



The Legality of DACA: Recent Litigation Developments

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Since 2012, certain unlawfully present non-U.S. nationals (aliens, as the term is used in the [Immigration and Nationality Act](#) [INA]) who entered the United States as children have been permitted to remain and work in this country for renewable two-year periods under the [Deferred Action for Childhood Arrivals](#) (DACA) initiative. During the Trump Administration, the Department of Homeland Security (DHS) [sought to rescind](#) DACA on the basis that it was unlawful. Several federal district courts [enjoined](#) DHS from terminating DACA and required the agency to continue accepting DACA applications and work authorization requests from current DACA recipients. In 2020, the Supreme Court [held](#) that DHS's rescission of DACA violated procedural requirements in federal law, thereby leaving DACA largely intact, without deciding on the legality of DACA itself.

In a separate and ongoing case, the State of Texas (joined by eight other states) [challenges](#) the legality of DACA. The plaintiffs rely on a 2015 decision by the U.S. Court of Appeals for the Fifth Circuit (*Texas I*) ruling that a related initiative, which would have expanded DACA and granted relief to unlawfully present parents of U.S. citizen or lawful permanent resident (LPR) children, was unlawful. In the new case—commonly called *Texas II*—a federal district court [ruled](#) on July 16, 2021, that the 2012 DHS memorandum establishing DACA is similarly unlawful. On October 5, 2022, the Fifth Circuit [affirmed](#) that decision but ordered the district court to review a [final rule](#) that DHS had promulgated during the pendency of the litigation that codifies the DACA policy set forth in the 2012 DHS memorandum. This Legal Sidebar examines the status of and key issues in the *Texas II* litigation. For further background about DACA, see CRS Report R46764, *Deferred Action for Childhood Arrivals (DACA): By the Numbers*, by Andorra Bruno.

What Is the Current Status of DACA?

The district court's July 16, 2021, ruling in *Texas II* [had invalidated](#) (or, in legal terminology, “vacated”) the DACA program set forth in the 2012 DHS memorandum. However, noting that DACA recipients have relied on the DACA initiative and its associated benefits for nearly a decade, the district court [temporarily stayed](#) the ruling as it applies to *current* DACA recipients pending an order from the district court, the Fifth Circuit, or the Supreme Court, on further review. On August 24, 2022, while the government's appeal was pending, DHS issued a [final rule](#) that “[preserves and fortifies](#)” the DACA policy in federal

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regulations. The rule will go into effect on October 31, 2022. In the meantime, on October 5, 2022, the Fifth Circuit [affirmed](#) the district court’s ruling that the original DACA program is unlawful. The court [continued](#) the district court’s stay of its ruling that allows existing DACA recipients to maintain their status pending further appeal in the case. The Fifth Circuit also [remanded](#) the case to the district court to consider the legality of DHS’s final rule codifying the DACA program in federal regulations in light of the Fifth Circuit’s decision.

As a result, current DACA recipients may retain their status and lawfully remain and work in the United States for the time being. They may also apply to [renew their status](#) every two years and [seek permission](#) to travel abroad and return to the United States pursuant to “[advance parole](#).” On the other hand, the Fifth Circuit’s decision bars DHS from approving *new*, first-time DACA applications and granting status to those applicants pending the outcome of the litigation (but the court’s order does not bar DHS from accepting new applications for processing as required under a [separate district court order](#)). Consequently, applicants (or prospective applicants) who have not yet obtained DACA status cannot be granted it while the Fifth Circuit’s decision remains in place.

What Are the Main Legal Issues in *Texas II*?

The salient issue in *Texas II* is whether DHS has authority to implement DACA. The INA establishes an [intricate scheme of restrictions](#) as to which categories of aliens may enter or remain in the United States and under what conditions. Has DHS violated that scheme of restrictions, or its constitutional duty under the [Take Care Clause](#) to pursue faithful execution of those restrictions, by implementing a program with potential to provide temporary relief from removal, work authorization, and other benefits to [more than 1 million persons](#) whose presence violates the INA? Or does DACA fall within the scope of the [enforcement discretion](#) that DHS, like all federal enforcement agencies, enjoys to allocate its prosecutorial resources in the manner that the agency determines best serves the national interest, particularly given that the number of unlawfully present aliens in the United States [far exceeds](#) DHS’s removal capacity for any given year?

