

# The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

---

October 13, 2017

VIA ECF

Honorable James Orenstein  
United States District Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

**Re: *Batalla Vidal et al. v. Duke et al.*, No. 16-cv-4756 (NGG) (JO)  
*State of New York et al. v. Trump et al.*, No. 17-cv-5228 (NGG) (JO)**

Dear Magistrate Judge Orenstein:

Plaintiffs respectfully submit this letter asking the Court to compel Defendants to complete production of the administrative record. The administrative record produced to date is clearly deficient. On October 6, 2017, Defendants provided Plaintiffs with an administrative record consisting of all public materials, most of which were judicial opinions regarding a different program than that at issue here. Defendants have made three key errors in compiling the administrative record that warrant an order from the Court requiring complete production. First, Defendants applied an erroneously narrow standard when compiling the administrative record. Second, Defendants failed to produce whole categories of relevant and necessary documents. Finally, in attempting to deflect challenges to the administrative record they filed, Defendants conflated the standard for obtaining completion of the administrative record with the standard to obtain supplementation of the administrative record with extra-record evidence.

The Court ordered a comprehensive administrative record on September 27, 2017. *See* Case Management and Scheduling Order, at 1, ECF No. 67.<sup>1</sup> As is the norm in cases with claims arising under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, Defendants have an obligation to produce a complete record upon which the Court can properly base its decision on the merits. Because Defendants have failed to do so, Plaintiffs respectfully move for the Court to order Defendants to complete the administrative record by October 20, 2017.

Plaintiffs met and conferred with Defendants on October 13, 2017. Unfortunately, Defendants continued to maintain that the October 6 administrative record was complete and accurate, and refused to provide an explanation for the many omissions from the record. Defendants confirmed that the October 6 administrative record was limited to what Acting Secretary Duke had directly considered when deciding to terminate the DACA policy, and that no documents considered or relied on by subordinates or other decision makers were included. As Defendants were unwilling to resolve this issue with Plaintiffs’ counsel out of court, Plaintiffs

---

<sup>1</sup> Unless otherwise noted, all ECF citations are to filings in the *Batalla Vidal v. Duke* action, 16-cv-4756.

have no choice but to seek the Court's assistance with obtaining a complete administrative record.

### **I. Defendants Applied an Incorrect Standard for What Documents an Agency is Required to Include in the Administrative Record**

Defendants compiled a skeletal administrative record based on an erroneously narrow standard of what the record must include. It is clearly established that an agency must compile a complete administrative record on which the reviewing court can base its decision. The Supreme Court has held that a complete record must “be based on the *full* administrative record that was before the Secretary at the time he made his decision.” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (emphasis added), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Courts subsequently have defined the “administrative record already in existence” for informal agency action as “what [the decision maker] had before him when he acted.” *Ass’n of Data Processing Serv. Organizations, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984); *see also James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (“The administrative record includes all materials ‘compiled’ by the agency, that were ‘before the agency at the time the decision was made.’” (quoting *Env’tl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981))).

An agency must provide more than simply the documents that were *personally* considered by the final decision maker. “[I]f the agency decisionmaker based his decision on the work and recommendations of subordinates, those materials should be included as well.” *Amfac Resorts, L.L.C. v. U.S. Dep’t of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001). In other words, courts have required that agencies provide all documents that were *directly or indirectly* considered by the final decision makers in making their decision. *See Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 308 (S.D.N.Y. 2012) (defining “relevant materials ‘before the agency’” as “those that the agency decision-makers directly or indirectly considered” (citing *State of Delaware Dep’t of Natural Res. and Env’tl. Control v. U.S. Army Corp. of Eng’rs*, 722 F. Supp. 2d 535, 541 (D. Del. 2010))); *Pac. Shores Subdivision, California Water Dist. v. U.S. Army Corps of Engineers*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) (“This Court has interpreted the ‘whole record’ to include ‘all documents and materials that the agency directly or indirectly considered . . . [and nothing] more nor less.’” (quoting *Maritel, Inc. v. Collins*, 422 F. Supp. 2d 188, 196 (D.D.C. 2006) (alteration and omission in original))); *Merritt Parkway Conservancy v. Mineta*, 424 F. Supp. 2d 396, 403 (D. Conn. 2006) (stating that “a document need not literally pass before the eyes of the final agency decisionmaker to be considered part of the administrative record” (internal quotation omitted)).

Contrary to this clear guidance from the courts, Defendants have produced only a subset of the administrative record. They characterize the record as consisting of “all non-privileged documents actually considered by the Acting Secretary of Homeland Security in making her decision to rescind the DACA policy.” Defs.’ Letter in Supp. of Mot. to Vacate Disc. Order, at 5, ECF No. 80. But the sparse record produced confirms that they have failed to produce all

documents directly or indirectly considered by the agency, and instead produced only those non-privileged documents personally considered by Acting Secretary Duke.<sup>2</sup>

Moreover, the Department of Homeland Security (“DHS”) has failed to follow guidance published by the Department of Justice (“DOJ”) regarding how agencies should compile an administrative record. That guidance, issued by the Executive Office for United States Attorneys, provides that materials “directly or indirectly considered” should include: (1) documents and materials whether or not they support the final agency decision; (2) documents and materials which were available to the decision-making office at the time the decision was made; (3) documents and materials considered by, or relied upon, by the agency; (4) documents and materials that were before the agency at the time of the challenged decision, even if the final agency decision-maker did not specifically consider them; and (5) privileged and non-privileged documents and materials. Joan Goldfrank, *Guidance to Client Agencies on Compiling the Administrative Record*, U.S. Atty. Bull. 7, 8 (Feb. 2000), [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usab4801.pdf](http://www.justice.gov/usao/eousa/foia_reading_room/usab4801.pdf).<sup>3</sup> The administrative record as it stands fails to capture these categories of documents under the “directly or indirectly considered” standard articulated by the government’s own publication.

## **II. The Administrative Record Provided By Defendants is Glaringly Incomplete, Warranting an Order for Defendants to Complete It**

The plainly incomplete record produced by Defendants rebuts the presumption of regularity ordinarily afforded the administrative record and warrants an order that the record be completed. In the Second Circuit, parties challenging agency decisions can overcome that presumption by providing a “strong suggestion” that the administrative record was incomplete. *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982). This is especially true where, as here, no formal agency proceedings have concretely determined the scope of the administrative record. *See id.* (“Determining what constitutes an agency’s informational base . . . may present a disputed issue of fact when there has been no formal administrative proceeding.”); *see also Pleasant E. Associates v. Martinez*, No. 02 CIV.4144 (LMM), 2002 WL 31458224, at \*1 (S.D.N.Y. Nov. 4, 2002) (explaining that when no formal administrative proceedings occurred and when the scope of the administrative record is in dispute, it is improper for a court to grant summary judgment to the defendants without allowing some discovery).

---

<sup>2</sup> Plaintiffs maintain, in light of the sparse administrative record that Defendants have provided, that Defendants still be required to produce a privilege log by the October 20 deadline. *See* Order on Defs.’ Mot. to Vacate, 3-4, ECF No. 72.

<sup>3</sup> DOJ has subsequently tried to limit the use of this guidance in order to obtain greater flexibility in litigation positions, but these tactical shifts in position do not undermine the persuasive value of the Goldfrank guidance. *See* Memorandum from Ronald J. Tenpas, Assistant Attorney Gen., U.S. Dep’t of Justice, to Selected Agency Counsel, (Dec. 23, 2008), *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, No. 3:17-cv-05211 (N.D. Cal. Oct. 12, 2017), ECF No. 71-1. Notably, the 2008 memorandum seeking to limit the effect of the Goldfrank guidance focuses solely on whether privileged materials are included in the record, not the inclusion of all non-privileged documents before the agency. *See also* Privilege Log, *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, No. 3:17-cv-05211 (N.D. Cal. Oct. 12, 2017), ECF No. 71-2 (attached hereto as Exhibit A).

