants accounted for eight of America's first eighty-one congressmen, three of our first ten Supreme Court justices, four of our first six secretaries of the treasury, and one of our first three secretaries of war." *Id.* More recently, in 2019, fifty-two members of the House of Representatives and sixteen Senators were either immigrants or children of immigrants. Geiger, *supra*.

13. Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/ [perma.cc/N7PX-U29B]. More than one million immigrants arrive to the United States each year. *Id.* Over forty million people living in the United States today were born in another country; immigrants currently account for 13.7 percent of the nation's population. *Id.*

14. Emma Lazarus, *The New Colossus*, POETRY FOUND., www.poetryfoundation.org/poems/46550/the-new-colossus [perma.cc/TSC7-PDDG] (last visited Sept. 21, 2020). "Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!" *Id.*

15. Nadwa Mossaad, *Refugees and Asylees: 2018*, OFF. OF IMMIGR. STATS. FOR U.S. DEPT' OF HOMELAND SECURITY 1 (Oct. 2019), www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/refugees_asylees_2018.pdf [perma.cc/KKG6-TE7U]. In 2018, the United States granted 22,405 individuals refugee status and 38,687 individuals were granted asylum. *Id.* The number of admitted refugees dropped from 84,988 in 2016, while the number of people granted asylum increased from 20,362 in 2016. *Id.* at 2, 8. To obtain either status, the individual must be unable or unwilling to return to their home country while also being unable or unwilling to avail themselves to the protection of their home country either due to persecution or a well-founded fear of persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion. *Id.* at 1. The primary difference between refugees and asylees is that refugees apply for status outside of the United States, while asylum-seekers are either already in the United States or apply for asylum when they reach a port of entry. *Id.*

16. *Why Don't Immigrants Apply for Citizenship?: There is No Line for Many Unauthorized Immigrants*, AM. IMMIGR. COUNCIL (Nov. 25, 2019), [www.americanimmigrationcouncil.org/research/why-don't-they-just-get-line](http://www.americanimmigrationcouncil.org/research/why-don-t-they-just-get-line) [perma.cc/NJ8J-Q9LW]. The vast majority of unauthorized immigrants have no path for obtaining legal status once they have illegally entered the country. *Id.* In general, there are only three pathways to obtain legal status under the current U.S. immigration system: through employment, family reunification, or

Since America's inception, parents from all over the world have left their homelands and brought their children with them to the United States.¹⁷ These children had little to no say in the matter.¹⁸ Dreamers, those protected under the Deferred Action for Childhood Arrivals ("DACA") program, are no different from the many immigrants who have made their way to American shores with the hope of a better life.¹⁹ These undocumented children have become an integral part of our modern society. They are our teachers, doctors, soldiers, caretakers, and even Pulitzer-prize winners.²⁰ They are brave, hardworking, and educated individuals who love America and want to continue living their lives in the only country they have ever truly called home.²¹

DACA grants undocumented individuals who came to the United States as minors and are upstanding individuals, a two-year forbearance from deportation proceedings and the opportunity to work legally.²² Many people oppose this program.²³ This opposition

humanitarian protection. *Id.* Many immigrants do not meet any of these categories and regardless of how long they have been in the U.S. or whether they are upstanding, law-abiding individuals, they will never be able to obtain legal status. *Id.* Additionally, certain countries like Mexico, China, India, and the Philippines, whose citizens make up the largest numbers of emigrants, often have to wait anywhere from 10-20 years in order to be granted legal residency if they apply "the right way." *Id.* In other words, these individuals would have to apply for status prior to entering the U.S., and then wait in their home countries for decades before they will ever find out if they have been granted legal status. *Id.*

17. *Legal Immigration to the United States, 1820-Present*, MIGRATION POL'Y INST., www.migrationpolicy.org/programs/data-hub/us-immigration-trends [perma.cc/KQ4F-LSFG] (last visited Sept. 29, 2021).

18. AMAR, *supra* note 12, at 455 (quoting former Michigan Governor Jennifer Granholm, who emigrated to the U.S. from Canada, "You can't choose where you are born, but you can choose where you live and where you swear your allegiance.").

19. Memorandum from Janet Napolitano to David V. Aguilar, Alejandro Mayorkas, and John Morton, U.S. DEPT OF HOMELAND SEC. (June 15, 2012), www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [perma.cc/3GYL-P3BL].

20. Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 109-10 (2013). Gaby Pacheco arrived in the United States at the age of seven. *Id.* She was an excellent student and talented athlete. *Id.* She took part in her high school's ROTC program and has been an active equal rights proponent since her time in college. *Id.* Yves Gomes was brought to America by his parents when he was just fourteen months old. *Id.* at 110. He excelled in school, was an active member in his local church, and is a caregiver for his cousin, who suffers from muscular dystrophy. *Id.* Jose Antonio Vargas came to the United States from the Philippines and won a Pulitzer Prize for his work in journalism. *Id.*

21. *Id.* at 111 ("I grew up here. This is my home. Yet even though I think of myself as an American and consider America my country, my country doesn't think of me as one of its own.").

22. Memorandum from Janet Napolitano, *supra* note 19.

23. Hans A. von Spakovsky, *DACA Is Not What Liberals Say It Is. Here Are the Facts*, HERITAGE FOUND. (Dec. 4, 2017),

begs the question: is there something inherently wrong with DACA that inspires debate and animosity amongst Americans?²⁴ The answer to that, as any good lawyer would tell you, is “it depends.” DACA is not a perfect program and was not created through the normal channels of bicameralism and presentment.²⁵ In other words, DACA was never passed into law by Congress; it came into being through executive action.²⁶ This has led to a continued debate about the overall legality of the program.²⁷ DACA, however, has allowed over 700,000 upstanding members of our society to remain in the United States and engage in our socio-economic system in a meaningful way.²⁸

Part II of this note is divided into four subsections. It will begin by providing some information about the various federal agencies involved in implementing U.S. immigration laws.²⁹ The focus then shifts to the Administrative Procedure Act (“APA”) and the Immigration and Nationality Act (“INA”) and why each is relevant

www.heritage.org/immigration/commentary/daca-not-what-the-democrats-say-it-here-are-the-facts [perma.cc/FG4C-QUHQ].

24. *Are DACA and the DREAM Act Good for America?*, PROCON (July 19, 2021), www.procon.org/headlines/are-daca-and-the-dream-act-good-for-america/#10 [perma.cc/C5G2-H69D].

25. U.S. CONST. art. I, § 7, cls. 2, 3; *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 947-49 (1983). “Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . . Every Order, Resolution, or Vote to Which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States.” U.S. CONST. art. I, § 7, cls. 2, 3. “The President’s role in the lawmaking process . . . reflects the Framers’ careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures . . . By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief . . . that legislation should not be enacted unless it has been carefully and fully considered by the Nation’s elected officials.” *Chadha*, 462 U.S. at 947-49.

26. *See id.* (explaining how the Framers created a system of bicameralism and presentment to pass legislation); Memorandum from Janet Napolitano, *supra* note 19.

27. Louis W. Fisher, *Executive Enforcement Discretion and the Separation of Powers: A Case Study on the Constitutionality of DACA and DAPA*, 120 W. VA. L. REV. 131, 132, 135-36, 158-60, 162 (2017); accord Lauren Gilbert, *Obama’s Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 260-61 (2013) (describing the conservative backlash after DACA was announced and the flurry of litigation immediately after its implementation contesting DACA’s legality).

28. *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. (1891), (1898) (2020) (“[B]y virtue of receiving deferred action, the 700,000 DACA recipients may request work authorization and are eligible for Social Security and Medicare.”).

29. *Operational and Support Components*, U.S. DEP’T OF HOMELAND SEC., www.dhs.gov/operational-and-support-components [perma.cc/JVP2-PM3V] (last visited Dec. 3, 2020).

in this context.³⁰ This section addresses the important interrelation between administrative agencies, such as the Department of Homeland Security (“DHS”), and the checks and balances put in place under the APA.³¹ It also looks at the specific limitations within the INA that DHS raised as a bar for judicial review.³² Next, some background on DACA will be given: what it is, how it came into being, and how it has positively impacted the lives of thousands of undocumented immigrants.³³ Additionally, a cursory overview of the Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) program will be useful for understanding why DHS chose to rescind DACA in 2017.³⁴ Finally, Part II concludes with a brief overview of the procedural history leading up to *Dep’t of Homeland Security v. Regents of the Univ. of California* (“*Regents*”) and discusses some of the key arguments made before the Supreme Court.³⁵

Part III turns to the Supreme Court’s analysis in *Regents*, what the decision means on its face, and what it might mean for the future of DACA.³⁶ Finally, Part IV concludes with a discussion about how to improve the DACA program so that it can provide a sustainable, long-term solution for current and future Dreamers while also pleasing DACA’s opponents.³⁷ The Supreme Court’s ruling in *Regents* demonstrated how precarious DACA’s status is, and the importance of creating a permanent program to protect Dreamers. A long-term, viable solution can be found by implementing and adapting the current DACA program into statutory law that provides a pathway to citizenship for Dreamers.

30. 5 U.S.C. §§ 101-505; 8 U.S.C. §§ 1101-1537 (2021).

31. 5 U.S.C. §§ 101, 105, 704, 706 (2021).

32. 8 U.S.C. § 1252(b)(9), (g) (2021).

With respect to review of an order of removal under subsection (a)(1), the following requirements apply . . . Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction . . . to review such an order or such questions of law or fact.

33. See Memorandum from Janet Napolitano, *supra* note 19 (describing the benefits Dreamers enjoy through DACA, namely a forbearance on deportation proceedings and the ability to work legally); Andorra Bruno, CONG. RSCH. SERV., R44764, *Deferred Action for Childhood Arrivals (DACA): Frequently Asked Questions* (Sept. 6, 2017), sgp.fas.org/crs/homsec/R44764.pdf [perma.cc/8UBD-H9AT]; *Regents of the Univ. of California*, 140 S. Ct. (1891); *FAQ: DACA and Dreamers*, FWD.US, www.fwd.us/daca-101/ [perma.cc/9NSG-F8UB] (last visited Sept. 19, 2021).

34. *Regents of the Univ. of California*, 140 S. Ct. (1891); *Texas v. United States*, 86 F. Supp. 3d 591 (2015).

35. *Id.*

36. *Regents of the Univ. of California*, 140 S. Ct. (1891), 1905-16.

37. Memorandum from Janet Napolitano, *supra* note 19.

II. BACKGROUND

This case note discusses a variety of topics that are important to the Supreme Court's ruling in *Regents*. This section will offer background information on relevant federal agencies and laws and will explain how DACA is involved in this lawsuit. Subsection A will begin by providing a brief overview of the government agencies involved in the U.S. immigration system.³⁸ Subsection B will dive into the APA and INA to explain why each is important to the Supreme Court's ruling.³⁹ Subsection C will provide some background information on DACA and DAPA.⁴⁰ Finally, Subsection D will provide a brief overview of the procedural history leading up to *Regents* and some of the arguments made before the Supreme Court.

A. Brief Overview of U.S. Immigration Agencies

There are a handful of important federal agencies involved in *Regents*, so it is useful to briefly describe each one. Starting at the “top,” there is the Department of Homeland Security.⁴¹ As part of the executive branch of the United States government, it “secure[s] the nation” and carries out federal immigration laws.⁴² Within DHS, three agencies—U.S. Citizenship and Immigration Services (“USCIS”), U.S. Immigration and Customs Enforcement (“ICE”), and U.S. Customs and Border Protection (“CBP”)—deal with different aspects of the immigration system.⁴³

Each agency plays a distinctive and essential role in the enforcement of U.S. immigration laws.⁴⁴ USCIS is in charge of administering the laws and resolving immigration requests.⁴⁵ This agency reviews and decides visa and work authorization applications, including DACA applications.⁴⁶ ICE is responsible for the criminal and civil enforcement of U.S. immigration laws.⁴⁷

38. *Operational and Support Components*, *supra* note 29.

39. *See generally* 5 U.S.C. §§ 500-596 (2021); 8 U.S.C. §§ 1101-1537 (2021) (detailing the administrative procedures government agencies must follow and the substantive immigration law DHS must apply).

40. Memorandum from Janet Napolitano, *supra* note 19; Memorandum from Jeh Charles Johnson to León Rodríguez, Thomas S. Winkowski, and R. Gil Kerlikowske (Nov. 20, 2014).

41. *Operational and Support Components*, *supra* note 29.

42. *Id.*; 5 U.S.C. § 101 (2021).

43. *Operational and Support Components*, *supra* note 29.

44. *Id.*

45. *Id.*

46. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., www.uscis.gov/DACA#filingprocess [perma.cc/92E4-Z268] (last updated Feb. 20, 2021).

47. *Operational and Support Components*, *supra* note 29.

Imagine them as immigration police officers.⁴⁸ ICE is typically known for conducting raids to arrest undocumented immigrants so that they can eventually be deported.⁴⁹ Finally, CBP is responsible for protecting the nation's borders, enabling trade and travel, and interviewing immigrants when they arrive at the United States border.⁵⁰

B. *Why the APA & INA Matter*

The aforementioned federal agencies must be governed by something – this is where the APA and INA come into play. These two statutes are central components in the Supreme Court's analysis and ultimate ruling in *Regents*. In short, the APA and INA set out the rules that DHS must play by when executing the nation's immigration laws.⁵¹ The INA provides the substantive rules, and the APA determines the procedural rules.

The INA is the federal statute that lays out our nation's immigration laws.⁵² It dictates what categories of visas are available, what factors might prevent someone from obtaining lawful status, what the path to citizenship requires, and whether agency actions are reviewable by a court.⁵³

In its legislative capacity, Congress is permitted to delegate some of its authority to executive agencies.⁵⁴ When Congress delegates authority, it is recognizing that some matters are better handled by experts.⁵⁵ DHS is one such executive agency under the

48. *See id.* (explaining ICE's role in the criminal and civil enforcement of America's immigration laws).

49. *Worksite Immigration Raids*, NAT'L IMMIGR. LAW CENT., www.nilc.org/issues/workersrights/worksite-raids/ [perma.cc/J9GA-Q7BY] (last visited Jan. 2020).

50. *Operational and Support Components*, *supra* note 29.

51. *See generally* 5 U.S.C. §§ 500-596 (2021); 8 U.S.C. §§ 1101-1537 (2021) (providing the administrative procedures government agencies must follow and the substantive immigration laws DHS must apply).

