GIBSON DUNN

Supreme Court Rejects DHS's Decision To Terminate DACA

***Department of Homeland Security, et al., v. Regents of the University of California, et al. and related cases*, Nos. 18-587, 18-588, and 18-589**

Decided June 18, 2020

Today, in a 5-4 decision, the Supreme Court held that DHS's decision to terminate the Deferred Action for Childhood Arrivals policy is unlawful.

Background:

Since 2012, the Deferred Action for Childhood Arrivals ("DACA") policy has enabled undocumented individuals who arrived in the United States as children—including nearly 700,000 current recipients—to live and work here without fear of deportation, so long as they qualify and remain eligible for the policy. In September 2017, Acting Secretary of Homeland Security Elaine Duke terminated DACA based on the Attorney General's determination that the policy was unlawful.

Respondents challenged DHS's action, contending that the decision to rescind DACA was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), because DHS failed to explain or consider the costs of its policy change, and relied on an incorrect legal premise, *i.e.*, that DACA is unlawful.

Gibson Dunn represented six individual DACA recipients in obtaining and defending on appeal the first nationwide preliminary injunction halting the termination of DACA. The Supreme Court granted certiorari to review the Ninth Circuit's decision affirming that injunction and two other district court decisions enjoining or vacating DHS's action. Gibson Dunn partner Ted Olson represented DACA

> *"[W]hen so much is at stake, . . . the Government should turn square corners in dealing with the people."*
>
> Chief Justice Roberts, writing for the Court

Gibson Dunn Represented Respondents:

DACA Recipients
Dulce Garcia;
Miriam Gonzalez Avila;
Saul Jimenez Suarez;
Viridiana Chabolla Mendoza;
Norma Ramirez;
and
Jirayut Latthivongskorn

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recipients, businesses, and nonprofits challenging the policy in presenting oral argument before the Supreme Court.

Issue:

Does the APA or the Immigration and Nationality Act ("INA") preclude judicial review of the Secretary's decision to terminate DACA? If the decision is reviewable, was it "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the APA?

Court's Holding:

The Court held that DHS's decision to terminate DACA is subject to judicial review and violated the APA.

What It Means:

- The Court's decision reinstates DACA for the immediate future, granting a significant victory to hundreds of thousands of individuals that currently enjoy or may be eligible for relief. As a result of the preliminary injunction obtained by Gibson Dunn, the large majority of DACA recipients have been able to renew their DACA applications during the more than two-year period since DHS announced its decision to terminate the program. Today's decision secures that victory and restores the opportunity for new applicants to apply to the program for the first time. The decision also reinstates key aspects of the DACA policy, including the ability of DACA recipients to seek advance parole so that they can travel abroad with assurances that they will be permitted to return to the United States.
- Although Dreamers may continue to live and work in the United States, they should be aware that this administration or a future administration could revoke DACA, provided that the agency meets the requirements for reasoned decisionmaking. The Court also did not decide the legality of the DACA policy. Unless Congress enacts permanent legislation to allow Dreamers to continue living and working in the country without fear of deportation, Dreamers' fate will remain uncertain.
- The Court held that the decision to rescind DACA was subject to judicial review notwithstanding the provision of the APA that precludes judicial review of agency decisions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). In *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), the Court held that this provision barred judicial review of an agency's decision not to prosecute or initiate an enforcement proceeding. The Court determined that *Chaney* did not apply here because DHS's decision to grant DACA to individuals went beyond simple non-enforcement and instead "created a program for conferring affirmative immigration relief."

- On the merits, the Court limited its analysis to the explanations that Acting Secretary Duke provided in her original September 2017 memorandum terminating DACA. The Court declined to consider a later memorandum in which Duke's successor, Secretary Kirstjen Nielsen, offered "additional explanation" for the September 2017 memorandum. The Court explained that limiting judicial review of agency action to "the grounds that the agency invoked when it took the action" promotes "agency accountability, "ensur[es] that parties and the public can respond fully and in a timely manner to an agency's exercise of authority," and "instills confidence that the reasons given are not simply convenient litigating positions." In light of this holding, an agency that seeks to provide "new justifications" for a prior policy decision may now be required to issue "a new decision" before a court can consider those justifications.

- The Court found two defects in Acting Secretary Duke's explanation of DHS's policy change: She never considered alternatives to the outright rescission of DACA, and she never addressed the effect of the termination of DACA on the reliance interests of DACA recipients and their families, schools, and employers. The Court emphasized that before rescinding a policy "in full," an agency must consider available alternatives, including a partial repeal. And while it was up to DHS to determine whether reliance on DACA was warranted, and what weight to give that reliance, DHS never made that determination.

The Court's opinion is available here.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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