**A. *The Agency's Administrative Record is Grossly Inadequate***

Applying the correct legal definition of the administrative record reveals that the record produced by Defendants is incomplete in five main respects, although a deficiency in just one of these categories would be sufficient to require that Defendants complete the current record.

First, and most blatantly, Defendants failed to provide any support in the administrative record for factual allegations made in support of terminating the DACA policy. For example, the record contains no documents related to Acting Secretary Duke's assertion in her memorandum terminating DACA that "USCIS has not been able to identify specific denial cases where an applicant appeared to satisfy the programmatic categorical criteria as outlined in the June 15, 2012 memorandum, but still had his or her application denied based solely upon discretion." Memorandum from Elaine C. Duke, Acting Sec'y of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship and Immigration Servs., Memorandum on Rescission of Deferred Action For Childhood Arrivals (DACA), at n.1, Sept. 5, 2017 ("DACA Termination Memo"), Notice of Filing Admin. R., Ex. 1, at 253 n.1, ECF No. 77-1. For Defendants to assert the record is complete despite missing this information would suggest that Acting Secretary Duke had no evidence to support her conclusion, and highlights why courts require agencies to provide all documents both directly *and* indirectly considered. *Cf. United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977) ("It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that [in] critical degree, is known only to the agency." (alteration in original) (quoting another source)).

Second, the record is devoid of any documents that purport to explain Defendants' decision to slowly wind down a program they assert is unlawful. Defendant Sessions' one-page legal analysis alerting Acting Secretary Duke that he considers DACA "an unconstitutional exercise of authority by the Executive Branch" provides only the vague reference to "costs and burdens that will be imposed on DHS associated with rescinding this policy" that counsel "an orderly and efficient wind-down process." Notice of Filing Admin. R., Ex. 1, at 251, ECF No. 77-1. The DACA Termination Memo, in a similarly conclusory manner, states that a wind down is needed "[r]ecognizing the complexities associated with winding down the program." *Id.* at 255. Nothing in the administrative record supports that bare claim of "complexities."

Similarly, the record contains no information about how the agency chose crucial dates in the termination process, including the September 5, 2017 date after which no new DACA applications would be considered, the October 5, 2017 deadline after which no renewal applications would be considered, and the March 5, 2018 final termination of the program. In their appearances before this Court, Defendants have previously represented that setting the renewal deadline for October 5 "was appropriate," Tr. 12:18–19. Sept. 14, 2017, and that "[i]n DHS's judgment, 30 days [notice] was a sufficient amount of time to complete the paperwork to file for renewals," *id.* 12:14–16. However, there is no information whatsoever within the administrative record about how this deadline was selected or how DHS concluded it was appropriate.

Third, the administrative record does not adequately reflect the role of DOJ or the White House in the decision-making process. The record contains a single, one-page document from DOJ that concludes, without analysis, that DACA is unlawful and instructs that DHS should terminate DACA. Notice of Filing Admin. R., Ex. 1, at 251, ECF No. 77-1. In their appearances before this Court, the Defendants have previously represented that DHS and DOJ were both

involved in the decision to terminate the DACA program. *See* Tr. 13:17–18, Sept. 14, 2017 (“The Attorney General and DHS both decided that this is an unlawful program . . .”). Moreover, Attorney General Sessions personally announced the termination of the program. *See* Attorney General Sessions Delivers Remarks on DACA, *State of New York v. Trump*, No. 1:17-cv-05228 (E.D.N.Y. Oct. 4, 2017), ECF No. 55-75. During that announcement, Attorney General Sessions stated that “[o]ur collective wisdom is that the policy is vulnerable to the same legal and constitutional challenges that the courts recognized with respect to the DAPA program.” *See id.* at 1. Despite the clear role of DOJ as a decision-making agency, the administrative record contains only a one-page document originating from DOJ. Moreover, Attorney General Sessions’ letter contains no legal analysis to support his bare conclusion.

It is also clear that President Trump and the White House actively advised DHS and DOJ to terminate DACA. For example, on September 5, 2017, the White House announced that the President had “Restore[ed] Responsibility and the Rule of Law to Immigration” by terminating DACA.<sup>4</sup> The announcement underscores the active role of the White House in the decision: “If *President Trump* had refused to act, many States were prepared to pursue litigation to end DACA by court order.” *Id.* (emphasis added). Despite this and many other assertions by the White House of its role in making decisions about the termination, the administrative record contains no documents sent from the White House to either DHS or DOJ.

Fourth, the administrative record excludes communications relevant to the DACA-termination decision. For example, nowhere in the record appears the August 14, 2017 letter from more than one hundred law professors to the White House, Chief of Staff John Kelly, and Acting Secretary Duke, urging them not to rescind the DACA program and arguing that the DACA program is legal. *See* Letter from Shoba Sivaprasad Wadhia, Samuel Weiss Faculty Scholar & Clinical Professor of Law, Penn State Law, to Donald Trump, President of the United States (Aug. 14, 2017) (attached hereto as Exhibit B). In President Trump’s statement on the DACA termination, he noted that “[t]he Attorney General of the United States, the Attorneys General of many states, and virtually all other top legal experts have advised that the program is unlawful and unconstitutional and cannot be successfully defended in court.” Statement, Donald J. Trump (Sept. 5, 2017), <https://www.whitehouse.gov/the-press-office/2017/09/05/statement-president-donald-j-trump>. Given the relevance of these communications to the DACA-policy termination and the reasons put forth by DHS and DOJ, their omission from the record raises the significant possibility that other communications were similarly omitted.

Finally, although much of the record consists of the various opinions in the *Texas v. United States* case, which concerned an entirely different policy, the record fails to reference cases, which were dismissed, that actually were brought to challenge the DACA program. *See Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015); *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015). The presence of one case (about a separate program) that Defendants believe supports their argument and exclusion of cases that actually concern the DACA program suggests the record is incomplete. *See Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982) (allowing discovery on the completeness of the record, and noting “[t]he fact that defendants presented documents that seemed to support the rationality of their actions does not mean that the same conclusion

---

<sup>4</sup> *See* Press Release, The White House Office of the Press Secretary, President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration (Sept. 5, 2017), <https://www.whitehouse.gov/the-press-office/2017/09/05/president-donald-j-trump-restores-responsibility-and-rule-law>.

would have been reached if the Court had been aware of other information that was before the agency”).

### III. Defendants Failed to Distinguish Between Requests to Complete the Record and Requests to Supplement the Record for APA Claims

In arguing that Plaintiffs are not entitled to discovery to challenge the completeness of the administrative record, Defendants have incorrectly conflated the need to complete the record with the need to supplement the record. When an agency fails to include in the administrative record documents it considered when making its decision, courts require the agency to provide additional documentation—either on its own accord or through discovery—to ensure the court has the full record before it when making its decision. *See, e.g., Dopico*, 687 F.2d 644 (requiring discovery on the completeness of the administrative record before the lower court could grant summary judgment to the agency). In contrast, if litigants wish to include additional, extra-record documents, they would need to demonstrate that the record should be supplemented. Parties seeking to supplement the administrative record must clear a higher bar, such as “when there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decisionmakers or where the absence of formal administrative findings makes such investigation necessary in order to determine the reasons for the agency’s choice.” *Nat’l Audubon Soc. v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997); *see also Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (noting a variety of circumstances in which courts have found supplementing the record necessary).