52. 8 U.S.C. §§ 1101-1537 (2021).

53. *Id.*

54. U.S. CONST. art. I, § 8, cl. 18; Gregory C. Ward, *Lussier v. Maryland Racing Commission: Maryland's Court of Appeals Upholds a Fine Imposed by an Administrative Agency Despite a Lack of Specific Authorization to Fine from the General Assembly*, 27 U. BALT. L. REV. 515, 520-21 (1998). Article I, § 8, cl. 18 of the Constitution grants Congress the authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18. Through this Necessary and Proper Clause, Congress is allowed "to create and empower administrative agencies." Ward, *supra*.

55. *See id.* at 529-30 (explaining that because administrative agencies deal with intricate issues in rapidly changing environments, experts in the field are best suited to address these issues); D'Vera Cohn, *How U.S. Immigration Laws and Rules Have Changed Through History*, PEW RSCH. CTR. (Sept. 30, 2015), www.pewresearch.org/fact-tank/2015/09/30/how-u-s-immigration-laws-and-

APA.⁵⁶ While Congress maintains its legislative power to confer rights to immigration status and pathways to citizenship, DHS retains the authority to set policies “for the exercise of discretion within the framework of the existing law.”⁵⁷ However, under the APA, federal agencies are required to engage in “reasoned decisionmaking”⁵⁸ and are “accountable to the public and their actions subject to review by the courts.”⁵⁹ In other words, the APA acts as a check on agency action.⁶⁰

In order to ensure administrative agencies like DHS do not abuse their discretion, Congress must be able to place some sort of check on the agency’s capabilities.⁶¹ Since DHS is accountable to the APA through sections 101 and 105,⁶² any action it takes must align with the provisions of the APA.⁶³ Moreover, if DHS acts in violation of the APA, its conduct may be judicially reviewable.⁶⁴ Thus, when the parties opposed to Duke’s rescission of DACA (“Respondents”) accused her of acting arbitrarily and capriciously in her decision, section 706 of the APA was triggered.⁶⁵ This provision allows a court to set aside agency action if it violates the APA.⁶⁶

C. *The History of DACA & DAPA*

For over two decades, Congress has failed to pass legislation

rules-have-changed-through-history/ [perma.cc/8SLB-FYHM]. “[M]any governmental policy decisions involve intricate issues that are more aptly dealt with by expert administrative agencies. This expertise is particularly necessary in areas that evolve rapidly and require flexibility.” Ward, *supra* note 54. Immigration law in the United States is constantly evolving and adapting to global trends and threats, changes in our foreign relations, and changing presidential policies. Cohn, *supra*. Thus, our nation is best served by experts in the field who understand these developments and can build a flexible system. Ward, *supra* note 54.

56. 5 U.S.C. §§ 101, 105 (2021). “The Executive departments are . . . [t]he Department of Homeland Security.” 5 U.S.C. § 101 (2021). “For the purpose of this title, ‘Executive agency’ means an Executive department . . .” 5 U.S.C. § 105 (2021).

57. Memorandum from Janet Napolitano, *supra* note 19.

58. *Michigan v. EPA*, 576 U.S. 743, 750 (2015).

59. *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

60. *Id.*

61. See Roni Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENV’T L. REV. 2, 212-13 (2015) (noting that both Democrats and Republicans wanted administrative law reform in order to maintain the status quo and prevent administrative agencies from acting “on the basis of unconstrained discretion.”).

62. 5 U.S.C. §§ 101, 105 (2021).

63. 5 U.S.C. § 704 (2021).

64. *Id.*

65. 5 U.S.C. § 706(2)(A) (2021) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]”).

66. *Id.*

that would protect undocumented immigrant youth.⁶⁷ After an unsuccessful attempt in 2000, Congress tried once more to pass the DREAM Act in 2011.⁶⁸ However, like before, its endeavor failed.⁶⁹ In response to this deadlock, the Obama Administration decided to take matters into their own hands pursuant to their enforcement authority.⁷⁰

Out of this gridlock, DACA was created.⁷¹ DACA is encompassed in a two-and-a-half-page memorandum by the former Secretary of Homeland Security, Janet Napolitano (“DACA Memorandum”).⁷² In this memorandum, Napolitano urged ICE, USCIS, and CBP to use discretion when enforcing the INA against young people who were brought to America as children.⁷³ These children are commonly referred to as Dreamers.⁷⁴

In order to qualify for deferred action under DACA, the applicant must meet certain criteria and pass a background check.⁷⁵

67. Keyes, *supra* note 20, at 105.

68. *Id.*, DREAM Act of 2011, H.R. 1841, 112th Cong. (2011). The DREAM Act was first proposed in 2000, and since then has gone through many iterations. Keyes, *supra* note 20, at 105. The DREAM Act is “[a] bill to authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as children, and for other purposes.” *Id.*

69. Keyes, *supra* note 20, at 106.

70. U.S. CONST. art. II, § 3; Memorandum from Janet Napolitano, *supra* note 19. “[The President] shall take Care that the Laws be faithfully executed[.]” U.S. CONST. art. II, § 3. “It remains for the executive branch . . . to set forth policy for the exercise of discretion within the framework of the existing law.” Memorandum from Janet Napolitano, *supra* note 19.

71. *Id.*

72. Memorandum from Janet Napolitano, *supra* note 19.

73. *Id.* (“[T]hese individuals lacked the intent to violate the law and ongoing review of pending removal cases is already offering administrative closure to many of them . . . Our Nation’s immigration laws . . . are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways.”).

74. *Id.*

75. Bruno, *supra* note 33; Misdemeanor Definition, *Black’s Law Dictionary* (11th ed. 2019). The applicant must meet the following criteria: (1) entered the United States under the age of sixteen; (2) under the age of thirty-one on the date in which the memorandum was issued (June 15, 2012); (3) continuous residence in the United States for at least five years prior to June 15, 2012; (4) physical presence in the United States when the memorandum was issued and when filing a request for consideration for deferred action; (5) must not already have lawful immigration status as of June 15, 2012; (6) must not have a felony record, been convicted of a significant misdemeanor, been convicted of three or more misdemeanors, and must not pose a threat to public safety or national security; (7) must either be in school, a high school graduate or previously obtained a general education development certification (GED), or was honorably discharged from the United States Military or Coast Guard; and (8) the applicant must be at least fifteen years old when requesting deferred action

Additionally, while not mentioned in the DACA Memorandum, those applying for DACA must show that they do not meet the criteria of a public charge.⁷⁶ In other words, they must prove that they will not be a burden on the U.S. government, nor will they receive government subsidies, such as food stamps.⁷⁷ If the applicant meets all of these requirements, then either ICE or USCIS may choose to issue a two-year forbearance from removal proceedings.⁷⁸ This means that a Dreamer will not be deported during these two years.⁷⁹ Additionally, those who are granted deferred action under DACA may apply for work authorization, which USCIS also grants at its discretion.⁸⁰ As a result of DACA, over 700,000 immigrants have been able to participate in our society and economy without fear of deportation.⁸¹ These Dreamers have started families,⁸² and make up 200,000 of our essential

under DACA. Bruno, *supra* note 33. A misdemeanor is a criminal offense which is less severe than a felony. Misdemeanor Definition, *Black's Law Dictionary*. These offenses are sometimes referred to as minor crimes and are usually punishable by “fine, penalty, forfeiture, or confinement.” *Id.* Somebody convicted of a misdemeanor will typically be held in a county jail, as opposed to a prison, for no longer than one year. *Id.* What classifies as a misdemeanor can vary by jurisdiction; however, some examples of common misdemeanors are perjury, battery, libel, conspiracy, driving with an expired license, and public nuisance. *Id.*

76. See 8 U.S.C. § 1182(a)(4)(A), (B)(i)(I)(II)(III)(IV)(V) (2021) (describing the factors considered when determining if someone will be a public charge); *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 229, 244-45 (4th Cir. 2020). The INA asserts that “[a]ny alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.” 8 U.S.C. § 1182(a)(4)(A) (2021). The term “public charge” has been part of the INA in some form since 1882 and Congress has purposefully left the term undefined, leaving it to the discretion of the executive branch. *CASA de Md., Inc.*, 971 F.3d at 229. In its essence, the public charge provision is tied to the non-citizen’s ability to be self-sufficient. *Id.* at 244. When determining whether a non-citizen would be a public charge, and thus inadmissible, DHS is to consider their age, health, family status, assets, resources, and financial status, as well as their level of education and their skills. 8 U.S.C. § 1182(B)(i)(I)(II)(III)(IV)(V) (2021). Under the Trump Administration, the Department of Homeland Security attempted to define “public charge” as any “alien who [is] likely to receive certain public benefits, including many cash and noncash benefits, for more than 12 months in the aggregate over any 36-month period.” *CASA de Md., Inc.*, 971 F.3d at 229. A Fourth Circuit ruling found that while the executive branch retains “discretion over the type, amount, and duration of public assistance,” public charge must be read and interpreted according to its plain meaning – a public charge is one who produces a money charge on the public for their support or care. *Id.* at 244.

77. *Id.*

78. Memorandum from Janet Napolitano, *supra* note 19.

79. *Id.*

80. *Id.* Recipients can renew their status and obtain an additional two-year forbearance; thus, extending their DACA status all while never moving any closer towards citizenship. *Id.*

81. *Regents of the Univ. of California*, 140 S. Ct. at 1896.

82. *Id.* at 1914 (“The consequences of the recession . . . would ‘radiate

workers – 30,000 of which work in healthcare.⁸³

While these undocumented youth have received protection under DACA since 2012, undocumented parents of U.S. citizens or lawful permanent residents were not able to receive the same benefits.⁸⁴ However, in 2014 DHS decided to establish DAPA—a sister program to DACA—in an attempt to bridge this gap in the immigration system.⁸⁵ DAPA would have granted forbearance, work authorization, and the same benefits DACA recipients receive, to over 4.3 million undocumented parents of U.S. citizens or lawful permanent residents.⁸⁶ Ultimately, DAPA never got off the ground.⁸⁷

D. Background to Regents & Key Arguments Made to the Supreme Court

Shortly after DAPA was announced in 2014, twenty-six states, led by Texas, filed a lawsuit against the U.S. government seeking to prevent the application of DAPA.⁸⁸ These states argued that the expansion of DACA to include DAPA violated the INA, APA, and the Take Care Clause.⁸⁹ After finding the states were likely to

outward' to DACA recipients' families, including their 200,000 U.S.-citizen children . . .").

83. *FAQ: DACA and Dreamers*, FWD.US, www.fwd.us/daca-101/ [perma.cc/BB55-Q3D5] (last visited Sept. 19, 2021).

84. Memorandum from Jeh Charles Johnson to León Rodriguez, Thomas S. Winkowski, and R. Gil Kerlikowske (Nov. 20, 2014).

85. *Regents of the Univ. of California*, 140 S. Ct. at 1902-03; *see also* Fisher, *supra* note 27, at 131 (explaining “In a 2014 memorandum, DHS launched DAPA, which similarly extends consideration for deferred action to ‘individuals who . . . have, [as of November 20, 2014], a son or daughter who is a U.S. citizen or lawful permanent resident’ and meet five additional criteria.”).

86. *Regents of the Univ. of California*, 140 S. Ct. at 1902; Nicole Svjlenka, *What We Know About DACA Recipients in the United States*, CTR. FOR AM. PROGRESS, (Sept. 5, 2019), www.americanprogress.org/issues/immigration/news/2019/09/05/474177/know-daca-recipients-united-states/ [perma.cc/HX5P-TJ73]. While this number may seem incredibly high and might shock the conscious of those who are against DACA, consider the economic and social benefits Dreamers have provided because of DACA. *Id.* Their ability to work lawfully generates billions in taxes paid to the government and allows them to pay into our social systems such as Medicare and Social Security. *Id.*

87. *Regents of the Univ. of California*, 140 S. Ct. at 1903 (“[I]n June 2017, following a change in Presidential administrations, DHS rescinded the DAPA Memorandum.”).

88. *Texas*, 86 F.Supp.3d at 604.

89. *Id.* at 647; *Regents of the Univ. of California*, 140 S. Ct. at 1902; 5 U.S.C. § 553(b), (c) (2021); U.S. CONST. art. II, § 3, cl. 4. APA § 553(b) requires administrative agencies to publish their proposed new rules in the Federal Register. 5 U.S.C. § 553(b) (2021). This notice informs government officials about the public rule making proceeding, provides the legal basis for the proposed rule, and gives a brief description of the rule. *Id.* After reviewing the notice, government officials can submit their comments and arguments either

succeed on at least one of these claims, the District Court for the Southern District of Texas issued a nationwide injunction preventing the implementation of DAPA.⁹⁰ The government eventually appealed this injunction to the Supreme Court; the Court affirmed the injunction.⁹¹

After President Trump took office, DHS issued a memorandum officially rescinding DAPA.⁹² Its reasons for ending DAPA were threefold: the President's stance on immigration, the injunction preventing DAPA was still in force, and the District Court for the Southern District of Texas's injunction.⁹³

Soon thereafter, former Attorney General Jefferson B. Sessions III received a letter from a number of states warning him that if DHS did not rescind DACA by September 5, 2017, they would challenge DACA's legality in court.⁹⁴ Attorney General Sessions promptly sent a letter to Acting Secretary of Homeland Security Elaine C. Duke ("Duke") urging an "orderly and efficient wind-down" of the DACA program.⁹⁵ Attorney General Sessions concluded that "DACA shared the 'same legal . . . defects that the court recognized as to DAPA' and was 'likely' to meet a similar fate."⁹⁶ Consequently, on September 5, 2017, Duke issued a memorandum terminating DACA and detailed how the program would be wound down.⁹⁷

in favor, or against, the proposed rule. 5 U.S.C. § 553(c) (2021). The Take Care Clause of the U.S. Constitution says that "[the President] shall take Care that the Laws be faithfully executed[.]" U.S. CONST. art. II, § 3, cl. 4. So essentially, the states were arguing that they never had a chance to review or comment on DAPA before DHS enacted the program. *Texas*, 86 F.Supp at 647. Therefore, by allowing DAPA to come into force, the executive branch failed to ensure that the laws were being followed faithfully. *Id.* at 607.

