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## The Constitutionality of DACA: Balancing the Rights of Undocumented Individuals and Constitutional Considerations

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**THE CONSTITUTIONALITY OF DACA: BALANCING THE RIGHTS  
OF UNDOCUMENTED INDIVIDUALS AND CONSTITUTIONAL  
CONSIDERATIONS**

ABSTRACT

*On July 16, 2021, federal Judge Andrew Hanen issued a decision from the Southern District of Texas holding that the Deferred Action for Childhood Arrivals program, implemented in 2012 by President Barack Obama, was unconstitutional. DACA was implemented as a response to a failure to pass legislation to protect undocumented immigrants that came to the United States as minors. The program, which is run by the Department of Homeland Security, requires applicants to meet certain specific requirements in order to obtain a renewable two-year period of deferred action and recognizes that such individuals had no intention to break United States law and are of a low priority to the DHS. The program has had a positive impact on the lives of both applicants, their families, and the general American economy. However, since it began, the program has faced pushback from individuals, arguing that it is unconstitutional, due to both procedural and substantive errors.*

*This paper takes a critical look at Judge Hanen's decision in declaring DACA unconstitutional and argues that the program meets both the procedural and substantive requirements for a policy set out by the Administrative Procedure Act. It examines the requirement of notice and comment rulemaking under the APA and the necessity of satisfying the Chevron test, arguing that DACA passes both because it is an act of prosecutorial discretion carried out by the DHS. Therefore, the Obama Administration implemented the policy fairly and DACA should be held to be constitutional, against Judge Hanen's decision.*

## INTRODUCTION

On June 15, 2012, then-President Barack Obama announced a new immigration program called Deferred Action for Childhood Arrivals (“DACA”) that allows certain undocumented individuals who meet specific criteria to receive a two-year period of deferred action, subject to renewal.<sup>1</sup> The policy is meant to protect individuals who came to the United States when they were children and have little to no memory of a life in another country.<sup>2</sup> Importantly, DACA does not provide a pathway to citizenship or a legal immigration status to those qualified, but the program does recognize that certain individuals had no choice in coming to the United States, lacked an intent to violate the law, and have made positive contributions to the country, making them a low priority.<sup>3</sup> DACA is just one form of deferred action, which establishes a lawful presence for undocumented immigrants for a defined period of time during which the person is safe from deportation.<sup>4</sup> This is because deferred action is an act of prosecutorial discretion, meaning it is awarded on a case-by-case basis depending on priority from the executive branch through the Department of Homeland Security (“DHS”).<sup>5</sup>

As of September 2021, an estimated 611,030 young undocumented individuals qualify and have obtained deferred action, which has allowed them to continue their lives without the constant fear of deportation.<sup>6</sup> Additionally, the program has had a noticeable, positive impact on the United States and its economy with DACA recipients experiencing “pronounced upward mobility in their socioeconomic status.”<sup>7</sup> A 2019 survey revealed that the DACA population was able to increase its wages, become more financially independent, and pursue

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1. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 24, 2022), <https://www.uscis.gov/DACA> [<https://perma.cc/J6BW-KWLD>].

2. Memorandum from Janet Napolitano, Sec’y of Homeland Sec., the Dep’t of Homeland Sec., to David Aguilar, Acting Commissioner, U.S. Customs and Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship and Immigr. Services, & John Morton, Dir., U.S. Citizenship and Immigr. Services (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/7LAH-4KXB>].

3. *Id.*

4. *Deferred Action Definition*, U.S. IMMIGR. <https://www.usimmigration.org/glossary/deferred-action> [<https://perma.cc/6R73-EXK6>] (last visited Sept. 4, 2022).

5. *Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 31, 2021), <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions> [<https://perma.cc/6GCV-MJBB>].

6. *Count of Active DACA Recipients By Month of Current DACA Expiration As of September 30, 2021*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 30, 2021), <https://www.uscis.gov/sites/default/files/document/data/Active%20DACA%20Recipients%20-%20September%2030%2C%202021.pdf> [<https://perma.cc/Q77G-372P>].

7. *Deferred Action for Childhood Arrivals (DACA): An Overview*, AM. IMMIGR. COUNCIL 1 (Sept. 2021), [https://www.americanimmigrationcouncil.org/sites/default/files/research/deferred\\_action\\_for\\_childhood\\_arrivals\\_daca\\_an\\_overview\\_0.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/deferred_action_for_childhood_arrivals_daca_an_overview_0.pdf) [<https://perma.cc/J6BW-KWLD>].

higher education, all while benefitting the United States economy by outpacing the general population in creating new businesses and in hiring full-time employees.<sup>8</sup>

Despite its positive impact, socially and economically, DACA has not come without controversy, including the blocking of an expansion to the policy and attempts to rescind the entire program.<sup>9</sup> The most recent legal roadblock is a July 16, 2021, ruling from the Southern District of Texas, where federal judge Andrew Hanen ruled DACA unconstitutional and vacated the program.<sup>10</sup> In his opinion, Judge Hanen argues that DACA violated the Administrative Procedure Act (“APA”), both procedurally and substantially, and that President Obama overstepped his executive authority in implementing it.<sup>11</sup>

This paper aims to 1) discuss the history of DACA and its decade-long legal battle through the courts, 2) analyze the most recent Judge Hanen ruling, arguing that DACA, and its implementation, was unconstitutional, and 3) discuss why DACA meets the APA requirements, both procedurally and substantially.

