

## IN EXPERT DEFENSE OF DACA

*By Kevin Johnson and Shoba Srivaprasad Wadhia*

### John Mitchell

Your amicus brief traced the history of executive discretion in immigration enforcement back to the 1960s. Does *Regents v. DHS* signify a broader change in how the executive branch is likely to wield its discretion going forward, either in immigration or other areas of law?

### Dean Johnson

In *Regents of University of California v. U.S. Department of Homeland Security*,<sup>1</sup> the U.S. Supreme Court will determine the future of the Deferred Action for Childhood Arrivals (DACA) policy.<sup>2</sup> Put into place in 2012 by the Obama administration, DACA provided temporary relief from removal, and work authorization, for young undocumented immigrants who came to the United States as children. The decision in this case will affect the lives of hundreds of thousands of persons who are Americans in every sense of the word.

If the Court upholds President Trump's rescission of DACA, recipients will lose legal rights to remain and work in the United States. In my estimation, such a result would be contrary to the law as well as tragic, unfair, and poor policy. It also would signal—not that President Trump needs one—that the President's discretion over immigration is virtually without legal constraint.

Alternatively, if the Supreme Court holds that the Trump administration's rescission was not justified, the holding, although showing that discretion has its limits, is unlikely to significantly constrain the President's discretion in immigration enforcement. If the Court chooses this route, it would likely limit its holding to finding that the Trump administration's claim that DACA was unlawful in this case cannot justify the rescission. Similar to the decision last year in which the Supreme Court rejected the Trump administration's rationale for a citizenship question on the 2020

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<sup>1</sup> 908 F.3d 476 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019).

<sup>2</sup> U.S. Dep't of Homeland Security, Deferred Action for Childhood Arrivals (DACA), <https://www.dhs.gov/deferred-action-childhood-arrivals-daca>.

Census,<sup>3</sup> the Court could hold that, although a rational justification that does not amount to political subterfuge would suffice, this one does not.

Whatever the Supreme Court rules about the rescission of DACA will not significantly affect the scope of the discretion of the President in the enforcement of the U.S. immigration laws. In the Immigration and Nationality Act of 1952,<sup>4</sup> as amended, Congress has bestowed immense discretion on the Executive Branch in enforcing the immigration laws. Different presidents have wielded that discretion in very different ways. Elections matter. The President, who exercises great discretion in immigration matters, and appoints department heads, immigration and federal judges, and others, can dramatically change the direction of the immigration ship. If nothing else, President Trump has demonstrated that.

### **Professor Wadhia**

As described in our brief, the former INS (and current DHS) has a long history of exercising prosecutorial discretion and deferred action specifically in immigration cases. The choice by former Secretary Janet Napolitano to enact DACA is consistent with former uses of deferred action both in terms of the population targeted (low priorities) and the instrument used (policy document by the immigration agency).

How the Supreme Court rules in DACA could have a low, medium, or significant impact on how the executive branch uses discretion moving forward. If the Supreme Court decides that the DACA case cannot be reviewed or that the current administration failed to provide a sound reason for ending DACA, this outcome could have little to no effect on how executive discretion is wielded moving forward. If the Supreme Court sides with the government and concludes that the Trump administration provided a sound reason for ending the DACA policy, the details of this conclusion will matter. The detail that will have the greatest influence on future acts of discretion will center on how and if the Court weighs in on the underlying legality of DACA.

Another scenario for the Court to conclude that the termination of DACA is lawful because the DACA policy itself is unlawful. This kind of outcome (which I believe would be a legally flawed and morally troubling one) would be more significant, and could limit the way discretion is used in the future. For example, future administrations may be reticent about adopting policies that are transparent like DACA, or ones that are aimed at listing

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<sup>3</sup> *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019).

<sup>4</sup> Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified, as amended, in scattered sections of 8 U.S.C.).

specific criteria to enable qualifying individuals to self-select and participate in a policy.

Distinguishable from DACA, future exercises of discretion may operate with less transparency, less efficiency, and less consistently (as many current discretionary decisions outside of the DACA policy currently do).

### **John Mitchell**

Whatever its outcome, the *Regents* case highlights the importance of immigration reform on the Congressional level. Both Professor Wadhia and Dean Johnson have written about the failed manifestation of a more progressive immigration agenda through the DREAM Act. When—and how—do you believe Congress will next act on immigration reform?

### **Dean Johnson**

My firm sense is that, sometime in the future, Congress will pass immigration reform. Forged in the Cold War, the Immigration and Nationality Act of 1952, even though amended many times, is ill-equipped to address global migration pressures in a highly mobile world with an increasingly integrated global economy. An undocumented immigrant population in the millions is a symptom of the inadequacies of current law. To accomplish reform, a path to legalization for undocumented immigrants will need to be part of the package. The laws also must be reformed to better address the nation's modern labors. Modernizing the legal immigration laws could make them more enforceable and diminish the likelihood of the emergence of a future undocumented population in the millions.<sup>5</sup>

For years, there has been bipartisan sentiment that the U.S. immigration system is broken and needs to be fixed. Rancorous debate has been ongoing about possible reform of the laws. That debate has been the subject of division and discontent. The extremes—from some kind of path to legalization for undocumented immigrants to immediate mass removals—remain far apart. Consequently, it is difficult to say when Congress might reach a political compromise on immigration reform.