90. *Id.* at 677-78; *Regents of the Univ. of California*, 140 S. Ct. at 1902 ("[The United States and officials of DHS] have clearly legislated a substantive rule without complying with the procedural requirements under the Administrati[ve] Procedure Act . . . [T]his temporary injunction enjoins the implementation of the DAPA program . . . It does not enjoin the previously instituted 2012 DACA program except for the expansions created in the November 20, 2014 DAPA Memorandum."). *Texas*, 86 F. Supp. at 677-78.

91. *Regents of the Univ. of California*, 140 S. Ct. at 1902-03.

92. *Id.* at 1903.

93. *Id.*

94. Memorandum from Elaine C. Duke to James W. McCament, Thomas D. Homan, Kevin K. McAleenan, Joseph B. Maher, Ambassador James D. Nealon, and Julie M. Kirchner, U.S. DEPT OF HOMELAND SEC. (Sept. 5, 2017).

95. *Regents of the Univ. of California*, 140 S. Ct. at 1903.

96. Letter from Attorney General Jefferson B. Sessions III, to Acting Secretary Duke, U.S. DEPT OF HOMELAND SEC. (Sept. 5, 2017). Attorney General Sessions determined "that DACA was effectuated by the [Obama] administration through executive action, without proper statutory authority and with no established end-date . . . Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the [e]xecutive [b]ranch." *Id.*

97. *Regents of the Univ. of California*, 140 S. Ct. at 1903 ("No new applications would be accepted, but DHS would entertain applications for two-

In a matter of days, individual DACA recipients, five states, the Regents of the University of California, and the National Association for the Advancement of Colored People (“NAACP”) each challenged this rescission.⁹⁸ They argued the rescission was arbitrary and capricious in direct violation of the APA⁹⁹ as well as an infringement of the Fifth Amendment’s Equal Protection Clause.¹⁰⁰ In two cases challenging the DACA rescission, the District Courts found that an equal protection claim could be brought against DHS.¹⁰¹ Accordingly, it issued a nationwide injunction preventing DHS from rescinding DACA for the time being.¹⁰²

In the case brought by the NAACP, however, the D.C. District Court gave DHS 90 days to reissue its rescission of DACA and provide a deeper explanation of the legal grounds for Duke’s rescission.¹⁰³ This resulted in then-Secretary Kirstjen M. Nielsen (“Nielsen”) issuing her own memorandum (“Nielsen Memorandum”).¹⁰⁴ Nielsen “decline[d] to disturb” Duke’s rescission and went on to provide three additional reasons why it was appropriate to rescind DACA.¹⁰⁵ Courts refused to consider the Nielsen Memorandum because it did not sufficiently explain Duke’s rescission.¹⁰⁶ After a handful of appeals by the government, the Supreme Court agreed to consolidate the remaining cases into the *Regents* case and hear the parties’ arguments.¹⁰⁷

In *Regents*, DHS attempted to argue that section 701(a)(2) of

year renewals from DACA recipients whose benefits were set to expire within six months [of the issuance of this memorandum]. For all other DACA recipients, previously issued grants of deferred action and work authorization would not be revoked but would expire on their own terms, with no prospect for renewal.”).

98. *Id.*

99. 5 U.S.C. § 706(2)(A) (2021); *Regents of the Univ. of California*, 140 S. Ct. at 1905 (quoting in part *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). “The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]”. 5 U.S.C. § 706(2)(A) (2021). When determining whether an agency action is arbitrary and capricious, the court is “to assess only whether the decision was ‘based on a consideration of the relevant factors and whether there has been a clear error of judgment.’” *Regents of the Univ. of California*, 140 S. Ct. at 1905.

100. *Id.* at 1903; U.S. CONST. amend. V (“[N]or [shall any person] be deprived of life, liberty, or property, without due process of law[.]”).

101. *Regents of the Univ. of California*, 140 S. Ct. at 1904.

102. *Id.*

103. *Nat’l Ass’n for the Advancement of Colored People v. Trump*, 298 F.Supp.3d 209, 243 (D.C. Dist. Ct. 2018).

104. Memorandum from Secretary Kirstjen M. Nielsen, U.S. DEP’T OF HOMELAND SEC. (June 22, 2018), www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DAC_A.pdf [perma.cc/56BC-A5AF].

105. *Id.*

106. *Regents of the Univ. of California*, 140 S. Ct. at 1904-05.

107. *Id.* at 1905.

the APA prevented the Supreme Court from reviewing Duke's rescission.¹⁰⁸ This provision is narrowly applied to the "rare 'administrative decision[s] traditionally left to agency discretion.'"¹⁰⁹ In other words, if Congress gives an agency the ability to decide whether or not to take action in its field of expertise, the courts cannot second-guess the agency's decision.¹¹⁰ Included in this category is the agency's decision to institute enforcement proceedings against any particular individual.¹¹¹ DHS asserted that its decision not to enforce DACA was within its discretion as an agency and, as such, the Supreme Court did not have the authority to review its actions.¹¹²

However, DHS's contention that DACA was a non-enforcement policy fell flat.¹¹³ The Court aptly recognized that DACA "is not simply a non-enforcement policy" – it is much more than that.¹¹⁴ The DACA Memorandum ordered USCIS to create and implement a process for identifying individuals who meet DACA's criteria.¹¹⁵ To that end, USCIS solicited and reviewed applications for forbearance and work authorization under DACA.¹¹⁶ Bearing these facts in mind, the Court determined that DACA was an "affirmative immigration relief" program.¹¹⁷ Thus, DHS could not claim protection under the APA, and the Supreme Court could review Duke's rescission.¹¹⁸

DHS then attempted to use section 1252(b)(9) and (g) of the INA to prevent the Supreme Court from reviewing Duke's rescission.¹¹⁹ The Court quickly did away with this argument by

108. 5 U.S.C. § 701(a)(2) (2021); Transcript of Oral Argument at 4-5, *Regents of the Univ. of California*, 140 S. Ct. (1891) (2020). "This chapter applies, according to the provisions thereof, except to the extent that . . . agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (2021).

109. *Regents of the Univ. of California*, 140 S. Ct. at 1905.

110. *Heckler v. Chaney*, 470 U.S. 821, 828 (1985).

111. *Regents of the Univ. of California*, 140 S. Ct. at 1905.

112. *Id.* at 1906 ("[T]he Government submits that DACA is a non-enforcement policy and that its rescission is therefore unreviewable.").

113. *See id.* (determining DACA is more than a non-enforcement policy and as such, DHS's rescission may be reviewed).

114. *Id.* (quoting in part *Heckler*, 470 U.S. at 832) ("In short, the DACA Memorandum does not announce a passive non-enforcement policy; it created a program for conferring affirmative immigration relief. The creation of that program – and its rescission – is an 'action [that] provides a focus for judicial review.'").

115. *Id.*; Memorandum from Janet Napolitano, *supra* note 19 (asserting "USCIS should establish a clear and efficient process for exercising prosecutorial discretion . . .").

116. *Id.*; Memorandum from Janet Napolitano, *supra* note 19 (stating "USCIS shall accept applications to determine whether these individuals qualify for work authorization.").

117. *Regents of the Univ. of California*, 140 S. Ct. at 1906.

118. *Id.* at 1906-07.

119. *Id.*; 8 U.S.C. § 1252(b)(9), (g) (2021).

With respect to review of an order of removal under subsection (a)(1), the

finding the provisions were inapplicable to the issues in *Regents*.¹²⁰ Sections 1252(b)(9) and 1252(g) apply in very limited situations.¹²¹ Under these provisions, a court is prohibited from reviewing any action the agency has taken to institute removal proceedings or deportation orders.¹²² Courts are also prohibited from hearing cases that arise from the agency's decision to deport a non-U.S. citizen.¹²³

DHS was looking at *Regents* in the wrong light. The Court noted that “[section] 1252(b)(9) ‘does not present a jurisdictional bar’ where those bringing suit ‘are not asking for review of an order of removal,’ ‘the decision . . . to seek removal,’ or ‘the process by which . . . removability will be determined.’”¹²⁴ This means a court can review agency action so long as that action does not relate to the agency's decision to deport, the deportation process, or a specific order by DHS that an individual should be deported.¹²⁵ The Respondents were attempting to challenge the sufficiency of Duke's explanation for revoking DACA, not a specific removal proceeding.¹²⁶ Therefore, the Court deemed section 1252(b)(9) was inapplicable and as such, did not bar the Court's review.¹²⁷

Turning to section 1252(g), the Court found this provision similarly inapplicable to the issues at hand.¹²⁸ This provision is limited to cases arising from removal proceedings or removal orders.¹²⁹ In *Reno v. American-Arab Anti-Discrimination Comm.*, the Court refused to accept the Government's contention that this section applies to “all claims arising from deportation proceedings,”

following requirements apply . . . Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory) . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

120. *Regents of the Univ. of California*, 140 S. Ct. at 1906.

121. *Id.* at 1907 (“Section 1252(b)(9) bars review of claims arising from ‘action[s]’ or ‘proceeding[s]’ brought to remove an alien’ . . . Section 1252(g) . . . limits review of cases ‘arising from’ decisions ‘to commence proceedings, adjudicate cases, or execute removal orders.’”).

122. 8 U.S.C. § 1252(b)(9) (2021) (“Judicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order . . . [N]o court shall have jurisdiction . . . to review such an order or such questions of law or fact.”).

123. 8 U.S.C. § 1252(g) (2021) (“[N]o court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action . . . to commence proceedings, adjudicate cases, or execute removal orders against any alien.”).

124. *Regents of the Univ. of California*, 140 S. Ct. at 1907 (quoting in part *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018)).

125. *Id.*

126. *Id.* at 1910.

127. *Id.* at 1907.

128. *Id.*

129. *Id.*

thus creating “a general jurisdictional limitation” on the courts.¹³⁰ The Court was not going to deviate from this precedent.¹³¹ Since *Regents* was not about a specific deportation proceeding or order, the Court was not barred by this provision of the INA.¹³²

The nuance is subtle but important. In rescinding DACA, DHS was not instituting a removal proceeding, adjudicating a case for removal, or executing a removal on any one specific person.¹³³ What it *was* doing was ending a program and its attendant benefits.¹³⁴ While ending this program *may eventually* lead to some of these actions, none were currently at issue.¹³⁵ The question before the Court was not about how Duke’s rescission impacted any one Dreamer in particular; instead, it was about how Duke *went about rescinding* DACA.¹³⁶ Given this important distinction, the Court found that none of the proposed bars to review—sections 701(a)(2), 1252(b)(9), or 1252(g)—prevented it from determining whether Duke’s rescission was arbitrary and capricious.¹³⁷ While DHS has a wide range of discretion in its application and enforcement of the INA, it does not have unbridled discretion.¹³⁸ DHS must ensure its actions conform to the current law.¹³⁹

Regents provides a good illustration of why DACA’s status is tenuous and why a long-term solution protecting Dreamers is necessary. Given that DACA has yet to be codified,¹⁴⁰ presidential administrations remain free to alter or rescind the program at their

130. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999).

131. See *Regents of the Univ. of California*, 140 S. Ct. at 1907 (rejecting DHS’s suggestion that INA section 1252(g) covers any legal claim arising from removal proceedings and therefore imposes a general jurisdictional bar to judicial review).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 1905 (“The dispute [before the Court] is . . . primarily about the procedure the agency followed in [rescinding DACA].”).

137. *Id.*

138. Memorandum from Doris Messner to Regional Directors, District Directors, Chief Patrol Agents, Regional and District Counsel, U.S. DEP’T OF JUSTICE (Nov. 17, 2000), www.niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Memo-ProsDiscretion.pdf [perma.cc/K6NS-RGKE] (“Prosecutorial discretion can extend only up to the substantive and jurisdictional limits of the law.”).

139. *Id.* (“[Prosecutorial discretion] can never justify an action that is illegal under the substantive law pertaining to the conduct, or one that while legal in other contexts, is not within the authority of the agency or officer taking it.”).

140. *Codify*, MERRIAM-WEBSTER, www.merriam-webster.com/dictionary/codify [perma.cc/8FFT-AEND] (last visited Oct. 4, 2021); Timothy Meyer, *Codifying Custom*, 160 U. PENN. L. REV. 995, 1000 (2012). “Codify” means “to reduce to a code.” MERRIAM-WEBSTER, *supra*. In practical terms, however, it essentially means “the law is on the books.” Codifying laws helps clarify the status and application of the law – and clarity promotes compliance. Meyer, *supra*.

discretion and in accordance with their stance on immigration.¹⁴¹ The Supreme Court was able to save DACA in this case, but only because Duke failed to follow the APA's requirements.¹⁴² It is entirely possible that a future presidential administration could look at *Regents* as a guideline for how to successfully end the DACA program.

III. COURT'S ANALYSIS

This section is divided into five subsections, each discussing a particular Justice's separate opinion. Subsection A will begin by identifying and interpreting Chief Justice Roberts's central arguments in his plurality opinion.¹⁴³ Beginning with a closer look at whether DHS's rescission of DACA is reviewable under the APA or the INA.¹⁴⁴ After addressing the issue of reviewability, the analysis will shift to determine whether DHS acted in accordance with the APA in rescinding DACA.¹⁴⁵ Finally, ending with a brief discussion as to Respondents's Equal Protection claims.¹⁴⁶ Subsection B will focus on Justice Sotomayor's opinion and why she believed Respondents's Equal Protection Claim should have survived review.¹⁴⁷ Subsection C will look at the reasoning behind Justice Thomas's opinion, which Justices Alito and Gorsuch joined.¹⁴⁸ Subsection D will address Justice Alito's brief separate opinion.¹⁴⁹ Finally, Subsection E will focus on why Justice Kavanaugh felt the Court should have given due consideration to

141. Fisher, *supra* note 27, at 158.

There is a strong argument Congress has 'de facto' delegated the authority to implement DAPA to the Executive by passing a 'detailed' immigration code that 'makes a huge fraction of noncitizens deportable at the option of the Executive.' Even before DACA and DAPA were implemented . . . this de facto delegation gave the President the power, 'without having to resort to the legislative process, to alter significantly the composition of the immigrant labor force, to permit immigrants with minor criminal convictions to stay rather than removing them, and so on.'

142. See generally *Regents of the Univ. of California*, 140 S. Ct. (1891) (illustrating how DHS could have properly rescinded DACA if it had followed the APA requirements).

143. *Id.* at 1907-16.