The Fifth Circuit’s October 5, 2022, decision in *Texas II* [held](#) that DACA conflicts with the INA’s regulatory scheme because it “creates a new class of otherwise removable aliens who may obtain lawful presence, work authorization, and associated benefits” that Congress never authorized. The Fifth Circuit also [rejected](#) the government’s assertion that DACA is a proper exercise of DHS’s discretion over immigration enforcement, reasoning that such discretion does not encompass the ability to confer lawful presence and associated benefits to removable aliens. Other federal courts [reasoned](#) to the [contrary](#) in lawsuits related to the Trump Administration’s efforts to terminate DACA (those decisions, however, are no longer good law after the Supreme Court ultimately struck down the termination on other grounds, as discussed below).

The plaintiff states in *Texas II* have also argued that DHS violated procedural rules by implementing DACA without conducting [notice and comment rulemaking procedures](#). The Fifth Circuit [agreed](#) with the district court that in establishing the DACA program by way of the 2012 memorandum, DHS had violated the Administrative Procedure Act’s (APA’s) procedural notice and comment requirements. As noted, however, during the pendency of the government’s appeal to the Fifth Circuit, DHS promulgated a [new DACA regulation](#), and that final rule was [issued after a period of notice and comment](#). In its final rule, DHS addressed public comments about DACA’s legality. The agency [argued that DACA does not violate the INA](#) because it merely confers—as an exercise of the executive branch’s enforcement discretion—a “discretionary, temporary, and nonguaranteed reprieve from removal” and creates no legally enforceable right for aliens to remain in the United States under a “blanket grant of lawful immigration status.” DHS also [weighed](#) the costs and benefits of DACA and [potential alternatives to that program](#). As discussed in this Sidebar, the Fifth Circuit’s decision, which affirmed the district court’s ruling that the original DACA

program was unlawful, has [remanded](#) the case to the district court to review the more recent 2022 DACA rule.

How Does *Texas II* Relate to the 2020 Supreme Court Decision About DACA (*DHS v. Regents of the University of California*)?

The *Regents* case concerned the legality of DHS’s 2017 decision to *rescind* DACA. Several lower courts held that the [rescission was likely unlawful](#) under the “arbitrary and capricious” standard of the APA because DHS had not “[adequately explained](#)” the reasons for the rescission. In its 2020 [decision](#), the Supreme Court [agreed](#) that DHS had offered insufficient reasoning in support of its DACA rescission (though the Court [observed](#) that DHS could end DACA if it provided an adequate explanation and satisfied any other procedural requirements). In contrast, the *Texas II* litigation concerns the legality of DACA itself, an issue that the Supreme Court did not address in *Regents*. In short, the *Texas II* case is about the legality of DACA, while *Regents* concerned the legality of DACA’s termination.

How Does *Texas II* Relate to the *Texas I* Litigation Concerning the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) Initiative?

In 2014, two years after the DACA initiative was launched by the Obama Administration, DHS announced a [two-part initiative](#) that would have (1) expanded DACA to cover more childhood arrivals and extended the deferred action period from two to three years, and (2) granted similar relief to certain unlawfully present aliens with children who are U.S. citizens or LPRs (DAPA). In 2015, the Fifth Circuit [held](#) that this initiative likely violated federal law because DHS failed to comply with notice and comment procedures when it created this expanded initiative, and the broad relief and associated benefits conferred by the initiative [conflicted with](#) “the INA’s system of immigration classifications and employment eligibility.” An equally divided Supreme Court [affirmed](#) in 2016. The case did not concern the legality of the original DACA program.

The *Texas II* litigation, on the other hand, strictly concerns the legality of the original DACA program, as it was implemented in 2012. In ruling that DACA is unlawful, however, both the district court and the Fifth Circuit determined that the Fifth Circuit’s reasoning in *Texas I*—that DHS’s implementation of DAPA and expansion of DACA violated the INA’s statutory scheme because it exceeded the existing framework for conferring lawful presence and associated benefits—[equally applied](#) to the implementation of DACA.

What Options Does Congress Have?

As with most immigration issues, Congress has ultimate authority to decide the future of DACA legislatively and is not required to wait for a resolution to the *Texas II* litigation. Congress could terminate DACA by defunding it or through substantive legislation that clearly prohibits DHS from granting the types of protections that the program provides. Conversely, Congress could enact a law clarifying that DHS has authority to implement DACA and other programmatic deferred action programs that confer collateral benefits. Or, along the lines of the [American Dream and Promise Act of 2021](#), passed by the House in March 2021, Congress could grant DACA recipients (and, if it wishes, other childhood arrivals and other groups of unlawfully present aliens) statutory relief. Such relief could include, among other possibilities, protection from removal, eligibility for specified benefits, and a pathway to [LPR](#) status. More broadly, Congress could consider legislative options that generally address the unlawfully present population at large, such as a 2021 [proposal to “parole”](#) unlawfully present aliens who meet certain requirements and allow them to remain and work in the United States for renewable periods of time.

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