Surprisingly, the Trump administration's immigration measures might hasten the coming of immigration reform. Through controversial measures such as the series of Muslim travel bans, family separation of migrant children in detention, and various policies aimed at Central Americans asylum seekers, President Trump has keenly focused the nation's attention on

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<sup>5</sup> See Kevin R. Johnson, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* (2009).

immigration and immigrants. Love or hate the administration's immigration initiatives, they are attracting attention to immigration in a way not seen in modern U.S. history. The political forces for change, which have been revitalized and mobilized by the Trump administration's aggressive immigration enforcement measures, appear to be here to stay. Under the circumstances, immigration reform as a practical matter seems inevitable.

Although Congress will pass immigration reform at some point in time, it is hard to say when. Meaningful reform would likely include a path to legalization to undocumented immigrants, increased enforcement measures, and changes to legal immigration. All are deeply complex and contested issues. The debate over reform unfortunately is marred by bluster and deep divisions. Powerful political forces have been stalemated. Only time will tell when the nation will see comprehensive immigration reform.

### **Professor Wadhia**

There is indeed a relationship between the DACA cases and broader legislative reform. As one illustration, the former President Barack Obama, when announcing DACA from the Rose Garden of the White House in June 2012, explained how Congress had been unable to come to an agreement or to pass legislation like the DREAM Act.

Importantly, this relationship should not be overstated. Preserving DACA and supporting the DREAM Act has never been an "either or" option as a matter of law. There will continue to be a need for healthy discretion (and acts of deferred action) in our immigration system even with legislative reform.

When Congress will act again on the DREAM Act is unknown and will depend on the will of Congress. The DREAM Act has been introduced in every Congress for nearly twenty years. Most people with DACA or DACA-like qualities have lived in the United States for more than a decade, with hundreds of thousands in school or on the frontlines during COVID-19.

Possibly, a negative outcome in the Supreme Court could influence how and if Congress acts on the DREAM Act, but the details will matter, especially if the negotiation becomes about protecting dreamers in exchange for criminalizing more immigrants, building walls, or setting more restrictions on legal immigration as has been done through recent proclamations and executive orders.

**John Mitchell**

Dean Johnson, do you have any predictions about the forthcoming decision in *Regents*? What can we expect given the jurisprudence of the highest court's current justices?

**Dean Johnson**

It is always hazardous to predict how the Supreme Court will decide a case. Consider a few recent decisions. Most Supreme Court watchers did not predict that the Roberts Court in *Sessions v. Dimaya*<sup>6</sup> would strike down a criminal removal provision on constitutional grounds. Similarly, few observers guessed that, after finding the administration's explanation to be window dressing, the Court would send back to the drawing board the proposed citizenship question on the 2020 Census.<sup>7</sup>

It is almost impossible to imagine a scenario in which the Court is not closely divided in deciding the DACA case. If the rescission of DACA is found unlawful, it will be a narrow decision, much like the Census 2020 decision. In that case, Chief Justice Roberts sided with the liberal Justices to reject the Trump administration's explanation for a citizenship question on the Census. That decision in effect ruled that, although a citizenship question can be included on the Census, the administration must have a bona fide and legitimate reason for the question, not a post-hoc rationalization that does not pass the "laugh" test.

Similarly, if the Court upholds the DACA rescission, the result will be narrow. The reasoning likely will go something like this: DACA was an exercise of prosecutorial discretion and to change the exercise of discretion is well within the discretion of the Executive Branch. It might be a short opinion that does not delve into much detail or acknowledge the impacts on young noncitizen lives.

For the reasons set forth in the immigration professors' amicus brief submitted to the Supreme Court,<sup>8</sup> a decision upholding the rescission would be a mistake. However, such a decision would return the pressing issue of relief for undocumented immigrants to the political process and consideration of immigration reform. Upholding the rescission of DACA would likely fuel a new political push for immigration reform. Such reform is needed and warrants our attention.

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<sup>6</sup> 138 S. Ct. 1204 (2018).

<sup>7</sup> *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019).

<sup>8</sup> The brief can be downloaded at <https://medium.com/@shobaswadhia/daca-at-the-supreme-court-immigration-law-scholars-brief-a0eec21c7924>.

**John Mitchell**

Professor Wadhia, you are among the nation's most influential immigration advocates. You sent a powerful message to the Supreme Court in your amicus brief. Looking beyond *Regents*, what will be your message to DACA recipients and our immigrant communities?

**Professor Wadhia**

Ultimately, the outcome in DACA is about people, their families, and our community. My first message to DACA recipients is that they are not alone. In the midst of a pandemic where the fate of the DACA case is uncertain at the time of this writing, nearly 30,000 DACA recipients are working on the frontlines as healthcare workers while their futures are on hold; Congress has passed a stimulus package that excludes DACA recipients in mixed status families; and media outlets have documented how information about DACA recipients can be accessed by ICE, the DHS enforcement arm, despite honors made by the government to protect this information, it is easy to feel alone. I am privileged to know, teach and advocate on behalf of DACA recipients—and it is my hope that they are supported.

My second message to DACA recipients is that whatever the outcome in DACA at the Supreme Court, your lives still matter and be it a court, agency, or Congress, I (we) will continue to advocate on your behalf, and defend the long history and legal foundation for deferred action and DACA.