144. *Id.* at 1905-07; 5 U.S.C. § 701(a)(2) (2021); 8 U.S.C. §§ 1252(b)(9), (g) (2021).

145. *Regents of the Univ. of California*, 140 S. Ct. at 1907-15; 5 U.S.C. § 706(2)(A) (2021).

146. *Regents of the Univ. of California*, 140 S. Ct. at 1915-16; U.S. CONST. amend V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . .").

147. *Regents of the Univ. of California*, 140 S. Ct. at 1916-18; U.S. CONST. amend V.

148. *Regents of the Univ. of California*, 140 S. Ct. at 1918-31.

149. *Id.* at 1932.

the Nielsen Memorandum.¹⁵⁰

The fact that there are five distinct opinions on the issues of DACA's legality, reviewability, and equal protection should further illustrate how complex and contentious this case was. This decision did very little, if anything, to protect DACA long-term. The program can still be rescinded at any time, Dreamers can still have their status taken away, and they still have no pathway to citizenship. If the United States truly wants to support Dreamers, Congress needs to create legislation that protects them and provides them with a pathway to citizenship.

A. *Understanding the Plurality: What was Chief Justice Roberts Talking About?*

It is important to understand that the Supreme Court was not determining the legality of DACA or if DHS was permitted to rescind DACA.¹⁵¹ In fact, this case is more a study of administrative law and procedure than anything else. *Regents* asked the Court to determine three issues: (1) whether they had the authority to evaluate the rescission of DACA; (2) whether DHS followed the APA rules and procedures in rescinding DACA; and (3) whether DHS adequately considered the impact this rescission would have on Dreamers and their communities.¹⁵²

1. *Can the Supreme Court Review the Rescission of DACA?*

Before determining whether the rescission was arbitrary and capricious in violation of the APA, the Court first had to determine whether it could even review the issues before them.¹⁵³ Chief Justice Roberts began by explaining there is a general presumption of reviewability when agency actions result in harm.¹⁵⁴ This presumption, however, can be refuted if “the ‘agency action is committed to agency discretion by law.’”¹⁵⁵ What this means is if actions taken by an agency have harmed an individual, then the

150. *Id.* at 1932-36.

151. *Id.* at 1905 (“The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may.”); *id.* at 1910 (“[W]e do not evaluate the claims challenging the explanation and correctness of [DHS’s] illegality conclusion.”).

152. *Id.* at 1905 (“The issues raised here are (1) whether the APA claims are reviewable, (2) if so, whether the rescission was arbitrary and capricious in violation of the APA, and (3) whether the plaintiffs have stated an equal protection claim.”).

153. *Id.* (“[B]efore determining whether the rescission was arbitrary and capricious, [the Court] must first address the Government’s contentions that DHS’s decision [to rescind DACA] is unreviewable under the APA and outside this Court’s jurisdiction.”).

154. *Id.*

155. *Id.*; 5 U.S.C. § 701(a)(2) (2021).

courts will typically be able to scrutinize this decision to determine its appropriateness.¹⁵⁶ With that said, if Congress has granted an agency some discretion in its decision-making, then the action may not be reviewed by the courts.¹⁵⁷

DHS argued that this exception applied here because sections 701(a)(2) of the APA “precludes review of ‘agency action,’ not agency ‘reasons.’”¹⁵⁸ Additionally, DHS’s “decision whether or not to enforce the law [under the INA] is committed to the agency’s unreviewable discretion.”¹⁵⁹ According to DHS, DACA was really nothing more than a non-enforcement policy whereby DHS had agreed not to enforce the provisions of the INA against Dreamers.¹⁶⁰ By rescinding DACA, DHS argued it was actually “enforcing the law”¹⁶¹ because DACA was only meant to be a temporary fix.¹⁶² In other words, DHS was claiming that it did not have to explain to the public, or the Court, why it chose to rescind DACA.¹⁶³ Moreover, even if it did have to explain itself, the fact that DACA was a non-enforcement policy contrary to the INA was a more than sufficient reason to rescind the program.¹⁶⁴

However, Chief Justice Roberts quickly did away with this

156. *Heckler*, 470 U.S. at 828 (“Any person ‘adversely affected or aggrieved’ by agency action . . . including a ‘failure to act,’ is entitled to ‘judicial review thereof,’ as long as the action is a ‘final agency action for which there is no other adequate remedy in a court.’”).

157. *Id.* (“[B]efore any review [of the agency action] may be had, a party must [prove that] (1) statutes [do not] preclude judicial review; or (2) agency action is [not] committed to agency discretion by law.”).

158. Transcript of Oral Argument, *supra* note 108, at 7; Reply Brief for Petitioners at 9, *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. (1891) (2020) (Nos. 18-587, 18-588, and 18-589) (“[I]f an action is committed to an agency’s unreviewable discretion, then it doesn’t matter what reason it gives for taking that action; it’s still unreviewable.”). Transcript of Oral Argument, *supra*.

159. Transcript of Oral Argument, *supra* note 108, at 5.

160. *Id.* at 4-5.

161. *Id.* at 8; *Regents of the Univ. of California*, 140 S. Ct. at 1906 (“[T]he Government argues that the rescission of a non-enforcement policy is no different – for purposes of reviewability – from the adoption of that policy. While the rescission may lead to increased enforcement, it does not, by itself, constitute a particular enforcement action . . . [T]he Government submits that DACA is a non-enforcement policy and that its rescission is therefore unreviewable.”).

162. Transcript of Oral Argument, *supra* note 108, at 5.

163. *Id.*

164. *Id.*; 8 U.S.C. § 1227(a)(1)(B) (2021); Bruno, *supra* note 33. DHS noted in its oral argument that “DACA was a temporary stopgap measure” by which “the Department agreed not to enforce the INA against hundreds of thousands of illegal aliens.” Transcript of Oral Argument, *supra* note 108, at 5. INA § 1227 speaks to the classes of non-citizens that are deportable. 8 U.S.C. § 1227 (2021). Specifically, INA § 1227(a)(1)(B) says that “[a]ny alien who is present in the United States in violation of this [statute] or any other law of the United States . . . is deportable.” 8 U.S.C. § 1227(a)(1)(B) (2021). Because the vast majority of Dreamers entered the United States illegally, they could qualify for deportation under this provision. Bruno, *supra* note 33.

argument by determining that DACA is much more than a non-enforcement policy.¹⁶⁵ In coming to this conclusion, Chief Justice Roberts looked at the DACA Memorandum itself.¹⁶⁶ This memorandum directed USCIS to take affirmative steps to “establish a clear and efficient process” for identifying applicants who meet the requirements for deferred action under DACA.¹⁶⁷ Additionally, after this directive, USCIS began accepting applications, reviewing their merits, and notifying applicants as to whether they were granted the two-year forbearance from deportation proceedings.¹⁶⁸ Chief Justice Roberts found this particularly important because it meant that DHS, through USCIS, was providing affirmative immigration relief to Dreamers.¹⁶⁹ Furthermore, the associated benefits that come with deferred action offered additional evidence “that DACA is more than simply a non-enforcement policy.”¹⁷⁰ Not only does DACA provide a two-year forbearance from deportation proceedings, Dreamers are also able to work legally and are eligible for social benefits, such as Medicare and Social Security.¹⁷¹ Accordingly, because the plurality of the Court found that DACA created an affirmative program of immigration relief and was not just an agency policy of non-enforcement, the rescission of DACA was reviewable.¹⁷²

Even though the APA did not prevent the Court from reviewing the rescission, it still had to determine whether the INA prevented review.¹⁷³ DHS claimed that INA sections 1252(b)(9) and 1252(g) provided separate bars for review since both provisions prohibit judicial review of removal decisions.¹⁷⁴ Chief Justice Roberts was not convinced and pointed out the rescission of DACA did not initiate any of the actions protected by these provisions.¹⁷⁵

Since neither the APA nor the INA prevented the Court from reviewing the rescission of DACA, the next step was to determine whether DHS abided by the APA procedures when it rescinded the program.¹⁷⁶ Principally, the Court had to determine whether DHS

165. *Regents of the Univ. of California*, 140 S. Ct. at 1906.

166. *Id.*

167. *Id.*; Memorandum from Janet Napolitano, *supra* note 19.

168. *Regents of the Univ. of California*, 140 S. Ct. at 1906.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 1907.

173. *Id.* (“The Government also invoked two jurisdictional provisions of the INA as independent bars to review. Neither applies.”).

174. *Id.*; 8 U.S.C. § 1252(b)(9), (g) (2021).

175. *See id.* (describing when judicial review of a decision to remove a non-citizen is appropriate). Chief Justice Roberts’s analysis of these INA provisions took up very little space in his overall opinion – encompassing only two short paragraphs. *Id.* “The rescission, which revokes a deferred action program with associated benefits, is not a decision to ‘commence proceedings,’ much less to ‘adjudicate’ a case or ‘execute’ a removal order.” *Id.*

176. *Id.*

provided sufficient explanation for its rescission and whether it adequately considered Dreamers' reliance interests.¹⁷⁷

There were two DHS memoranda, the Duke Memorandum and the Nielsen Memorandum, before the Court that spoke to the rescission of DACA.¹⁷⁸ In September 2017, Duke determined that DACA should be rescinded for two reasons: (1) the Fifth Circuit had ruled DAPA unlawful due to the benefits it conferred, and (2) Attorney General Sessions concluded that DACA suffered from the same legal defects as DAPA.¹⁷⁹ In her memorandum, Nielsen attempted to elaborate on Duke's reasoning.¹⁸⁰

During oral argument, Justice Breyer noted that a foundational principle in administrative law is that "a court may uphold agency action only on the grounds that the agency invoked when it took the action."¹⁸¹ This means that DHS had to stay within the explanations given in the initial Duke Memorandum.¹⁸² It could not go back and add more reasons because that would constitute post hoc rationalization (i.e. reasons given after the fact).¹⁸³

Chief Justice Roberts noted that DHS either had to reissue the memorandum rescinding DACA and provide further elaboration on Duke's reasoning, or start from scratch and "tak[e] new agency action."¹⁸⁴ Since Nielsen chose to take the first route, the Court was required to carefully scrutinize her memorandum "to ensure that the rescission [was] not upheld on the basis of impermissible 'post

177. *Id.* at 1907, 1913-16.

178. Memorandum from Elaine C. Duke, *supra* note 94; Memorandum from Kirstjen M. Nielsen, *supra* note 104.

179. *Regents of the Univ. of California*, 140 S. Ct. at 1910; Memorandum from Kirstjen M. Nielsen, *supra* note 104. Attorney General Sessions determined "that DACA 'was effectuated by the [Obama] administration through executive action, without proper statutory authority and with no established end-date . . . Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the [e]xecutive [b]ranch.'" *Id.*

180. Memorandum from Kirstjen M. Nielsen, *supra* note 104.

181. Transcript of Oral Argument, *supra* note 108, at 39.

182. Memorandum from Elaine C. Duke, *supra* note 94.

Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated. In the exercise of my authority in establishing national immigration policies and priorities . . . I hereby rescind the June 15, 2012 memorandum.

183. *Post Hoc*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Overton Park*, 401 U.S. at 419. "Post hoc" means "after this" or "subsequently." *Post Hoc*, BLACK'S LAW DICTIONARY. Thus, post hoc rationalizations would be reasons given after something has already occurred. *Id.* Post hoc rationalizations are viewed critically by courts and "have traditionally been found to be an inadequate basis for review . . . [as] they clearly do not constitute the 'whole record' compiled by the agency . . . [which is] the basis for review required by . . . the Administrative Procedure Act." *Overton Park*, 401 U.S. at 419.

184. *Regents of the Univ. of California*, 140 S. Ct. at 1908.

hoc rationalization.”¹⁸⁵ DHS attempted to convince the Justices that the Nielsen Memorandum was not a post hoc rationalization because she was reiterating DHS’s official position on DACA.¹⁸⁶ Rather, DHS contended that Nielsen was ratifying the decisions laid out in the Duke Memorandum as the official position of the agency.¹⁸⁷ The Court did not see the Nielsen Memorandum in that light.¹⁸⁸ According to the elementary principle announced by Justice Breyer, the Court had to look at the reasons given by DHS when it first took action in September 2017.¹⁸⁹

With this in mind, the Court determined that the Nielsen Memorandum failed to elaborate on Duke’s initial reasoning.¹⁹⁰ The Court found that the Nielsen Memorandum bore little relationship to the Duke Memorandum and actually “offered three ‘separate and independently sufficient reasons’ for rescission.”¹⁹¹ This determination amounted to the kiss of death for the Nielsen Memorandum because it meant that she was providing “impermissible ‘post hoc rationalization[s].’”¹⁹² Ultimately, Chief Justice Roberts determined this was not the case to cut corners or grant exceptions to foundational principles of agency law.¹⁹³ Therefore, DHS was going to be held to the reasons given in the

185. *Id.*

186. Transcript of Oral Argument, *supra* note 108, at 40 (“It’s not a post hoc rationalization. It’s the official position of the agency set forth by the agency itself.”).

187. *Id.*

188. *Regents of the Univ. of California*, 140 S. Ct. at 1908.

Secretary Nielsen’s reasoning bears little relationship to that of her predecessor. Acting Secretary Duke rested the rescission on the conclusion that DACA is unlawful. Period . . . By contrast, Secretary Nielsen’s new memorandum offered three ‘separate and independently sufficient reasons’ for the rescission . . . only the first of which is the conclusion that DACA is illegal.

189. *Id.* at 1908 (quoting in part *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (*per curiam*)); see Memorandum from Elaine C. Duke, *supra* note 94 (“When an agency’s initial explanation ‘indicate[s] the determinative reason for the final action taken,’ the agency may elaborate later on that reason (or reasons) but may not provide new ones.”); *Regents of the Univ. of California*, 140 S. Ct. at 1908.

190. *Regents of the Univ. of California*, 140 S. Ct. at 1908.

191. *Id.*; Memorandum from Kirstjen M. Nielsen, *supra* note 104.

First, as the Attorney General concluded, the DACA policy was contrary to law . . . Second, regardless of whether the DACA policy is ultimately illegal, it was appropriately rescinded by DHS because there are, at a minimum, serious doubts about its legality . . . Third, regardless of whether these concerns about the DACA policy render it illegal or legally questionable, there are sound reasons of enforcement policy to rescind the DACA policy.