At this time, Plaintiffs are not moving to supplement the record. Instead, Plaintiffs merely ask this Court to order that Defendants provide an adequate record on which this Court may base its decision. While, if necessary, Plaintiffs will attempt to utilize the current discovery period to obtain a complete administrative record, Plaintiffs hope this will be unnecessary and that the Court will order Defendants to complete the administrative record in good faith, to include all documents that were directly and indirectly considered by Acting Secretary Duke when she decided to terminate the DACA policy.

Respectfully submitted,

/s/ Muneer I. Ahmad<sup>†</sup>

David Chen, Law Student Intern  
Susanna D. Evarts, Law Student Intern  
Healy Ko, Law Student Intern  
Victoria Roeck, Law Student Intern  
Hannah Schoen, Law Student Intern  
Emily Villano, Law Student Intern  
Muneer I. Ahmad, Esq.<sup>†</sup>  
Marisol Orihuela, Esq.<sup>†</sup>  
Michael J. Wishnie, Esq. (MW 1952)  
JEROME N. FRANK LEGAL SVCS. ORG.  
michael.wishnie@yale.edu  
Phone: (203) 432-4800

Jessica R. Hanson, Esq.<sup>†</sup>  
Mayra B. Joachin, Esq.<sup>†</sup>  
Karen Tumlin, Esq.<sup>†</sup>  
NATIONAL IMMIGRATION LAW CENTER  
P.O. Box 70067  
Los Angeles, CA 90070  
Phone: (213) 639-3900

Justin Cox, Esq.<sup>†</sup>  
NATIONAL IMMIGRATION LAW CENTER  
PO Box 170208  
Atlanta, GA 30317

Amy S. Taylor, Esq. (AT 2056)  
Deborah Axt, Esq. (DA 4885)  
Scott Foletta, Esq.\*  
Alexia Schapira, Esq.\*  
MAKE THE ROAD NEW YORK  
301 Grove Street  
Brooklyn, NY 11237  
Phone: (718) 418-7690

Phone: (678) 279-5441

Joshua A. Rosenthal, Esq.†  
NATIONAL IMMIGRATION LAW CENTER  
1121 14<sup>th</sup> Street NW, Suite 200  
Washington, DC 20005  
Phone: (202) 216-0261

*Attorneys for Batalla Vidal et al. Plaintiffs*

/s/ Lourdes M. Rosado

Lourdes M. Rosado  
Sania Khan  
Diane Lucas  
Ajay Saini  
Civil Rights Bureau  
Office of the New York Attorney General  
120 Broadway, 23rd Floor  
New York, NY 10271  
Phone: (212) 416-6348

Jonathan B. Miller  
Genevieve C. Nadeau†  
Abigail B. Taylor†  
Assistant Attorneys General  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108  
Phone: (617) 727-2200

Colleen M. Melody†  
Marsha Chien†  
Office of the Attorney General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
Phone: (206) 464-7744

*Attorneys for New York et al. plaintiffs*

CC: All Counsel (via ECF)

† Appearing *pro hac vice*

\* Application for admission to E.D.N.Y. forthcoming

# **EXHIBIT A**

DOCID	To	FROM	CC	SUBJECT LINE	TOPIC	DOCDATE	CUSTODIAN	DHSQ Privilege	DHSQ Priv Descriptions
DACA_RLIT00000001					DHS memorandum regarding executive discretion in immigration	8/1/2017	Duke, Elaine C	AC - Attorney Client Privilege;DP - Deliberative Process	Attorney mental impressions regarding matter in litigation or anticipated litigation;Deliberations regarding DACA policy
DACA_RLIT00000002					Deliberations on talking points regarding DACA	8/11/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy
DACA_RLIT00000003					Deliberations on talking points regarding DACA	8/14/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy
DACA_RLIT00000006					Pre-briefing document for meeting regarding status and future of DACA	8/23/2017	Duke, Elaine C	AC - Attorney Client Privilege;WP - Work Product;DP - Deliberative Process	Attorney mental impressions regarding matter in litigation or anticipated litigation;Deliberations regarding DACA policy;Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding DACA policy;Seeking or providing legal advice regarding litigation risk;Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT00000007					DHS memorandum regarding OLC memo on DAPA	8/22/2017	Duke, Elaine C	AC - Attorney Client Privilege;DP - Deliberative Process	Attorney mental impressions regarding matter in litigation or anticipated litigation;Deliberations regarding DACA policy;Seeking or providing legal advice regarding implementation of DACA rescission;Seeking or providing legal advice regarding litigation risk;Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT00000015					Deliberations on talking points regarding DACA	9/5/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program
DACA_RLIT00000025					Notes from deliberations regarding DACA	unknown	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy;Deliberations regarding rescission of DACA program
DACA_RLIT00000027					Background information provided for deliberations regarding DACA	unknown	Duke, Elaine C	AC - Attorney Client Privilege;WP - Work Product;DP - Deliberative Process	Deliberations regarding DACA policy; Draft document created litigation
DACA_RLIT00000028					Notes on DHS memorandum regarding immigration reform priorities and DACA	unknown	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy
DACA_RLIT00000031					Notes from deliberations regarding DACA policy	9/5/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy
DACA_RLIT00000033					Notes from deliberations on talking points regarding DACA	9/5/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission
DACA_RLIT00000034					Deliberations on talking points regarding DACA	9/5/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission
DACA_RLIT00000057					Notes on article regarding DACA program	8/15/2012	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program
DACA_RLIT00000059					DHS memorandum containing information for use in deliberations regarding DACA, immigration enforcement policy, and other matters in litigation	unknown	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy; deliberations regarding immigration enforcement policy and matters in litigation
DACA_RLIT00000061					Notes on deliberations on talking points regarding DACA and other immigration enforcement priorities	unknown	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy
DACA_RLIT00000066					Notes on Texas v. United States decision by the Fifth Circuit	11/25/2015	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy; Deliberations regarding rescission of DACA program

DACA_RLIT0000067					Notes on DHS memorandum summarizing deliberations regarding rescission of DACA and how it would be implemented	8/24/2017	Duke, Elaine C	DP - Deliberative Process; EP - Executive Privilege	Deliberations regarding DACA policy; Deliberations regarding implementation of DACA rescission; Deliberations regarding rescission of DACA program; Seeking or providing legal advice regarding DACA policy; Seeking or providing legal advice regarding implementation of DACA rescission; Seeking or providing legal advice regarding litigation risk; Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT0000068					Notes on media articles regarding DACA	multiple	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT0000069					Draft White House memorandum regarding litigation related to DACA	8/23/2017	Duke, Elaine C	AC - Attorney Client Privilege; DP - Deliberative Process; EP - Executive Privilege	Attorney mental impressions regarding matter in litigation or anticipated litigation; Deliberations regarding DACA policy; Deliberations regarding implementation of DACA rescission; Deliberations regarding rescission of DACA program; Seeking or providing legal advice regarding DACA policy; Seeking or providing legal advice regarding implementation of DACA rescission; Seeking or providing legal advice regarding litigation risk; Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT0000070					Notes on participant list for deliberations regarding DACA	unknown	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy; Deliberations regarding implementation of DACA rescission; Deliberations regarding rescission of DACA program
DACA_RLIT0000072					Notes on prior statements by the President regarding DACA	8/24/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy; Deliberations regarding rescission of DACA program
DACA_RLIT0000073					Notes on pre-briefing document for meeting regarding status and future of DACA	8/23/2017	Duke, Elaine C	AC - Attorney Client Privilege; DP - Deliberative Process	Attorney mental impressions regarding matter in litigation or anticipated litigation; Deliberations regarding DACA policy; Deliberations regarding implementation of DACA rescission; Deliberations regarding rescission of DACA program; Seeking or providing legal advice regarding DACA policy; Seeking or providing legal advice regarding implementation of DACA rescission; Seeking or providing legal advice regarding litigation risk; Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT0000074					Notes on memorandum regarding options for DACA	unknown	Duke, Elaine C	AC - Attorney Client Privilege; DP - Deliberative Process	Attorney mental impressions regarding matter in litigation or anticipated litigation; Deliberations regarding DACA policy; Deliberations regarding implementation of DACA rescission; Deliberations regarding rescission of DACA program; Seeking or providing legal advice regarding DACA policy; Seeking or providing legal advice regarding implementation of DACA rescission; Seeking or providing legal advice regarding litigation risk; Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT0000075					Notes on DHS memorandum discussing future of DACA	unknown	Duke, Elaine C	AC - Attorney Client Privilege; DP - Deliberative Process	Attorney mental impressions regarding matter in litigation or anticipated litigation; Deliberations regarding DACA policy; Deliberations regarding implementation of DACA rescission; Deliberations regarding rescission of DACA program; Seeking or providing legal advice regarding DACA policy; Seeking or providing legal advice regarding implementation of DACA rescission; Seeking or providing legal advice regarding litigation risk; Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT00000102	John K. Mashburn (WH); Matthew J. Flynn (WH); Anthony M. Paranzino (WH)	Frank Wuco (DHS)	Elizabeth Neumann (DHS); Chad Wolf (DHS)	170831 DHS Daily Cabinet Affairs Report	Email regarding Cabinet report containing deliberations on DACA	8/31/2017	Duke, Elaine C	DP - Deliberative Process; EP - Executive Privilege	Deliberations regarding DACA policy

DACA_RLIT00000103					Cabinet report containing deliberations on DACA	8/31/2017	Duke, Elaine C	DP - Deliberative Process; EP - Executive Privilege	Deliberations regarding DACA policy
DACA_RLIT00000226	Elaine C. Duke (DHS)	Chad Wolf (DHS)		Memo + Outline	Email regarding draft DHS memoranda discussing rescission of DACA and implementation	9/3/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000227					Draft DHS memorandum regarding rescission of DACA	9/3/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000228					Draft DHS memorandum regarding implementation of rescission of DACA	9/3/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program; Deliberations regarding implementation of DACA rescission
DACA_RLIT00000230	Kevin K. McAleenan (DHS); Elaine C. Duke (DHS); Claire Grady (DHS); Gene Hamilton (DHS)	Chad Wolf (DHS)	Thomas Homan (DHS)	RE: Preparations for Pending Policy Announcement	Email discussion regarding strategies for implementing rescission of DACA	9/4/2017	Duke, Elaine C	PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding implementation of DACA rescission
DACA_RLIT00000231	Elaine C. Duke (DHS)	Chad Wolf (DHS)		RE: Memo + Outline	Email discussions regarding rescission of DACA and talking points regarding rescission	9/4/2017	Duke, Elaine C	AC - Attorney Client Privilege;PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding rescission of DACA program; Seeking or providing legal advice regarding rescission of DACA program; Contains legal advice provided by counsel
DACA_RLIT00000232	Kevin K. McAleenan (DHS); Elaine C. Duke (DHS); Claire Grady (DHS); Gene Hamilton (DHS)	Chad Wolf (DHS)	Thomas Homan (DHS)	RE: Preparations for Pending Policy Announcement	Email discussion regarding strategies for implementing rescission of DACA	9/4/2017	Duke, Elaine C	PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding implementation of DACA rescission
DACA_RLIT00000234	Elaine C. Duke (DHS)	Chad Wolf (DHS)		RE: Calls	Email discussion of deliberations regarding rescission of DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process;PII - Personal Privacy	Deliberations regarding rescission of DACA program
DACA_RLIT00000235	Elaine C. Duke (DHS)	Chad Wolf (DHS)		RE: Memo + Outline	Email regarding draft DHS memoranda discussing rescission of DACA and implementation	9/4/2017	Duke, Elaine C	AC - Attorney Client Privilege;DP - Deliberative Process	Deliberations regarding rescission of DACA program; Seeking or providing legal advice regarding rescission of DACA program; Contains legal advice provided by counsel
DACA_RLIT00000236					Draft DHS memorandum regarding rescission of DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000237	Elaine C. Duke (DHS)	Chad Wolf (DHS)		RE: Draft Memo	Email discussion regarding draft memorandum discussing rescission of DACA	9/4/2017	Duke, Elaine C	PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding rescission of DACA program;
DACA_RLIT00000238	Elaine C. Duke (DHS)	Chad Wolf (DHS)	Chad Wolf (DHS)	AS1 Public Statement	Email regarding draft talking points for DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000239					Draft talking points for DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000240	Elaine C. Duke (DHS)	Chad Wolf (DHS)		RE: AS1 Statement to DHS Employees	Email regarding draft talking points for DACA	9/4/2017	Duke, Elaine C	PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000241	Elaine C. Duke (DHS)	Chad Wolf (DHS)		RE: AS1 Statement to DHS Employees	Email regarding draft talking points for DACA	9/4/2017	Duke, Elaine C	PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000242	Elaine C. Duke (DHS)	Chad Wolf (DHS)	Chad Wolf (DHS)	AS1 Statement to DHS Employees	Email regarding draft talking points for DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000243					Draft talking points for DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000245	Elaine C. Duke (DHS)	Chad Wolf (DHS)		FW: Draft Memo	Email discussion regarding draft DHS memorandum discussing rescission of DACA	9/4/2017	Duke, Elaine C	AC - Attorney Client Privilege;PII - Personal Privacy;DP - Deliberative Process	program;Seeking or providing legal advice regarding rescission of DACA program; Contains legal advice provided by counsel
DACA_RLIT00000246					Draft DHS memorandum regarding rescission of DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000247	Elaine C. Duke (DHS)	Chad Wolf (DHS)		DHS Press Release	Email regarding draft press release discussing DACA rescission	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000248					Draft press release discussing DACA rescission	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000450	John F. Kelly (WH); Kirstjen M. Nielsen (WH)	Elaine C. Duke (DHS)	Chad Wolf (DHS)	DACA	Email discussion regarding potential rescission of DACA and implementation	8/24/2017	Duke, Elaine C	DP - Deliberative Process;EP - Executive Privilege	Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program