192. *Regents of the Univ. of California*, 140 S. Ct. at 1908.

193. *Id.* at 1909-10 (“The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision.”).

Duke Memorandum.¹⁹⁴

2. *Was the Rescission Arbitrary & Capricious?*

Once the Court determined it would review the Duke Memorandum, the Court had to decide whether it was arbitrary and capricious.¹⁹⁵ While Respondents argued the Duke Memorandum failed to adequately explain the agency's conclusion that DACA was illegal, Chief Justice Roberts pointed out that Duke was actually "bound by the Attorney General's legal determination."¹⁹⁶ Under section 1103(a)(1) of the INA,¹⁹⁷ the Secretary of Homeland Security (in this case, Duke), must treat all legal determinations made by the Attorney General as controlling.¹⁹⁸ Chief Justice Roberts acknowledged that Respondents did not address critical issues related to section 1103(a)(1), and as such, the Court would not consider them.¹⁹⁹ This is important because it means that the Court

194. *See id.* (determining that DHS was going to have to defend Duke's original three reasons for rescinding DACA and Nielsen's additional justifications for rescission would not be considered by the Court).

195. *Id.* at 1910; 5 U.S.C. § 706(2)(A) (2021) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]").

196. *Regents of the Univ. of California*, 140 S. Ct. at 1910.

197. 8 U.S.C. § 1103(a)(1) (2021) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.*") (emphasis added).

198. *Regents of the Univ. of California*, 140 S. Ct. at 1910.

199. *Id.*; *Supreme Court Procedures*, U.S. COURTS, www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [perma.cc/7MGU-BY22] (last visited Nov. 21, 2020); Emily Belz, *High Court, High Costs*, WORLD MAG. (Sept. 13, 2017), www.wng.org/articles/high-court-high-costs-1618203551 [perma.cc/C97Q-4RVW]. The Court said that Respondents failed to "discuss whether Duke was required to explain a legal conclusion that was not hers to make." *Regents of the Univ. of California*, 140 S. Ct. at 1910. Additionally, Respondents did not "discuss whether the current suits challenging Duke's rescission decision . . . are proper vehicles for attacking the Attorney General's legal conclusion." *Id.* Respondents' failure to bring these arguments to the fore means that the legality of DACA still remains in the balance, left to be determined on another day. *See Regents of the Univ. of California*, 140 S. Ct. at 1910 (finding Respondents failed to address legal issues regarding the impact of Attorney General Sessions's legal conclusions on Duke's discretion in rescinding DACA). With that said, it takes a lot of time, money, effort, and a bit of luck to bring a case before the United States Supreme Court. Belz, *supra*. It is very possible that the legality of DACA never makes it to the floor of the Supreme Court. *See Supreme Court Procedures, supra* (explaining how each year the Supreme Court only accepts one hundred to one hundred and fifty of the seven thousand cases

was not going to determine the legality of DACA in this case.²⁰⁰ This served as a double-edged sword because it meant the Court was not going to support the rescission of DACA, but it also was not going to affirm the program either.²⁰¹

Instead, the Court focused its analysis on the question of whether Duke “failed to consider . . . important aspect[s] of the problem” before her.²⁰² In other words, did Duke adequately consider differentiating between forbearance and DACA-related benefits, and did she consider the reliance issues at stake prior to issuing her rescission.²⁰³

Chief Justice Roberts looked at DACA as having two separate components: the two-year forbearance from removal proceedings and the benefits available to DACA recipients after they have been granted forbearance.²⁰⁴ While former Attorney General Sessions concluded that DACA suffered from the same legal defects as those found in DAPA,²⁰⁵ he was silent on the forbearance aspect of DACA.²⁰⁶ This was an important distinction for the Court because Duke was aware that the Fifth Circuit’s ruling on DAPA was centered on benefits and not forbearance, yet she made no such distinction in her rescission of DACA.²⁰⁷ Instead of differentiating between two central aspects of DACA, the Duke Memorandum “treated the Attorney General’s conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation.”²⁰⁸

In conflating these two aspects of DACA and rescinding the program in full, instead of limiting the rescission just to the related benefits, the Court determined that the Duke Memorandum was arbitrary and capricious.²⁰⁹ DHS argued that it was not obligated to

submitted for their review).

200. *Regents of the Univ. of California*, 140 S. Ct. at 1910.

201. *See id.* (explaining how DACA’s legality is a legal issue for the Attorney General to determine, but how to address the program’s potential illegality is a policy choice within DHS’s authority).

202. *Id.*

203. *Id.*

204. *Id.* at 1911. As a reminder, these benefits include work authorization and the ability to benefit from Medicare and Social Security. *Id.*

205. *Id.* at 1911-12. The Fifth Circuit found that DAPA was contrary to the INA because it conferred work authorization and public benefits to otherwise removable individuals. *Id.* The focus of the Fifth Circuit’s decision was not on DAPA’s forbearance policy, it was on the attendant benefits which would have been available to DAPA recipients. *Id.*

206. *Id.* at 1912 (“[T]he Attorney General neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy.”).

207. *Id.* at 1911-12 (“Secretary Duke recognized that the Fifth Circuit’s holding addressed the benefits associated with DAPA . . . [However,] Duke did not characterize the opinion as one about forbearance.”).

208. *Id.* at 1912.

209. *See id.* (finding “Thus, given DHS’s earlier judgment that forbearance is ‘especially justified’ for ‘productive young people’ who were brought here as children and ‘know only this country as home’ . . . the DACA Memorandum could

separate these two aspects of DACA in its rescission and could reasonably view the forbearance and benefits as “importantly linked.”²¹⁰ Nonetheless, the Court rejected this argument on the grounds that there was no evidence to show that DHS ever considered the possibility of separating the two aspects by only rescinding the benefits portion of DACA.²¹¹

The Court found the Duke Memorandum arbitrary and capricious not only because it rescinded the program in full but also because it failed to address “whether there was ‘legitimate reliance’ on the DACA Memorandum.”²¹² Chief Justice Roberts noted that agencies must take into consideration “serious reliance interests” when they change course on a longstanding policy and that a failure to do so would be arbitrary and capricious.²¹³

Respondents and their amici pointed out that since DACA’s inception in 2012, recipients have organized their lives around this program and the forbearance and benefits it provides.²¹⁴ Respondents argued that rescinding DACA would “radiate outward” to Dreamers’ families and communities.²¹⁵ Dreamers have “enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children” because they relied on DACA.²¹⁶ Removing them from the work force would result in the loss of billions of dollars in economic activity and tax revenue.²¹⁷ Respondents believed that these were strong reliance interests that required attention and consideration by DHS.²¹⁸

While the Court agreed that these interests were “certainly noteworthy,” they were not necessarily a deciding factor.²¹⁹ Chief Justice Roberts was clear that DHS retained the flexibility and autonomy to rescind DACA in light of other policy interests which might outweigh Dreamers’ reliance interests.²²⁰ However, DHS was still required to consider these reliance interests,²²¹ and the Court

not be rescinded in full ‘without any consideration whatsoever’ of a forbearance-only policy.”).

210. *Id.* at 1913.

211. *Id.*

212. *Id.*

213. *Id.* (quoting in part *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting in part *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009))).

214. *Regents of the Univ. of California*, 140 S. Ct. at 1914.

215. *Id.*

216. *Id.*

217. *Id.* (“[E]xcluding DACA recipients from the lawful labor force may . . . result in the loss of \$215 billion in economic activity and an associated \$60 billion in federal tax revenue over the next ten years . . . [Moreover], States and local governments could lose \$1.25 billion in tax revenue each year.”).

218. Transcript of Oral Argument, *supra* note 108, at 58-9.

219. *Regents of the Univ. of California*, 140 S. Ct. at 1914.

220. *Id.*

221. *Id.* at 1915 (“[B]ecause DHS was ‘not writing on a blank slate,’ . . . it

did not see the wind-down process in the Duke Memorandum as sufficiently addressing Dreamers' reliance interests.²²² The only purpose behind this process was to help the agency deal with the "administrative complexities" of ending such an expansive program.²²³ While agencies are not required to "explore 'every alternative device and thought conceivable by the mind of man,'" Duke should have given these reliance interests their due weight and considered alternative methods of winding down DACA.²²⁴

Ultimately, the Duke Memorandum failed under APA section 706(2)(A)²²⁵ because Duke did not consider the possibility of retaining the forbearance component of DACA, nor did she make efforts to accommodate Dreamers' reliance interests.²²⁶ Thus, this rescission could not stand.²²⁷

3. *Were Dreamers' Lives, Liberty, or Property at Stake?*

Finally, Chief Justice Roberts had to address Respondents' contention that the rescission of DACA violated the Equal Protection Clause of the Fifth Amendment.²²⁸ He swiftly rejected

was required to assess whether there were reliance interests, determine whether they were significant and weigh any such interests against competing policy concerns.”).

222. *Id.* at 1914 (“Acting Secretary Duke authorized DHS to process two-year renewals for those DACA recipients whose benefits were set to expire within six months.”).

223. *Id.*; Memorandum from Elaine C. Duke, *supra* note 94 (“Recognizing the complexities associated with winding down the program, the Department will provide a limited window in which it will adjudicate certain requests for DACA[.]”).

224. *Regents of the Univ. of California*, 140 S. Ct. at 1914-15.

Had Duke considered reliance interests, she might, for example, have considered a broader renewal period based on the need for DACA recipients to reorder their affairs. Alternatively, Duke might have considered more accommodating termination dates for recipients caught in the middle of a time-bounded commitment, to allow them to, say, graduate from their course of study, complete their military service, or finish a medical treatment regimen. Or she might have instructed immigration officials to give salient weight to any reliance interests engendered by DACA when exercising individualized enforcement discretion.

225. 5 U.S.C. § 706(2)(A) (2021) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]”).

226. *Regents of the Univ. of California*, 140 S. Ct. at 1915.

227. *Id.*

228. *Id.*; U.S. CONST. amend. V; *Equal Protection*, LEGAL INFO. INST., www.law.cornell.edu/wex/equal_protection [perma.cc/8LZV-BE3V] (last visited Sept. 29, 2021). “[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law[.]” U.S. CONST. amend. V. “The Fifth Amendment’s Due Process Clause requires the United States government to practice equal protection . . . Equal protection forces [the government to act] impartially – not draw distinctions between individuals solely on differences that are irrelevant to a legitimate governmental objective.” *Equal Protection*,

this argument due to Respondents' failure to meet the elements of an equal protection claim.²²⁹ Respondents asserted that this rescission would disproportionately affect Latinos from Mexico because seventy-eight percent of Dreamers are Mexican.²³⁰ Nevertheless, the Court found this argument ineffective.²³¹ Given that Latinos make up the vast majority of America's undocumented immigrants, Chief Justice Roberts reasoned that any "cross-cutting immigration relief program" would have a disproportionate effect on this demographic.²³²

Respondents went on to argue the rescission of DACA had an unusual history, and certain "pre- and post-election statements made by President Trump" demonstrated the administration's discriminatory intent.²³³ The Court was not convinced by these arguments either.²³⁴ Despite DHS reaffirming DACA merely three months prior to its rescission, Chief Justice Roberts found nothing irregular in the months preceding the Duke Memorandum.²³⁵ After the Fifth Circuit determined DAPA was void because of the benefits it conferred, Chief Justice Roberts reasoned that Attorney General Sessions and DHS were merely responding in a natural way to a "newly identified problem."²³⁶ Moreover, given that Attorney General Sessions and Duke were the relevant actors in the decision to rescind DACA, any statements made by the President were unilluminating because they were "remote in time and made in unrelated contexts."²³⁷ Furthermore, Respondents were unable to "identif[y] statements by [either Attorney General Sessions or Duke] that would give rise to an inference of discriminatory motive."²³⁸ Respondents' inability to prove "an 'invidious discriminatory purpose'" behind the rescission of DACA meant that their equal protection claim must fail.²³⁹

supra.

229. *Regents of the Univ. of California*, 140 S. Ct. at 1915.

[E]ven if the claim is cognizable, the allegations here are insufficient. To plead animus, a plaintiff must raise a plausible inference that an 'invidious discriminatory purpose was a motivating factor' in the relevant decision . . . Possible evidence includes disparate impact on a particular group, '[d]epartures from the normal procedural sequence,' and 'contemporary statements by members of the decisionmaking body.'

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 1916.

235. *Id.*

236. *Id.* ("The DAPA memo did not address the merits of the DACA policy or its legality. Thus, when the Attorney General later determined that DACA shared DAPA's legal defects, DHS's decision to reevaluate DACA was not a 'strange about-face' . . . It was a natural response to a newly identified problem.").

237. *Id.*

238. *Id.*

239. *Id.* at 1915-16.

Taken in its entirety, Chief Justice Roberts' plurality opinion reads like a playbook on how DHS could go about rescinding DACA "the right way" in the future. While he prevented the rescission in the immediate, he gave detailed examples of what DHS should have considered, what it should have included in its rescission memorandum, and ways in which it could legally wind-down the program.²⁴⁰ DHS could, at any point, refer back to this plurality opinion to create a new rescission memorandum that ticks all the boxes Chief Justice Roberts laid out. DACA lives to fight another day, but its days might be numbered after this decision.

B. Justice Sotomayor: It's Too Early to Squash an Equal Protection Claim

While Justice Sotomayor concurred with the plurality that DHS violated the APA because the Duke Memorandum was arbitrary and capricious, she dissented against their equal protection conclusion.²⁴¹ She believed that Respondents had met the threshold requirements and their "complaints create[d] more than a 'sheer possibility that a defendant has acted unlawfully.'"²⁴² Instead of dismissing their equal protection claim, Justice Sotomayor would have remanded the issue for further factual development.²⁴³

Justice Sotomayor began by pointing out some of the declarations made by President Trump against Mexicans.²⁴⁴ Both before and after he assumed office, President Trump referred to Mexican immigrants as "people [with] lots of problems," "the bad ones," "animals," and "criminals, drug dealers, [and] rapists."²⁴⁵ Justice Sotomayor found it relevant that these comments were made regarding "unlawful migration from Mexico – a keystone of President Trump's campaign and a policy priority of his administration."²⁴⁶ She said these statements, taken as a whole,

240. *See id.* at 1907-17 (detailing the reliance issues DHS should have considered, the different ways it could have wound down the program, and accepting DHS's concerns as valid reasons for rescinding the program).

241. *Id.* at 1916-17 (Sotomayor, J., concurring in part).

242. *Id.* at 1918 (quoting in part *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

243. *Id.* at 1917-18.

244. *Id.* at 1917.

245. *Id.*; Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), www.time.com/4473972/donald-trump-mexico-meeting-insult/ [perma.cc/C5Q2-JHZA]. "When Mexico sends its people, they're not sending their best . . . They're sending people that have lots of problems, and they're bringing those problems with [them]. They're bringing drugs. They're bringing crime. They're rapists." Reilly, *supra*.

246. *Regents of the Univ. of California*, 140 S. Ct. at 1917 (Sotomayor, J., concurring in part); James Cooper, *The United States, Mexico, and the War on Drugs in the Trump Administration*, 25 WILLAMETTE J. INT'L L. & DISPUTE RES. 234, 235 (2018). "[A] great deal of Mr. Trump's Presidential campaign was focused around the relationship the United States has with its southern

“create[d] a strong perception” that the rescission of DACA was “contaminated by impermissible discriminatory animus.”²⁴⁷ Justice Sotomayor argued that President Trump’s statements acted as a backdrop to his administration’s treatment of immigrants, especially immigrants from Mexico.²⁴⁸ Accordingly, she asserted the rescission of DACA could not be disentangled from President Trump’s statements and the Court should have considered them as a probable motivating factor in DHS’s decision to rescind DACA.²⁴⁹

The majority of Dreamers impacted by the rescission are the very same demographic of immigrants President Trump had repeatedly attacked.²⁵⁰ Given this line of reasoning, Justice Sotomayor said there was something suspicious about DHS’s decision to rescind DACA a mere three months after it had reaffirmed its commitment to the program.²⁵¹ Thus, she would have remanded this issue for further factual development to determine whether DHS violated the Equal Protection Clause of the Fifth Amendment.²⁵²

Justice Sotomayor made a valid point. It is difficult to imagine how statements made by a sitting President against the very population most impacted by the rescission of DACA could not have a significant impact on DHS’s ultimate decision. After all, as a member of the executive branch, DHS answers to the President.²⁵³ The Court should have allowed Respondents to develop their theory by granting them an opportunity for further discovery.

neighbor and on the border that the two countries share.” Cooper, *supra*.

247. *Regents of the Univ. of California*, 140 S. Ct. at 1917 (Sotomayor, J., concurring in part).

248. *Id.* at 1918; Cooper, *supra* note 246, at 236. “[T]he impact of the policy decision must be viewed in the context of the President’s public statements on and off the campaign trail.” *Regents of the Univ. of California*, 140 S. Ct. at 1917. “During his campaign, Mr. Trump promised to create a deportation force to remove the estimated eleven million undocumented immigrants . . . According to the President, many of these undocumented immigrants are rapists and drug dealers, and he often refers to them as ‘bad hombres.’” Cooper, *supra* note 246.

249. *Regents of the Univ. of California*, 140 S. Ct. at 1917-18 (“[T]he plurality minimizes the disproportionate impact of the rescission decision on Latinos[.]”).

250. *Id.* at 1918 (“I would not so readily dismiss the allegation that an executive decision disproportionately harms the same racial group that the President branded as less desirable mere months earlier.”).

251. *Id.* at 1917 (quoting in part *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019)) (“The abrupt change in position . . . raises the possibility of a ‘significant mismatch between the decision . . . made and the rational . . . provided.’”).

252. *Id.* at 1918 (quoting in part *Iqbal*, 556 U.S. at 678) (“The facts in [R]espondents’ complaints create more than a ‘sheer possibility that a defendant has acted unlawfully.’ . . . Whether they ultimately amount to actionable discrimination should be determined only after factual development on remand.”).

253. *U.S. Department of Homeland Security*, USAGOV, www.usa.gov/federal-agencies/u-s-department-of-homeland-security [perma.cc/NAL5-EMRF] (last visited Sept. 29, 2021).

C. Justice Thomas: There's No Need to Look Any Further Than DACA's Own Illegality

Justice Thomas wrote a fairly scathing opinion in which he concurred with the plurality's judgment but dissented against their overall review of the DACA program.²⁵⁴ The crux of Justice Thomas's argument was that DACA was enacted illegally, thus it is an illegal program that DHS was not required to renew.²⁵⁵ He said the Court should have limited its inquiry to whether DHS's determination of illegality was sound.²⁵⁶ Justice Thomas argued that the plurality opinion forces presidential administrations to maintain "unlawful programs" implemented by previous administrations.²⁵⁷

Justice Thomas began by asserting that "an agency literally has no power to act. . . unless and until Congress confers power upon it"²⁵⁸ If an agency exceeds this authority, then it has acted unlawfully.²⁵⁹ He pointed out that Congress never gave DHS the authority to create new immigration classes or grant widespread relief from removal— which is, in fact, what DACA did.²⁶⁰ Justice Thomas argued that in creating and implementing DACA, DHS altered the way in which the laws apply to a large group of undocumented immigrants because the INA explains that people who have entered the United States without inspection or who have overstayed their visas must be removed from the country.²⁶¹ "Instead of merely refusing to enforce the INA's removal laws against an individual, the DHS has enacted a wide-reaching

254. *Regents of the Univ. of California*, 140 S. Ct. at 1918-31 (Thomas, J., concurring in part).

255. *Id.* at 1918-19, 1922 ("Without any purported delegation of authority from Congress and without undertaking a rulemaking, DHS [under President Obama] unilaterally created a program known as . . . DACA . . . [T]he program was unlawful from its inception."). *Id.* at 1918-19. ("The decision to rescind an unlawful agency action is *per se* lawful."). *Id.* at 1922.

256. *Id.* at 1919.

257. *Id.*

[T]he majority's holding creates perverse incentives, particularly for outgoing administrations. Under the auspices of today's decision, administrations can bind its successors by unlawfully adopting significant legal changes through [e]xecutive [b]ranch agency memoranda . . . [T]he majority erroneously holds that the agency is not only permitted, but required, to continue administering unlawful programs that it inherited from a previous administration.

258. *Id.* at 1921 (Thomas, J., concurring in part) (quoting in part *Arlington v. FCC*, 569 U.S. 290, 317 (2013)).

259. *Id.*

260. *Id.* at 1922.

261. *Id.* (quoting *Texas v. United States*, 328 F.Supp.3d 662, 713 (S.D. Tex. 2018)) ("DACA [recipients] primarily entered the country either by overstaying a visa or by entering without inspection, and the INA instructs that aliens in both classes are removeable.").

program that awards legal presence . . . to individuals Congress has deemed deportable or removable.”²⁶² If Congress wanted to grant an exception for Dreamers, it very well could have; if it wanted to delegate this authority to DHS, it could have, but because Congress did not, DHS could not act on its own volition.²⁶³ Justice Thomas asserted that DHS acted unlawfully in issuing the DACA Memorandum and in building out procedures to enact the DACA program.²⁶⁴

Justice Thomas then took issue with the plurality’s analysis of the rescission under the APA.²⁶⁵ From his perspective, the Court’s analysis should begin and end with DACA’s illegality.²⁶⁶ Not only did the DACA Memorandum “flout[] the APA’s procedural requirements,”²⁶⁷ its continued enforcement means that “every action taken by DHS under DACA is [an] unlawful exercise of power.”²⁶⁸ By announcing that DACA was illegal, DHS had met the requirements under the APA and sufficiently explained its action.²⁶⁹ Justice Thomas brushed the reliance interests aside as irrelevant since DHS never had the statutory authority to create DACA in the first place.²⁷⁰ He argued that requiring DHS to give

262. *Id.* at 1925 (quoting *Texas*, 86 F.Supp.3d at 654).

263. *Id.* at 1922.

Congress clearly knows how to provide for classwide deferred action when it wishes to do so. On multiple occasions, Congress has used express language to make certain classes of individuals eligible for deferred action . . . Congress has failed to provide similar explicit provisions for DACA recipients, and the immigration laws contain no indication that DHS can, at will, create its own categorical policies for deferred action.

264. *Id.*

265. *Id.* at 1926.

266. *Regents of the Univ. of California*, 140 S. Ct. at 1926 (Thomas, J., concurring in part) (“DHS has no authority here to create DACA, and the unlawfulness of that program is a sufficient justification for its rescission.”).

267. *Id.*

268. *Id.* at 1926-28.

Because DACA has the force and effect of law, DHS was required to observe the procedures set out in the APA if it wanted to promulgate a legislative rule. It is undisputed . . . that DHS did not do so. It provided no opportunity for interested parties to submit comments regarding the effect that the program’s dramatic and very significant change in immigration law would have on various aspects of society. It provided no discussion of economic considerations or national security interests. Nor did it provide any substantial policy justifications for treating young people brought to this country differently from other classes of aliens who have lived in the country without incident for many years. And, it did not invoke any law authorizing DHS to create such a program beyond its inexplicable assertion that DACA was consistent with existing law. Because DHS failed to engage in the statutorily mandated process, DACA never gained status as a legally binding regulation that could impose duties or obligations on third parties.

269. *Id.* at 1928.

270. *Id.* at 1930.

additional policy reasons for rescinding DACA and further consideration to reliance interests was not only illogical, but was not grounded in precedent and violated the separation of powers.²⁷¹

While Justice Thomas made some valid points and his arguments sound compelling, he ultimately misconstrued the plurality's holding. DACA was indeed created unilaterally and without Congressional legislation or rulemaking.²⁷² However, DACA's overall legality was not at issue in this case – the Court explicitly stated that it would not be addressing this issue.²⁷³ Instead, what was under consideration were the actions taken by DHS after Attorney General Sessions concluded that DACA's benefits violated the INA.²⁷⁴

Justice Thomas was wrong in his interpretation of the reliance interests at stake. In dismissing these interests, he disregarded the reality of the situation. Irrespective of whether DACA was enacted legally or illegally, hundreds of thousands of people have organized their lives around this ongoing program.²⁷⁵ These interests and the consequences of rescinding DACA should have been considered by DHS. Even if a program was not enacted through the normal channels of lawmaking, it should not mean the rescission of the same program may also be allowed to fall outside the law. If DHS were permitted to act in violation of the APA and rescind DACA without considering these reliance interests, it would set a dangerous precedent of allowing agencies to circumvent the law meant to restrain them.

271. *Id.* at 1926 (quoting in part *Massachusetts v. EPA*, 549 U.S. 497, 536 (2007)).

This rule 'has no basis in our jurisprudence.' . . . No court can compel [e]xecutive [b]ranch officials to exceed their congressionally delegated powers by continuing a program that was void [from the beginning] . . . In reviewing agency action, our role is to ensure that [e]xecutive [b]ranch officials do not transgress the proper bounds of their authority, . . . not to perpetuate a decision to unlawfully wield power in direct contravention of the enabling statute's clear limits.

272. See Xiao Ming Hu, *Deferred Action for Childhood Arrivals and Prosecutorial Discretion: Legality, Policy, and Foreign Comparison*, 23 TEMP. INT'L & COMP. L.J. 27 (2014) (describing how DACA came into existence through executive action and the legal defects DACA suffers from because it did not go through the channels of bicameralism and presentment); Susan B. Dussault, *Who Needs DACA or the DREAM Act? How the Ordinary Use of Executive Discretion Can Help (Some) Childhood Arrivals Become Citizens*, 22 LEWIS & CLARK L. REV. 441 (2018).

273. *Regents of the Univ. of California*, 140 S. Ct. at 1910.

274. *Id.* at 1905; Letter from Attorney General Jefferson B. Sessions III, *supra* note 96.

275. See generally Brief for Lawyers' Committee for Civil Rights Under Law et. al. as Amici Curiae in Support of Respondents at 11-21, *Dep't of Homeland Security v. Regents of the Univ. of California* 140 S. Ct. (1891) (2020), *Trump v. NAACP*, *McAleenan v. Batalla Vidal* (Nos. 18-587, 18-588, 18-589) (providing support for why DHS was required to consider Dreamers' reliance interests and what those reliance interests were).

Moreover, contrary to Justice Thomas's understanding, the plurality's decision does not force new administrations to maintain unlawful programs. The plurality agreed that it is within DHS's authority to end the program.²⁷⁶ At the core of the plurality's decision is the mandate that when rescinding a program such as DACA, DHS must abide by the procedures set out in the APA.²⁷⁷ So long as an administrative agency follows these procedures, it can terminate a previous administration's programs.²⁷⁸

D. Justice Alito: "Our constitutional system is not supposed to work [this] way."²⁷⁹

Justice Alito's brief opinion in which he concurred in the judgment but dissented in part, centers around the role of the Federal Judiciary as it relates to DACA.²⁸⁰ He saw DACA as a political quagmire, one in which the courts should not be involved.²⁸¹ Despite this, Justice Alito noted that the rescission of DACA had been the subject of litigation for most of President Trump's term in office.²⁸² Through this litigious process, a duly elected President was unable to follow through on one of his policy objectives – namely, rescinding DACA.²⁸³

Justice Alito goes on to echo Justice Thomas's opinion that DACA was illegal from the get-go, and this fact, in and of itself, is sufficient to justify DHS's termination of the program.²⁸⁴ Assuming, for the sake of argument, that DACA *was* lawful, Justice Alito claimed the Court had no rational basis for overturning DHS's rescission.²⁸⁵ From his perspective, DACA could be seen as a "lawful

276. *Regents of the Univ. of California*, 140 S. Ct. at 1905 ("The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may.").

277. *See id.* at 1916 (finding DHS failed to provide a reasoned explanation for rescinding DACA because it did not consider Dreamers' reliance interests or the possibility of retaining the forbearance component of DACA).

278. *See id.* (remanding the issue to DHS so that they may consider the possibility of rescinding DACA again).

279. *Id.* at 1932 (Alito, J., concurring in part).

280. *Id.*

281. *Id.*

282. *Id.* ("Early in [President Trump's term in office], his administration took the controversial step of attempting to rescind the . . . DACA program. Shortly thereafter, one of the nearly 700 federal district court judges blocked this rescission, and since then, the issue has been mired in litigation.").

283. *Id.* ("[T]oday, the Court still does not resolve the question of DACA's rescission. Instead, it tells the [DHS] to go back and try again. What this means is that the Federal Judiciary, without holding that DACA cannot be rescinded, has prevented that from occurring during an entire Presidential term.").