DACA_RLIT00000451	Thomas Homan (DHS)	Elaine C. Duke (DHS)	Chad Wolf (DHS); Elizabeth Neumann (DHS)	Article	Email discussion regarding information for deliberations on potential rescission of DACA	8/24/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000513	Chad Wolf (DHS); Jonathan Hoffman (DHS); Gene Hamilton (DHS)	Elaine C. Duke (DHS)		For our discussions	Email discussion regarding information for deliberations on DACA	8/9/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy
DACA_RLIT00000695	Chad Wolf (DHS)	Elaine C. Duke (DHS)		RE: Memo + Outline	Email discussion regarding draft DHS memorandum discussing rescission of DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000697	Chad Wolf (DHS)	Elaine C. Duke (DHS)		RE: Memo + Outline	Email discussion regarding draft DHS memorandum discussing rescission of DACA	9/4/2017	Duke, Elaine C	AC - Attorney Client Privilege;PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding rescission of DACA program; Contains legal advice provided
DACA_RLIT00000698	Kevin McAleenan (DHS)	Elaine C. Duke (DHS)		RE: Preparations for Pending Policy Announcement	Email discussion regarding potential rescission of DACA and implementation	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding implementation of DACA rescission
DACA_RLIT00000703	Chad Wolf (DHS)	Elaine C. Duke (DHS)		Calls	Email discussion on deliberations regarding DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000705	Chad Wolf (DHS)	Elaine C. Duke (DHS)		RE: Draft Memo	Email discussion regarding draft DHS memorandum discussing rescission of DACA	9/4/2017	Duke, Elaine C	AC - Attorney Client Privilege;PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding rescission of DACA program; Contains legal advice provided
DACA_RLIT00000706	Chad Wolf (DHS)	Elaine C. Duke (DHS)		RE: AS1 Statement to DHS Employees	Email regarding draft talking points for DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000707	Chad Wolf (DHS)	Elaine C. Duke (DHS)		RE: AS1 Public Statement	Email regarding draft talking points for DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000708	Chad Wolf (DHS)	Elaine C. Duke (DHS)		RE: AS1 Statement to DHS Employees	Email regarding draft talking points for DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000709	Chad Wolf (DHS)	Elaine C. Duke (DHS)		RE: AS1 Statement to DHS Employees	Email regarding draft talking points for DACA	9/4/2017	Duke, Elaine C	PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000711	Chad Wolf (DHS)	Elaine C. Duke (DHS)		RE: AS1 Statement to DHS Employees	Email regarding draft talking points for DACA	9/5/2017	Duke, Elaine C	PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00001249	Elaine C. Duke (DHS); Claire Grady (DHS); Chad Wolf (DHS); Gene Hamilton (DHS)	Kevin McAleenan (DHS)	Thomas Homan (DHS)	Preparations for Pending Policy Announcement	Email discussion regarding potential rescission of DACA and implementation	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding implementation of DACA rescission
DACA_RLIT00001250	Chad Wolf (DHS); Elaine C. Duke (DHS); Claire Grady (DHS); Gene Hamilton (DHS)	Kevin McAleenan (DHS)	Thomas Homan (DHS)	RE: Preparations for Pending Policy Announcement	Email discussion regarding potential rescission of DACA and implementation	9/4/2017	Duke, Elaine C	PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding implementation of DACA rescission
DACA_RLIT00001372	Kevin McAleenan (DHS); Elaine C. Duke (DHS); Claire Grady (DHS); Chad Wolf (DHS); Gene Hamilton (DHS)	Thomas Homan (DHS)		RE: Preparations for Pending Policy Announcement	Email discussion regarding potential rescission of DACA	9/4/2017	Duke, Elaine C	PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding implementation of DACA rescission
DACA_RLIT00001396	Elaine C. Duke (DHS); Chad Wolf (DHS); Joseph Maher (DHS); Dimple Shah (DHS)	Gene Hamilton (DHS)		**CLOSE HOLD**	Email discussion regarding draft letter discussing rescission of DACA	9/4/2017	Duke, Elaine C	AC - Attorney Client Privilege;DP - Deliberative Process; EP - Executive Privilege	Deliberations regarding rescission of DACA program; Contains legal advice provided by counsel and information from Executive review
DACA_RLIT00001397					Draft letter discussing rescission of DACA	9/4/2017	Duke, Elaine C	AC - Attorney Client Privilege;WP - Work Product;DP - Deliberative Process	Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding rescission of DACA program; Contains legal advice provided by counsel
DACA_RLIT00001399	Elaine C. Duke (DHS); Chad Wolf (DHS)	Gene Hamilton (DHS)		Draft Memo	Email discussion regarding draft DHS memorandum discussing rescission of DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00001400					Draft DHS memorandum discussing rescission of DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00001586	Nancy Clark (DHS)	Nancy Clark (DHS)		SIGNIFICANT CORRESPONDENCE REPORT: 08.02.17	Internal email summarizing correspondence from Rep. Lewis regarding DACA	8/2/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy

DACA_RLIT00001873					Notes on DHS memorandum summarizing deliberations regarding rescission of DACA and how it would be implemented	unknown	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program
DACA_RLIT00001874					Notes on DHS memorandum regarding OLC memo on DAPA	unknown	Duke, Elaine C	AC - Attorney Client Privilege;WP - Work Product;DP - Deliberative Process	Attorney mental impressions regarding matter in litigation or anticipated litigation;Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding DACA policy;Seeking or providing legal advice regarding implementation of DACA rescission;Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT00001875					Notes on pre-briefing document for meeting regarding status and future of DACA	8/23/2017	Duke, Elaine C	AC - Attorney Client Privilege;WP - Work Product;DP - Deliberative Process	Attorney mental impressions regarding matter in litigation or anticipated litigation;Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding DACA policy;Seeking or providing legal advice regarding implementation of DACA rescission;Seeking or providing legal advice regarding litigation risk;Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT00001876					Draft White House memorandum regarding litigation related to DACA	8/24/2017	Duke, Elaine C	AC - Attorney Client Privilege;WP - Work Product;DP - Deliberative Process;EP - Executive Privilege	Attorney mental impressions regarding matter in litigation or anticipated litigation;Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding DACA policy;Seeking or providing legal advice regarding implementation of DACA rescission;Seeking or providing legal advice regarding litigation risk;Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT00001877					Notes on CNN article discussing DACA	8/29/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00001878					Notes on Washington Post article discussing DACA	9/2/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00001879					Notes on DHS memorandum regarding potential rescission of DACA and implementation	unknown	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program

DACA_RLIT00001880					Notes on DHS memorandum regarding OLC memo on DAPA	unknown	Duke, Elaine C	AC - Attorney Client Privilege;WP - Work Product;DP - Deliberative Process	Attorney mental impressions regarding matter in litigation or anticipated litigation;Deliberations regarding DACA policy;Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding DACA policy
DACA_RLIT00001881					Notes on CNN article discussing DACA	9/1/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00001882					Notes on media articles regarding DACA	8/24/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00001883					Notes on Politico article discussing DACA	8/24/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00001885					Notes on 2014 OLC memo to the Secretary of DHS and counsel to the President regarding prioritization of removal	11/19/2014	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00001887					Notes from deliberations regarding DACA rescission	unknown	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program
DACA_RLIT00001888					Notes from deliberations regarding DACA rescission	9/1/2017	Duke, Elaine C	AC - Attorney Client Privilege;DP - Deliberative Process	Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding implementation of DACA; rescission;Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT00001889					Notes on draft memorandum regarding rescission of DACA and implementation	unknown	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program
DACA_RLIT00001890					Notes from deliberations regarding DACA rescission	8/30/2017	Duke, Elaine C	AC - Attorney Client Privilege;DP - Deliberative Process	Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA policy;Seeking or providing legal advice regarding implementation of DACA rescission;Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT00001891					Notes on media articles regarding DACA	multiple	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program

# **EXHIBIT B**

President Donald J. Trump  
The White House  
1600 Pennsylvania Avenue NW  
Washington, DC 20500

August 14, 2017

Dear President Trump:

As immigration law teachers and scholars, we write to express our position that the executive branch has legal authority to implement Deferred Action for Childhood Arrivals (DACA 2012). This letter provides legal analysis about DACA 2012. In our view, there is no question that DACA 2012 is a lawful exercise of prosecutorial discretion. Our conclusions are based on years of experience in the field and a close study of the U.S. Constitution, administrative law, immigration statutes, federal regulations and case law. As the administration determines the future of DACA 2012, understanding its legal foundation and history is critical.

DACA 2012 was announced by the President, and implemented in a memorandum by the Secretary of Homeland Security, on June 15, 2012.<sup>1</sup> It enables qualifying individuals to request a temporary reprieve from removal known as “deferred action.” Deferred action is one form of prosecutorial discretion in immigration law and has been used for decades by the Department of Homeland Security (DHS) (and formerly the Immigration and Naturalization Service (INS)) and over several administrations.<sup>2</sup>

Whether a requesting individual receives deferred action under DACA 2012 is at the discretion of DHS. Qualifying individuals may request DACA 2012 if they came to the United States before the age of sixteen; are currently in school or have graduated; have continuously resided in the United States since June 15, 2007; have not been convicted of a felony, “significant misdemeanor,” or three or more non-significant misdemeanors; do not otherwise pose a threat to public safety or national security; and otherwise warrant protection as a matter of discretion.<sup>3</sup>

---

<sup>1</sup> See Barack Obama, President, Remarks by the President on Immigration (June 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration>; Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot. et al. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>2</sup> See Shoba Sivaprasad Wadhia, *Beyond Deportation The Role of Prosecutorial Discretion in Immigration Cases* 14-32 (2015) (“Wadhia, *Beyond Deportation*”); Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 Am. U. L. Rev. 1285, 1296-97 (2015) (“Wadhia, *History of Prosecutorial Discretion*”); Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 Wm. & Mary Bill of Rts. J. 463, 475-92 (2012); Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. Rev. 1, 21-22 (2012) (“Wadhia, *Sharing Secrets*”).

<sup>3</sup> DHS requires that DACA applicants: “1. Were under the age of 31 as of June 15, 2012; 2. Came to the United States before reaching your 16<sup>th</sup> birthday; 3. Have continuously resided in the United States since June 15, 2007, up to the present time; 4. Were physically present in the United States on June 15, 2012, and at the time of making your

Individuals who are granted DACA 2012 receive a two-year period in deferred action and also gain eligibility to apply for employment authorization.

The legal authority for DACA 2012 originates from the U.S. Constitution. Article II, Section Three (the Take Care Clause) states in part that the President “shall take Care that the Laws be faithfully executed.”<sup>4</sup> Inherent in the function of the “Take Care Clause” is the ability of the President to target some immigration cases for removal and to use prosecutorial discretion favorably in others. As described by the U.S. Supreme Court:

[W]e recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to “take Care that the Laws be faithfully executed.”<sup>5</sup>

As early as 1976, former INS General Counsel Sam Bernsen executed a legal opinion that identified the Take Care Clause as the primary source for prosecutorial discretion in immigration matters. He wrote: “The ultimate source for the exercise of prosecutorial discretion in the Federal Government is the power of the President. Under Article II, Section 1 of the Constitution, the executive power is vested in the President. Article II, Section 3, states that the President ‘shall take care that the laws be faithfully executed.’”<sup>6</sup>

The U.S. Supreme Court has also recognized the role of prosecutorial discretion in the immigration system. In *Arizona v United States*, the Court noted that “[a] principal feature of the removal system is the broad discretion exercised by immigration officials . . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all . . . .”<sup>7</sup>

Congress created the Immigration and Nationality Act (the Act or INA) in 1952 and it remains the primary statutory authority for immigration law today.<sup>8</sup> Importantly, Congress has delegated most discretionary immigration functions to DHS. Section 103 of the Act provides that

---

request for consideration of deferred action with USCIS; 5. Had no lawful status on June 15, 2012; 6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and 7. Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.” *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. Citizenship & Immigr. Servs., <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last updated Dec. 22, 2016).

<sup>4</sup> U.S. Const. art. II, § 3.

<sup>5</sup> Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 Tex. L. Rev. See Also 59, 63 (2013) (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)).

<sup>6</sup> Memorandum from Sam Bernsen, Gen. Counsel, Immigration & Naturalization Serv., to Comm’r, Immigration & Naturalization Serv. 2 (July 15, 1976), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf>.

<sup>7</sup> 567 U.S. 387, 396.

<sup>8</sup> See Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.); *Immigration and Nationality Act*, U.S. Citizenship & Immigr. Servs., <https://www.uscis.gov/laws/immigration-and-nationality-act> (last updated Sept. 10, 2013).

“[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens . . . .”<sup>9</sup>

Congress has repeatedly acknowledged that the Executive has power to grant “deferred action” for certain categories of people such as victims of crimes and human trafficking.<sup>10</sup> Additionally, previous administrations have announced deferred action programs to protect qualifying individuals. For example, under the George W. Bush administration, U.S. Citizenship and Immigration Services (part of DHS) announced a deferred action program for students affected by Hurricane Katrina<sup>11</sup> and later developed a program for the widows of U.S. citizens.<sup>12</sup> Moreover, Congress also recognized legal authority for immigration prosecutorial discretion in INA § 242(g), which bars judicial review of three specific prosecutorial discretion decisions by the agency: to commence removal proceedings, to adjudicate cases, and to execute removal orders.<sup>13</sup>

Another important legal source for deferred action is Title 8 of the Code of Federal Regulations. Section 274a.12(c)(14) dates to 1981 and is the product of notice and comment rulemaking.<sup>14</sup> This regulation specifically identifies deferred action by name and allows individuals granted deferred action to apply for work authorization upon a showing of “economic necessity.”<sup>15</sup> Over the last two decades, thousands of individuals have applied for and received work authorization based on a deferred action grant.<sup>16</sup>

There are also agency guidance documents related to deferred action issued by DHS (and formerly INS) over the last four-plus decades. The 1976 legal opinion by former INS General Counsel Sam Bernsen cites to the Take Care Clause of the U.S. Constitution, as well as statutory and case law from as early as 1825 to affirm the exercise of prosecutorial discretion in immigration.<sup>17</sup> It was around this time when INS published its first guidance on deferred action in the form of an “Operations Instruction.” This “Operations Instruction” stated “(ii) Deferred action. In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category.”<sup>18</sup> Since 1975, deferred action has been identified in several subsequent

<sup>9</sup> 8 U.S.C. § 1103(a)(1) (2012).

<sup>10</sup> See 8 U.S.C. § 1227(d)(4) (2012), INA § 237(d)(4).

<sup>11</sup> See Press Release, U.S. Citizenship and Immigration Services, USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina (Nov. 25, 2005), [https://www.uscis.gov/sites/default/files/files/pressrelease/FIStudent\\_11\\_25\\_05\\_PR.pdf](https://www.uscis.gov/sites/default/files/files/pressrelease/FIStudent_11_25_05_PR.pdf); see also 70 Fed. Reg. 70,992 (Nov. 25, 2005).

<sup>12</sup> See DHS Establishes Interim Relief for Widows of U.S. Citizens, U.S. Department of Homeland Security (June 9, 2009), <http://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens>. See generally Wadhia, *Beyond Deportation*, *supra*, ch.4.

<sup>13</sup> 8 U.S.C. § 1252(g) (2012).

<sup>14</sup> See 8 C.F.R. § 274a.12(c)(14); *Unconstitutionality of Obama’s Executive Actions on Immigration: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Stephen H. Legomsky); *Reining in Amnesty: Texas v. U.S. and Its Implications: Hearing Before the Subcomm. on Oversight, Agency Action, Fed. Rights & Fed. Courts, S. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Jill E. Family); Shoba Sivaprasad Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 Colum. J. Race & L. 1 (2016) (“Wadhia, *Demystifying Employment Authorization*”).

<sup>15</sup> 8 C.F.R. § 274a.12(c)(14).

<sup>16</sup> See Wadhia, *Demystifying Employment Authorization*, *supra*, at 25.

<sup>17</sup> Memorandum from Sam Bernsen, *supra*, at 2.