284. *Id.* ("DACA was unlawful from the start, and that alone is sufficient to justify its termination.").

285. *Id.*

exercise of prosecutorial discretion.”²⁸⁶ Therefore, its rescission would be of the same character.²⁸⁷ Accordingly, such agency discretion would be unreviewable by the courts under section 701(a)(2) of the APA.²⁸⁸ He further posited that even if the rescission of DACA was reviewable, it was neither arbitrary nor capricious.²⁸⁹ Therefore, Justice Alito implies he would have upheld the Duke Memorandum as adequate because it provided sufficient consideration to avoid being arbitrary and capricious.²⁹⁰

Justice Alito’s lamentation over the fact that a duly elected President was unable to achieve one of their policy objectives seems out of touch. Since Justice Alito joined the Supreme Court in 2006, not a single U.S. President has been able to follow through on 100 percent of their policy goals.²⁹¹

E. Justice Kavanaugh: The Nielsen Memorandum Should Have Been Considered in The Plurality’s Decision.

Justice Kavanaugh wrote a partial concurrence in which his principal argument was that the Court misapplied the rule regarding post hoc rationalizations and the Nielsen Memorandum should have been considered in their decision.²⁹² He reasoned that had the Nielsen Memorandum been considered by the Court, it would have resolved the Court’s issues with the Duke Memorandum.²⁹³

Justice Kavanaugh contends that the post hoc rationalization doctrine was misapplied by the plurality.²⁹⁴ The appropriate application of this doctrine prevents courts from “uphold[ing] agency action on the basis of rationales offered by anyone *other than*

286. *Id.*

287. *Id.*

288. *Id.*; 5 U.S.C. § 701(a)(2) (2021) (“This chapter applies, according to the provisions thereof, except to the extent that . . . agency action is committed to agency discretion by law.”).

289. *Regents of the Univ. of California*, 140 S. Ct. at 1932 (Alito, J., concurring in part).

290. *Id.*

291. See Elaine C. Kamarck, *Why Presidents Fail And How They Can Succeed Again 2*, 4-6 (Brookings Institution Press 2016) (explaining how modern presidents struggle to achieve their policy objectives because they misjudge their ability to persuade the public into supporting their goals, twenty-first century politics have become hyper-polarized, and presidents tend to spend too much time talking to the public and campaigning when instead they should focus on government management in order to achieve their objectives),

292. *Regents of the Univ. of California*, 140 S. Ct. at 1932-35 (Kavanaugh, J., concurring in part).

293. *Id.* at 1933.

294. See *id.* at 1934 (describing the Nielsen Memorandum as similar to other forms of agency action that offer supplemental explanation and are commonly considered by courts).

the proper decisionmakers.”²⁹⁵ Additionally, the post hoc rationalization doctrine does not prevent agencies from providing further explanation for their reasoning after an initial decision has been made.²⁹⁶ As the Secretary of DHS, Nielsen was a proper decisionmaker and her memorandum provided further explanation for the initial rescission.²⁹⁷ Justice Kavanaugh felt that “[u]nder ordinary application of the arbitrary-and-capricious standard, the Nielsen Memorandum—with its alternative and independent rationales and its discussion of reliance—would pass muster as an explanation for the [e]xecutive [b]ranch’s action.”²⁹⁸

Justice Kavanaugh is right. Nielsen would be an appropriate agency decisionmaker with the authority to address and provide further explanation for DHS’s reasons for rescinding DACA. He is also correct in finding that Nielsen provided further detail about the decision to rescind DACA and addressed issues of reliance.²⁹⁹ He is also likely correct in assuming the Nielsen Memorandum would meet the APA requirements, and therefore the rescission would not be arbitrary and capricious.

However, there is a fine line between providing further explanation and providing additional reasons. The Duke Memorandum gave only two reasons for rescinding DACA: the ruling in *Texas v. United States*, finding DAPA violated the INA and APA,³⁰⁰ and the letter from Attorney General Sessions suggesting that DACA suffered from the same legal defects as DAPA.³⁰¹ In contrast, Nielsen gave three additional reasons which were never mentioned in the Duke Memorandum.³⁰² Nielsen’s job, as ordered by the D.C. District Court, was to dive deeper into the two original reasons given by Duke.³⁰³ She did not do this. Even Justice Kavanaugh’s own understanding of the post hoc rationalization

295. *Id.* (emphasis added) (quoting *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (2006)).

296. *Id.*

297. *Id.* at 1933-34.

298. *Id.* at 1933 (“[T]he Nielsen Memorandum more fully explained the Department’s legal reasons for rescinding DACA, and clarified that even if DACA were lawful, the Department would still rescind DACA for a variety of policy reasons. The Nielsen Memorandum also expressly addressed the reliance interests of DACA recipients.”).

299. Memorandum from Kirstjen M. Nielsen, *supra* note 104.

300. *See Texas*, 86 F. Supp. 3d 591 (holding DAPA violated the procedural requirements of the APA section 553 and would impermissibly grant immigration relief to a large group of undocumented immigrants).

301. Memorandum from Elaine C. Duke, *supra* note 94.

302. Memorandum from Kirstjen M. Nielsen, *supra* note 104.

First, . . . the DACA policy was contrary to law . . . Second, regardless of whether the DACA policy is ultimately illegal, it was appropriately rescinded by DHS because there are, at a minimum, serious doubts about its legality . . . Third, regardless of whether these concerns about the DACA policy render it illegal or legally questionable, there are sound reasons of enforcement policy to rescind the DACA policy.

303. *NAACP*, 298 F.Supp.3d at 245.

doctrine could not help Nielsen because she was not elaborating on Duke's initial reasoning – she was providing *additional* reasons to support the rescission.³⁰⁴ In doing this, Nielsen was trying to stack the odds in DHS's favor. Nielsen's reasons may have some validity to them, which is likely why Justice Kavanaugh felt the Nielsen Memorandum "would pass muster."³⁰⁵ However, they were not the explanations given in the Duke Memorandum, and as such, the Court could not take them into consideration.³⁰⁶ Nielsen was given explicit instructions by the D.C. District Court: to expand upon Duke's initial reasoning for rescinding DACA. She was not allowed to provide additional reasons that were not considered or offered by Duke in her memorandum. Nielsen failed to follow this directive and this mistake meant that her memorandum would not be considered by the Supreme Court.

Perhaps DHS would have been able to successfully terminate DACA had Nielsen written the initial rescission memorandum. However, this is not the reality of the situation. Instead, the Court decided DHS must be held to its initial reasoning given in the Duke Memorandum and it must deal with the consequences of providing post hoc rationalizations.³⁰⁷

IV. PERSONAL ANALYSIS

If there is one thing to take away from the Supreme Court's ruling in *Regents*, it is that DACA is not safe in its current form. What is also clear from this decision is that the only way to protect Dreamers and DACA is through a congressionally passed law. In this section, a feasible, long-term solution to this problem will be offered; a solution that will not only help Dreamers today but will protect future Dreamers as well.

Since DACA's inception in 2012, the program has generally garnered wide-spread public support.³⁰⁸ Arguably, Congress has

304. Memorandum from Kirstjen M. Nielsen, *supra* note 104.

305. *Regents of the Univ. of California*, 140 S. Ct. at 1933.

306. *See id.* at 1909-10 (finding "[Nielsen's statements] can be viewed only as impermissible *post hoc* rationalizations and thus are not properly before us . . . This is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision.").

307. *Id.*

308. Memorandum from Janet Napolitano, *supra* note 19; Jens Manuel Krogstad, *Americans Broadly Support Legal Status for Immigrants Brought to the U.S. Illegally as Children*, PEW RSCH. CTR. (June 17, 2020), www.pewresearch.org/fact-tank/2020/06/17/americans-broadly-support-legal-status-for-immigrants-brought-to-the-u-s-illegally-as-children/ [perma.cc/TP42-2XP6]; Anita Kumar, *Poll: Trump Voters Want to Protect Dreamers*, POLITICO (June 17, 2020), www.politico.com/news/2020/06/17/trump-supporters-dreamers-poll-323432 [perma.cc/W8HH-ZYJ4]. According to a poll conducted by the Pew Research Center in the summer of 2020, seventy-four percent of Americans would approve of a law which grants permanent legal status to those who came to the

given its implied approval to DACA since it has yet to usher through a law which would render the program unnecessary.³⁰⁹ While members of Congress have brought forward at least four different statutes that attempt to address the issue of illegal childhood arrivals, none have succeeded.³¹⁰ However, there is no real need for Congress to reinvent the wheel because an answer has already been established.

Codifying DACA in its current form, with certain alterations and additions, would resolve the issues presented in *Regents*. The DACA Memorandum lays out the precise criteria required to be eligible for deferred action and work authorization.³¹¹ Additionally, USCIS, ICE, and CBP have established and utilized processes which align with the DACA Memorandum, and these processes have, by and large, worked.³¹² Why fix what is not broken?³¹³

United States as children. Krogstad, *supra*. Ninety-one percent of Democrats favor this initiative; fifty-four percent of Republicans have said they would be in favor of such a law. *Id.* Also, according to a POLITICO/Morning Consult poll, sixty-nine percent of those who voted for Donald Trump in the 2016 Presidential election believe that Dreamers should be protected. *Id.*

309. *Utah Ass'n of Cnty. v. Clinton*, 1999 U.S. Dist. LEXIS 15852, * 37 (D. Utah 1999). Congress can ratify official government action through “a group of indirect congressional actions.” *Id.*

310. American Hope Act of 2017, H.R. 3591, 115th Cong. (2017); Bar Removal of Individuals who Dream and Grow our Economy (BRIDGE) Act, H.R. 496, 115th Cong. (2017); Dream Act of 2017, S. 1615, 115th Cong. (2017); Recognizing America’s Children Act, H.R. 1468, 115th Cong. (2017).

311. Memorandum from Janet Napolitano, *supra* note 19.

The following criteria should be satisfied before an individual is considered for an exercise of prosecutorial discretion pursuant to this memorandum: came to the United States under the age of sixteen; has continuously resided in the United States for a[t] least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum; is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and is not above the age of thirty.

312. *DACA Population Receipts Since Injunction June 30, 2020*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 16, 2020), www.uscis.gov/sites/default/files/document/reports/DACA_Population_Receipts_since_Injunction_Jun_30_2020.pdf [perma.cc/Q4V4-66NC].

313. Of course, this note is aiming to fix what *is* broken within the system, namely that there is no long-term, guaranteed protection for Dreamers. However, the program as a whole has worked as a means of granting childhood arrivals some peace of mind and the ability to actively engage in our society without having to constantly be looking over their shoulder, worried they may be deported.

A. *How DACA Compares to Other Forms of Immigration Relief*

By granting deferred action under DACA, DHS is exercising its prosecutorial discretion over who will be deported and who can remain in the United States.³¹⁴ Typical instances of prosecutorial discretion consider various factors when deciding whether to take action against an undocumented immigrant.³¹⁵ The immigrant in this case does not have the opportunity to petition for their own benefit, unlike Dreamers under DACA.³¹⁶ DACA is unique from other forms of prosecutorial discretion because it asks applicants to get involved in the decision-making process.³¹⁷ In this sense, the method of applying for and receiving deferred action and work authorization under DACA mirrors the process of applying for other types of affirmative immigration relief.³¹⁸

To qualify for relief under DACA, the applicant must affirmatively engage with our immigration system by filing an application and paying a processing fee to USCIS.³¹⁹ USCIS then reviews the application to ensure the applicant meets all of the requirements under DACA and uses its discretion to grant deferred action and work authorization.³²⁰ Compare this to the process for

314. See Hu, *supra* note 272 (describing how prosecutorial discretion is used to grant deferred action for Dreamers); Memorandum from Doris Messner, *supra* note 138.

‘Prosecutorial discretion’ is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone . . . In the immigration context, the term applies not only to the decision to issue, serve, or file a Notice to Appear . . . but also to a broad range of other discretionary enforcement decisions, including . . . granting deferred action[.]

315. *Id.* Some of the factors considered when deciding whether to exercise prosecutorial discretion include: the individual’s immigration status and history, their criminal history and length of residence in America, potential humanitarian concerns resulting from removal, the likelihood of successfully removing the individual or achieving other enforcement mechanisms against them, whether the individual is likely to become eligible for immigration relief in the future, the effect that removal would have on their future admissibility, whether the individual has cooperated with law enforcement, DHS’s available resources, the level of community attention, and whether the individual has honorably served in the U.S. military or Coast Guard. *Id.*

316. *Id.*

317. Hu, *supra* note 272, at 29 (“DACA is the first exercise of prosecutorial discretion that allows aliens to directly apply for deferred action before they are subject to removal proceedings.”).

318. *Id.* at 32 (“Individuals who meet the criteria can apply for deferred action by filing a form I-821D. Individuals can also file a form I-765 to apply for employment authorization. The USCIS has also stated that it will not waive the \$465 application fee.”).

319. *Id.* at 41, 50-51.

320. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 46.

receiving a J-1 visa,³²¹ where an individual also affirmatively engages with USCIS by filing an application and paying a processing fee.³²² Just like under DACA, USCIS reviews the J-1 application to ensure the applicant meets the requirements and then uses its discretion to grant immigration status and work authorization.³²³ The principal difference between the administration of the J-1 visa and DACA is that Congress has codified the process for obtaining a J-1 visa but has failed to codify DACA. DACA is already functioning like other affirmative immigration programs – it just needs to be formalized by Congress.

B. Transforming DACA Into Statutory Law

If Congress were to pass a law codifying the DACA program, the possibility of DACA being rescinded by a future administration would be eliminated. The Court in *Regents* specifically chose not to address the legality of DACA³²⁴ and it openly admitted that DHS is authorized to rescind the program at its discretion.³²⁵ If DACA were passed into law then its overall legality would no longer be in question because it would have gone through the appropriate channels of bicameralism and presentment.³²⁶ Additionally, DHS would have no authority to rescind the program because only the United States Supreme Court has the authority to invalidate laws that violate the federal Constitution.³²⁷ This would grant current

321. *J-1 Visa Basics*, BRIDGEUSA, www.j1visa.state.gov/ [perma.cc/DV2K-RYHB] (last visited Sept. 29, 2021); *Working in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., www.uscis.gov/working-in-the-united-states [perma.cc/7JL2-XEKF] (last visited Sept. 29, 2021). The J-1 visa is a non-immigrant visa category with a relatively broad application. *J-1 Visa Basics*, *supra*. Under this visa category, an individual can come to the United States and live, study, and work here for up to four years. *Id.* Those eligible for this visa range from foreign physicians, au pairs, camp counsellors, trainees and interns, teachers, students seeking secondary education, and summer work travel. *Id.* Additionally, under this category, an individual has the opportunity to apply for subsequent visa categories (so long as they qualify) which can place them on a path towards permanent residency, which can ultimately lead to citizenship. *Working in the United States*, *supra*.

322. *Exchange Visitors*, U.S. CITIZENSHIP & IMMIGR. SERVS., www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/exchange-visitors [perma.cc/W5MB-TU8K] (last visited Sept. 29, 2021).

323. *Id.*

324. *Regents of the Univ. of California*, 140 S. Ct. at 1910.

325. *Id.* at 1905 (“The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may.”).

326. U.S. CONST. art. I, § 7, cls. 2, 3.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . . Every Order, Resolution, or Vote to Which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States.

327. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the

and future Dreamers some peace of mind by allowing them to live their lives without fear that they could have their status ripped out from under them at any moment.

Congress's job, to some degree, has already been done for them because the DACA Memorandum, and the procedures built out by DHS in response to it, have already done a lot of the heavy lifting. Congress could easily take the criteria and procedures already in place and replicate them into a formal immigration statute. However, some important additions and alterations would need to be made for a DACA statute to appease both Democrats and Republicans, and account for both current and future Dreamers.

One issue with the current DACA Memorandum is that an individual must "ha[ve] continuously resided in the United States for at least five years *preceding the date of [the] memorandum and is present in the United States on the date of [the] memorandum.*"³²⁸ This means that for someone to qualify for DACA, they had to be in the United States on June 15, 2012, and must have been continuously residing in the U.S. since at least June 15, 2007.³²⁹ This creates a major problem for any child who was, or will be, brought into this country illegally after the issuance of the DACA Memorandum because it means they cannot apply for deferred action under DACA. Given America's history as an immigrant nation and the fact that many people seek a better life in the United States,³³⁰ the likelihood that illegal child migration will come to an end is unrealistic.

To address the issue of illegal child migration, America needs to develop a long-term solution that is not contingent upon the child being in the United States on a given date. Congress can, and should, include a provision in the proposed DACA statute that requires all applicants to maintain continual residence in the U.S. to prove they are committed to living in America long-term, e.g., five years. However, they should avoid tying this timeframe to any given date (such as, for example, the date on which Congress would pass the statute into law). By avoiding a date-specific timeframe, Congress would allow the nation to address child migration for the foreseeable future. Unless some breakdown in the process begins to evolve, the U.S. could rest assured knowing that undocumented child migrants are being protected by our immigration system.

Another major drawback of the current DACA program is that

province and duty of the judicial department to say what the law is.").

328. Memorandum from Janet Napolitano, *supra* note 19 (emphasis added).

329. *Id.*

330. See Budiman, *supra* note 13 (providing data to show the number of immigrants in the United States, how this number has changed over time, where immigrants are coming from, how many obtain U.S. citizenship, generally where most immigrants live in America, and how many work and get an education in the U.S.); Mossaad, *supra* note 15.

Dreamers have no pathway to citizenship.³³¹ In other words, Dreamers currently have no hope of becoming permanent residents of the country they call home. Any law passed by Congress pertaining to Dreamers and DACA absolutely must include some pathway to citizenship. Otherwise, the problems facing Dreamers (principally, that their deferred action may be revoked at any time, and they could be deported) will not truly be resolved and Americans will have to continuously revisit this subject.

Admittedly, granting citizenship to undocumented migrants is likely to be the most contentious aspect of any future DACA statute.³³² Some members of Congress, such as Texas's former Republican Representative Lamar Smith, and Virginia's former Republican Congressman Bob Goodlatte, have argued that granting amnesty to Dreamers would only "encourage[] more illegal immigration and contribute[] to the surge of unaccompanied minors and families seeking to enter the U.S. illegally."³³³ However, creating a pathway to citizenship for Dreamers will not only save time and money for ICE³³⁴ and USCIS but will generate billions of dollars towards the United States' gross domestic product.³³⁵ ICE only has the resources to deport 400,000 undocumented immigrants per year³³⁶ and USCIS receives millions of applications every year.³³⁷ Creating a pathway to citizenship for Dreamers would

331. Memorandum from Janet Napolitano, *supra* note 19 ("This memorandum confers no substantive right, immigration status or pathway to citizenship.").

332. See Republicanviews, *Republican Views On DACA* (Dec. 31, 2018) www.republicanviews.org/republican-views-on-daca/ [https://perma.cc/V2J9-378W] (explaining that DACA is a highly contentious issue within the Republican party because it deals with the issue of illegal immigration, which most Republicans are firmly against).

333. Bob Goodlatte, *Goodlatte Statement on Ending Executive Overreach on Immigration*, HOUSE OF REP. JUDICIARY COMM. (Sept. 5, 2017), republicans-judiciary.house.gov/press-release/goodlatte-statement-ending-executive-overreach-immigration/ [perma.cc/D7XD-7PEA]; *Are DACA and the DREAM Act Good for America?*, *supra* note 24.

334. Hu, *supra* note 272 at 38 ("ICE 'only has the resources to remove . . . less than [four] percent of the estimated illegal alien population in the United States.' As a result, ICE has to prioritize the use of its resources for enforcement, detention, and removal.").

335. *Are DACA and the DREAM Act Good for America?*, *supra* note 24. "DACA recipients will 'contribute \$460.3 billion to the U.S. gross domestic product [GDP] over the next decade – economic growth that would be lost were DACA to be eliminated. *Id.* Additionally, if an act were to be passed addressing Dreamers, 'it would add \$22.7 billion annually to the US GDP, and up to \$400 billion over the next decade.'" *Id.*

336. Hu, *supra* note 272, at 38.

337. USCIS *Final FY 2019 Statistics Available*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 16, 2020) www.uscis.gov/news/alerts/uscis-final-fy-2019-statistics-available [perma.cc/FX3T-632F]; *DACA Population Receipts Since Injunction June 30, 2020*, *supra* note 312. In 2019 alone, USCIS processed more than 40 million applications and received around 2.2 million applications for work authorization. *USCIS Final FY 2019 Statistics Available*, *supra*. Additionally,

minimize some of the work ICE and USCIS have to do because fewer Dreamers would be regularly applying for renewals, and deportations would decrease. ICE could then focus its limited resources on deporting those who pose a threat to national security and public safety.³³⁸

Furthermore, to qualify for deferred action under DACA, applicants must essentially be upstanding individuals and maintain this status for USCIS to renew their two-year forbearance from deportation.³³⁹ Dreamers cannot be felons or have multiple misdemeanors, they must either be currently enrolled in school or graduated from high school, or they must be honorably discharged members of the Coast Guard or Armed Forces.³⁴⁰ In other words, Dreamers are educated, hardworking, productive, patriotic, and brave members of our communities. Why would we want to deport these types of individuals? Congress has the ability and the opportunity to pass a law that would protect these people and acknowledge the impact and benefit Dreamers have had, and will continue to have, on our nation.

In a proposed DACA statute, Congress could easily maintain these “upstanding individual” requirements and institute a “trial-run pipeline” for obtaining permanent residency. Under this proposed DACA statute, individuals would apply for the same deferred action and work authorization currently provided under the DACA program. Instead of a two-year forbearance, however, Congress should make it a five-year forbearance. During these five years, Dreamers would need to continually reside in the U.S., pay their taxes, avoid run-ins with the law, contribute positively to their communities either through community service, continued education, enlisting in the military, or continual employment throughout the full five year “trial-run.” Then, at the end of these five years, if USCIS is satisfied that the Dreamer has meet all of these requirements, they would qualify for permanent residency. Thus, granting Dreamers citizenship to the country they have positively contributed to and call their home.

While some might argue that America should not reward people for breaking the law and entering the United States illegally, the truth of the matter is that these Dreamers “lacked the intent to violate the law”³⁴¹ and are “productive young people [who] have

there are currently 27,850 current Dreamers whose two-year forbearance is set to expire no later than June 2022. *DACA Population Receipts Since Injunction June 30, 2020*, *supra* note 312. What this means, in practical terms, is that USCIS is staring down the barrel of almost 30,000 applications for renewal in the next seven months. *Id.*

338. Memorandum from Doris Messner on Exercising Prosecutorial Discretion, *supra* note 138.

339. Memorandum from Janet Napolitano, *supra* note 19.

340. *Id.*

341. *Id.*

already contributed to our country in significant ways.”³⁴² A child should not be punished for their parents’ actions.³⁴³ Dreamers really are the epitome of the American Dream and, as fellow children of immigrants, Americans should support these individuals and help them secure their own path to citizenship.

V. CONCLUSION

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”³⁴⁴ These famous words found in America’s Declaration of Independence were written by the children of immigrants and apply to everyone.³⁴⁵ Our country was literally and figuratively built by immigrants and their descendants – America would not be the nation it is today without their influence.³⁴⁶ Dreamers are no less important than the immigrants who came to America in the past. By creating a law that solidifies their status and leads them down a path towards citizenship, we would be acknowledging their importance in the fabric of our country.

After the Court’s decision in *Regents*, DACA lived to fight another day, but its status remains tenuous. In the Summer of 2020, the Trump Administration made further attempts to roll-back the program.³⁴⁷ Ultimately, their attempt failed and DACA remained in place.³⁴⁸ More recently, on July 16, 2021, the Southern

342. *Id.*

343. *Ezekiel* 18:19 (“The son will not bear the punishment for the sin of the father[.]”).

344. The Declaration of Independence para. 2 (U.S. 1776).

345. *Id.*; Matthew Wills, *Who Wrote the Declaration of Independence?*, JSTOR DAILY (July 2, 2016), www.daily.jstor.org/who-wrote-the-declaration-independence/ [perma.cc/RM5D-QNWX].

346. Erin Blakemore, *These Iconic Figures of American History Were All Immigrants*, TIME (Nov. 12, 2015), www.time.com/4108606/history-american-immigrants/ [perma.cc/W6NH-CCYL]; Jessica Bush, *10 Famous Immigrants Who Made America Great*, BUZZWORTHY www.buzzworthy.com/10-famous-immigrants-who-changed-america/ [perma.cc/F6HS-BABN] (last visited Sept. 29, 2021).

347. Memorandum from Chad F. Wolf, to Mark Morgan, Matthew Albence, and Joseph Edlow (July 28, 2020).

348. Priscilla Alvarez, *DHS Updates Website to Indicate DACA Program Has Been Restored*, CNN (Dec. 7, 2020), www.cnn.com/2020/12/07/politics/daca-restored-dhs-website/index.html [perma.cc/3Z3Q-WGUR] [hereafter Alvarez I]; Priscilla Alvarez, *Federal Judges Tears Into Trump Administration Over its Handling of DACA*, CNN (Nov. 18, 2020), www.cnn.com/2020/11/18/politics/daca-garaufis/index.html [perma.cc/3WM8-84A9] [hereafter Alvarez II]. In November of 2020, Federal Judge Nicholas Garaufis determined that when Chad Wolf issued the July 2020 Memorandum limiting renewal requests and new applications for DACA, Wolf was not legally serving as Acting Secretary of Homeland Security. Alvarez I, *supra*. Accordingly, the rules issued by Wolf limiting applications and renewals were

District of Texas once again weighed in on DACA.³⁴⁹ The Texas court declared DACA illegal, vacated the DACA Memorandum, and issued a permanent injunction prohibiting DHS from approving new applications submitted after July 16, 2021.³⁵⁰ Despite this holding, DHS can still process renewal applications and associated requests for work authorization as well as accept initial DACA applications.³⁵¹

There is still hope for DACA. DHS and the Department of Justice can appeal the Southern District of Texas's decision. Moreover, after the Supreme Court decided *Regents*, America elected a new President, Joseph R. Biden.³⁵² President Biden "championed the creation and expansion of the . . . DACA program" and his overall stance on immigration is a far cry from former President Trump's immigration policy.³⁵³ President Biden has promised to establish a path to citizenship for Dreamers, and in the meantime, has promised to keep the current DACA program in place until a long-term solution is found.³⁵⁴ President Biden's political party, the Democrats, holds a majority of the seats in Congress.³⁵⁵ The 2022 midterms are approaching, however, and 469 seats in Congress will be up for election.³⁵⁶ If Biden wants to pass a DACA statute, he and the current Congress should act quickly. Hopefully, President Biden and Congress can look to this note for a viable, legislative solution to protect current and future Dreamers.

invalid. Alvarez II, *supra*. In accordance with Judge Garaufis' orders, DHS was able to accept new applications for DACA status, renewal applications, and reinstated the two-year timeframe for deferred action and work authorization. Alvarez I, *supra*.

349. *Texas v. United States*, 2021 U.S. Dist. LEXIS 133114 (S.D. Tex. 2021).

350. *Id.* at 120-21.

351. *Additional Information: DACA Decision in State of Texas, et al. v. United States of America, et al., 1:18-CV-00068, (S.D. Texas July 16, 2021) ("Texas II")*, U.S. CITIZENSHIP & IMMIGR. SERVS., www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/additional-information-daca-decision-in-state-of-texas-et-al-v-united-states-of-america-et-al-118-cv [perma.cc/4ZKF-ZNTD] (last updated Aug. 31, 2021).

352. *Presidential Election, 2020*, BALLOTPEDIA, www.ballotpedia.org/Presidential_election_2020 [perma.cc/7DB3-9V8P] (last visited Sept. 29, 2021).

353. *The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN HARRIS, www.joe Biden.com/immigration/ [perma.cc/7LJY-34DE] (last visited Sept. 29, 2021).

354. *Id.* ("Dreamers and their parents should have a roadmap to citizenship through legislative immigration reform. But in the meantime, Biden will remove the uncertainty for Dreamers by reinstating the DACA program, and he will explore all legal options to protect their families from inhumane separation.")

355. *Party Division*, U.S. SENATE, www.senate.gov/history/partydiv.htm [perma.cc/A5W7-F57P] (last visited Oct. 6, 2021).

356. *United States Congress elections, 2022*, BALLOTPEDIA, ballotpedia.org/United_States_Congress_elections_2022 [https://perma.cc/R628-JZCF] (last visited Nov. 5, 2021).