<sup>18</sup> (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii) (1975); see also

guidance documents.<sup>19</sup> Guidance documents are common in administrative law and are a recognized form of agency action under the Administrative Procedure Act.<sup>20</sup>

At tension with the aforementioned body of law is a letter sent by ten state Attorneys General to the administration requesting that DACA 2012 be rescinded.<sup>21</sup> This letter refers to DACA 2012 as “unlawful” and does so without citing to the foundational legal authorities behind deferred action. Furthermore, the letter conflates deferred action, “lawful presence” and work authorization in ways that are legally unsound and unclear. Finally, the letter itself shoehorns arguments into *Texas v. United States*, a lawsuit that never included the core of DACA 2012, and instead involved policies that are at this point in time moot.<sup>22</sup> Moreover, a previous lawsuit challenging DACA 2012 failed on jurisdictional grounds and would inevitably inform any future challenge.<sup>23</sup>

While the scope of this letter is to describe the legal foundation for DACA 2012, it is important to highlight the history and inevitability of prosecutorial discretion in immigration enforcement. Prosecutorial discretion exists because the government has limited resources and lacks the ability to enforce the law against the entire undocumented population. Recognizing this resource limitation, Congress has charged the Secretary of DHS with “establishing national immigration enforcement policies and priorities.”<sup>24</sup> Prosecutorial discretion and policies like DACA 2012 also have a humanitarian dimension, and such factors have long driven deferred action decisions. Finally, DACA 2012 has been an unqualified policy success, allowing over three-quarters of a million recipients to continue their education, receive professional licensing, find employment, and pay taxes into Social Security and other tax coffers.<sup>25</sup>

---

Wadhia, *Beyond Deportation*, *supra* at ch. 2; Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J. 243, 247-52 (2010); Shoba Sivaprasad Wadhia, *Sharing Secrets*, *supra*, at 9-11 (2012); Leon Wildes, *John Lennon v. The U.S.A.: The Inside Story of the Most Bitterly Contested and Influential Deportation Case in United States History* (2016).

<sup>19</sup> Wadhia, *History of Prosecutorial Discretion*, *supra*; Shoba Sivaprasad Wadhia, *The Aftermath of United States v. Texas: Rediscovering Deferred Action*, Yale J. on Reg.: Notice & Comment Blog (Aug. 8, 2017, 12:19 PM), <http://yalejreg.com/nc/the-aftermath-of-united-states-v-texas-rediscovering-deferred-action-by-shoba-sivaprasad-wadhia>.

<sup>20</sup> *Reining in Amnesty: Texas v. U.S. and Its Implications: Hearing Before the Subcomm. on Oversight, Agency Action, Fed. Rights & Fed. Courts, S. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Jill E. Family)

<sup>21</sup> Letter from Ken Paxton, Att’y Gen. of Texas et al., to Jefferson B. Sessions, Att’y Gen. of the United States (June 29, 2017) [https://www.texasattorneygeneral.gov/files/epress/DACA\\_letter\\_6\\_29\\_2017.pdf?cachebuster:5](https://www.texasattorneygeneral.gov/files/epress/DACA_letter_6_29_2017.pdf?cachebuster:5).

<sup>22</sup> *Texas v. United States* involves challenges to two deferred action policies announced two years after the original DACA policy was announced. The two later policies, popularly known as “DACA +” and “DAPA,” were enjoined by a federal district court in Brownsville, Texas, and later by the Fifth Circuit Court of Appeals. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015). Although the Supreme Court reviewed the case, the Court was equally divided. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam). A majority of the Supreme Court never ruled on the case, and the litigation never reached beyond the preliminary injunction stage. On June 15, 2016, DHS issued a memorandum rescinding DAPA. Memorandum from John F. Kelly, Dep’t of Homeland Security Sec’y, to Kevin K. McAleenan, Acting Comm’r U.S. Customs and Border Prot., et al., (June 15, 2017), <https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf>.

<sup>23</sup> *Crane v. Johnson*, 783 F.3d 244, 252 (5th Cir. 2015).

<sup>24</sup> 6 U.S.C. § 202(5) (2016).

<sup>25</sup> See, e.g., Tom K. Wong et al., *New Study of DACA Beneficiaries Shows Positive Economic and Educational Outcomes*, Center for American Progress (Oct. 18, 2016), <https://www.americanprogress.org/issues/immigration/news/2016/10/18/146290/new-study-of-daca-beneficiaries-shows-positive-economic-and-educational-outcomes>.

This letter outlines the legal foundation for DACA 2012 and confirms that maintaining such a policy falls squarely within the Executive's discretion. The legal authority for the Executive Branch to operate DACA 2012 is crystal clear. As such, choices about its future would constitute a policy and political decision, not a legal one. As the administration decides how best to address DACA 2012, we hope that the legal foundation and history for this policy is addressed wisely and that decisions on the future of DACA 2012 are made humanely.

Thank you for your attention.

*Shoba Sivaprasad Wadhia*

Shoba Sivaprasad Wadhia Esq.\*  
Samuel Weiss Faculty Scholar &  
Clinical Professor of Law  
Director, Center for Immigrants' Rights Clinic  
Penn State Law

Jill E. Family  
Commonwealth Professor of Law and  
Government  
Widener University Commonwealth Law  
School

Michael A. Olivas  
William B. Bates Distinguished Chair in  
Law  
University of Houston Law Center

CC: John F. Kelly, White House Chief of Staff  
Elaine C. Duke, Acting Secretary of Homeland Security

*\* All institutional affiliations are for identification purposes only and do not signify institutional endorsement of this letter*

Stephen Yale-Loehr  
Professor of Immigration Law Practice  
Cornell Law School

Hiroshi Motomura  
Susan Westerberg Prager Professor of Law  
University of California Los Angeles

Lenni Benson  
Professor of Law, Director Safe Passage  
Project Clinic  
New York Law School

Stephen Legomsky  
John S. Lehmann University Professor  
Emeritus  
Washington University School of Law

Roxana C. Bacon  
Adjunct Professor  
University of Miami School of Law

Maryellen Fullerton  
Professor of Law  
Brooklyn Law School

Renee C. Redman  
Adjunct Professor of Law  
University of Connecticut School of Law

Polly J. Price  
Asa Griggs Candler Professor of Law  
Emory University School of Law

Kristina M. Campbell  
Professor of Law  
UDC David A. Clarke School of Law

Linda Bosniak  
Distinguished Professor  
Rutgers Law School

Caitlin Barry  
Director, Farmworker Legal Aid Clinic  
Villanova University Charles Widger School  
of Law

David Baluarte  
Associate Clinical Professor of Law  
Washington and Lee University School of  
Law

Jessica Anna Cabot  
Clinical Teaching Fellow  
University of Connecticut School of Law

Jennifer Lee  
Assistant Clinical Professor of Law  
Temple University Beasley School of Law

Sarah Song  
Professor of Law and Political Science  
U.C. Berkeley School of Law

Karen Musalo  
Bank of America Foundation Chair in  
International Law  
Professor & Director, Center for Gender and  
Refugee Status  
U.C. Hastings College of the Law

Geoffrey Hoffman  
Director, University of Houston Law Center  
Immigration Clinic  
University of Houston Law Center

Melynda Barnhart  
Visiting Associate Professor  
New York Law School

Randi Mandelbaum  
Distinguished Clinical Professor of Law  
Rutgers Law School

Janet Beck  
Visiting Assistant Clinical Professor  
University of Houston Law Center

Kevin Ruser  
Professor of Law  
University of Nebraska College of Law

Benjamin Casper Sanchez  
Director, James H. Binger Center for New  
Americans  
University of Minnesota Law School

Dr. Barbara Harrell-Bond  
Emerita Professor, Refugee Studies Centre  
University of Oxford

Leti Volpp  
Robert D. and Leslie Kay Raven Professor of  
Law  
U.C. Berkeley School of Law

Deborah M. Weissman  
Reef C. Ivey II Distinguished Professor of  
Law  
University of North Carolina School of Law

Michael J Churgin  
Raybourne Thompson Centennial Professor in  
Law  
University of Texas at Austin

César Cuauhtémoc García Hernández  
Associate Professor of Law  
University of Denver Sturm College of Law

Enid Trucios-Haynes  
Professor of Law  
Brandeis School of Law, University of  
Louisville

Miriam Marton  
Assistant Clinical Professor of Law  
University of Tulsa College of Law

Christopher N. Lasch  
Associate Professor  
University of Denver Sturm College of Law

Michael J. Wishnie  
William O. Douglas Clinical Professor of  
Law Yale Law School

Rubén G. Rumbaut  
Distinguished Professor  
University of California, Irvine

Hiroko Kusuda  
Clinic Professor  
Loyola New Orleans College of Law

Maureen A. Sweeney  
Associate Professor  
University of Maryland Carey School of Law

David Abraham  
Professor of Immigration and Citizenship  
Law University of Miami School of Law

Alina Das  
Professor of Clinical Law  
New York University School of Law

Elissa Steglich  
Clinical Professor  
University of Texas School of Law

Violeta R. Chapin  
Clinical Professor of Law  
University of Colorado Law School

Marisa Cianciarulo  
Associate Dean for Academic Affairs and  
Professor of Law  
Chapman University

Kate Griffith  
Associate Professor  
Cornell University School of Industrial and  
Labor Relations

Stephen Wizner  
William O. Douglas Clinical Professor  
Emeritus and Professorial Lecturer  
Yale Law School

Jennifer Moore  
Professor of Law  
University of New Mexico School of Law

Peter Margulies  
Professor of Law  
Roger Williams University School of Law

Charles Shane Ellison  
Special Assistant Professor of Law in the  
Immigrant and Refugee Clinic  
Creighton University School of Law

Perna Lal  
Staff Attorney and Clinical Supervisor  
EBCLC, a clinic of Berkeley Law  
U.C. Berkeley School of Law

Marissa Montes  
Co-Director, Immigrant Justice Clinic  
Loyola Law School

Theo Liebmann  
Clinical Professor of Law  
Hofstra Law School

Howard F. Chang  
Earle Hepburn Professor of Law  
University of Pennsylvania Law School

Sylvia Lazos  
Justice Myron Leavitt Professor  
William S Boyd School of Law, University of  
Nevada Las Vegas

Estelle M. McKee  
Clinical Professor  
Cornell Law School

Rachel E. Rosenbloom  
Professor of Law  
Northeastern University School of Law

Laila L.Hlass  
Professor of Practice  
Tulane University School of Law

John A Scanlan  
Emeritus Professor of Law  
Maurer School of Law, Indiana University-  
Bloomington

Stewart Chang  
Associate Professor of Law and Director of  
the Center for International and Comparative  
Law  
Whittier Law School

Denise Gilman  
Director, Immigration Clinic  
University of Texas Law School

Sarah Sherman-Stokes  
Associate Director of the Immigrants' Rights  
and Human Trafficking Program  
Boston University School of Law

Stella Burch Elias  
Professor  
University of Iowa College of Law

Sabi Ardalan  
Assistant Clinical Professor  
Harvard Law School

Charles H. Kuck  
Adjunct Professor  
Emory Law School

Rebecca Sharpless  
Clinical Professor  
University of Miami School of Law

Jennifer Nagda  
Lecturer  
University of Pennsylvania Law School

Linda Tam  
Clinical Instructor  
U.C. Berkeley School of Law

Philip L. Torrey  
Managing Attorney, Harvard Immigration  
and Refugee Clinical Program  
Harvard Law School

David B. Thronson  
Professor of Law and Associate Dean for  
Experiential Education  
Michigan State University College of Law

Veronica T. Thronson  
Clinical Professor of Law, Director,  
Immigration Law Clinic  
Michigan State University College of Law

Peter L. Markowitz  
Professor of Law  
Cardozo School of Law

Christina Pollard  
Visiting Assistant Professor  
University of Arkansas School of Law

Laura A Hernandez  
Professor of Law  
Baylor Law School

Rebecca Kitson  
Adjunct Professor of Law  
University of New Mexico School of Law

Irene Scharf  
Professor of Law  
University of Mass Dartmouth School of Law

Maria Woltjen  
Lecturer  
University of Chicago Law School

Michelle A. McKinley  
Bernard B. Kliks Professor of Law  
University of Oregon School of Law

Gabriel J. Chin  
Edward L. Barrtt Jr. Chair & Martin Luther  
King Jr. Professor of Law  
U.C. Davis School of Law

Ericka Curran  
Immigration Clinic Professor  
Florida Coastal School of Law

Jennifer Lee Koh  
Professor of Law  
Western State College of Law

Anil Kalhan  
Associate Professor of Law  
Drexel University Kline School of Law

Kari Hong  
Assistant Professor  
Boston College Law School

Holly S. Cooper  
Lecturer and Co-Director of the Immigration  
Law Clinic  
U.C. Davis School of Law

Julia Vazquez  
Directing Attorney & Lecturer of Law  
Southwestern Law School

Monika Batra Kashyap  
Visiting Assistant Professor of Law  
Seattle University School of Law

Anita Sinha  
Assistant Professor of Law  
American University, Washington College of  
Law

Margaret H. Taylor  
Professor of Law  
Wake Forest University School of Law

Victor C. Romero  
Professor of Law  
Penn State Law

Kathleen Kim  
Professor of Law  
Loyola Law School Los Angeles

Alan Hyde  
Distinguished Professor  
Rutgers Law School

Susan Hazeldean  
Assistant Professor  
Brooklyn Law School

Kit Johnson  
Associate Professor of Law  
University of North Dakota School of Law

Joanne Gottesman  
Clinical Professor of Law and Director,  
Immigrant Justice Clinic  
Rutgers Law School

Mary Holper  
Associate Clinical Professor  
Boston College Law School

Sabrina Rivera  
Staff Attorney/Adjunct Faculty  
Western State College of Law

Jon Weinberg  
Professor of Law  
Wayne State University

Lynn Marcus  
Professor of the Practice; Co-Director,  
Immigration Law Clinic  
University of Arizona James E. Rogers  
College of Law

Gloria Valencia-Weber  
Professor Emerita  
University of New Mexico School of Law

Raquel E. Aldana  
Associate Vice Chancellor for Chancellor for  
Academic Diversity and Professor of Law  
U.C. Davis School of Law

Sarah Paoletti  
Practice Professor of Law and Director,  
Transnational Legal Clinic  
University of Pennsylvania School of Law

Andrew Moore  
Associate Professor of Law  
University of Detroit Mercy School of Law

Jayesh Rathod  
Professor of Law  
American University, Washington College of  
Law

Sheila Velez Martinez  
Jack and Lovell Olender Professor of Asylum  
Refugee and Immigration Law  
University of Pittsburgh School of Law

Mariela Olivares  
Associate Professor of Law  
Howard University School of Law

Richard A. Boswell  
Professor of Law  
U. C. Hastings College of the Law

Muneer I. Ahmad  
Clinical Professor of Law and Deputy  
Director for Experiential Education  
Yale Law School

Ediberto Roman  
Professor of Law & Director of Immigration  
and Citizenship Initiatives  
Florida International University