#### I. A HISTORY OF DACA IN THE UNITED STATES AND SUBSEQUENT POLICY CHANGES AND RULINGS

DACA emerged from the Development, Relief and Education for Alien Minors Act (hereinafter “the Dream Act”), which was a bill that continuously failed to pass through Congress during the early twenty-first century.<sup>12</sup> The Dream Act was intended to provide a legal pathway to U.S. citizenship to undocumented immigrants, often referred to as “Dreamers,” who were brought to the United States by their parents when they were children.<sup>13</sup> As the Dream Act failed through multiple administrations with both Democratic and Republican Congresses, President Obama signed DACA into place through executive action.<sup>14</sup> DACA was only meant to be a temporary order that provided relief to applicants, until Congress could agree and eventually pass the Dream

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8. Tom K. Wong et al., *DACA Recipients’ Livelihoods, Families, and Sense of Security Are at Stake This November*, AM. PROGRESS (Sept. 19, 2019), <https://www.americanprogress.org/article/daca-recipients-livelihoods-families-sense-security-stake-november/> [<https://perma.cc/XX8W-5H6P>].

9. See Marnette Federis, *Deferred Action for Childhood Arrivals: A timeline*, WORLD (June 18, 2020), <https://theworld.org/stories/2020-05-28/deferred-action-childhood-arrivals-timeline> [<https://perma.cc/7N6W-456U>].

10. See generally *Texas v. United States*, 549 F. Supp. 3d 572, 572 (S.D. Tex. 2021).

11. *Id.* at 607.

12. Yamiche Alcindor & Sheryl Gay Stolberg, *After 16 Futile Years, Congress Will Try Again to Legalize ‘Dreamers’*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/dream-act-daca-trump-congress-dreamers.html> [<https://perma.cc/M2E7-3AJR>].

13. *The Dream Act: An Overview*, AM. IMMIGR. COUNCIL (Mar. 16, 2021), <https://www.americanimmigrationcouncil.org/research/dream-act-overview> [<https://perma.cc/PFR6-RN3X>].

14. Alcindor & Stolberg, *supra* note 12.

Act.<sup>15</sup> However, a decade later, Congress still has not passed the Dream Act, and DACA has continuously faced legal challenges since its implementation.<sup>16</sup>

The 2012 iteration of DACA allows undocumented immigrants that fall under certain requirements to receive two-year, renewable deferred action and qualifies them to receive work authorization.<sup>17</sup> The individual must have come to the United States before his or her sixteenth birthday; be under the age of thirty-one as of June 15, 2012, when the program was announced; have continuously resided in the United States since June 15, 2007, up until the present time of application; been present in the United States on the day of announcement, June 15, 2012; and is either in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged United States veteran.<sup>18</sup> Additionally, the individual cannot have been convicted of a felony, a significant misdemeanor offense, or three or more other misdemeanors.<sup>19</sup> These requirements are meant to insure that those who are able to obtain the two-year deferred action are individuals that are low priority cases for U.S. immigration services, such as law abiding persons who contribute to the country in a positive manner.<sup>20</sup>

*A. Expanding DACA and the Following Recission of DAPA*

Since the implementation of DACA, there has been one large attempt to expand the policy in order to broaden immigration reform.<sup>21</sup> Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”), announced on November 20, 2014, through a DHS memorandum,<sup>22</sup> was meant to expand DACA by allowing the parents of U.S. citizens or lawful permanent residents to also receive deferred action.<sup>23</sup> The memorandum also extended DACA through loosening the requirements for those that could fall under the

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15. *Id.*

16. *Id.*

17. Napolitano, *supra* note 2.

18. *Id.*

19. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 1.

20. Napolitano, *supra* note 2.

21. Marnette Federis, *supra* note 9.

22. Memorandum from John F. Kelly, Sec’y of Homeland Sec., the Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs and Border Prot., James McCament, Acting Dir., U.S. Citizenship and Immigr. Services, Thomas Homan, Acting Dir., U.S. Immigr. and Customs Enf’t, Joseph Maher, Acting Gen. Couns., and Michael Dougherty, Assistant Sec’y of Border, Immigr., and Trade Pol’y (June 15, 2017), <https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf> [<https://perma.cc/R2MB-WNN2>].

23. Memorandum from Jeh Charles Johnson, Sec’y of Homeland Sec., the Dep’t of Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship and Immigr. Servs., Thomas Winkowski, Acting Dir., U.S. Immigr. and Customs Enf’t, and R. Gil Kerlikowske, Comm’r, U.S. Customs and Border Prot. 3 (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action\\_2.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_2.pdf) [<https://perma.cc/S8JY-BWHY>].

original 2012 requirements by removing the age cap requirement, extending the renewal period to three years, and raising the necessary date of entry for applicants.<sup>24</sup>

However, the proposed DAPA program never came into full effect, as twenty-six states, led by Texas, filed a lawsuit against the federal government to prevent it from being implemented.<sup>25</sup> The Southern District of Texas, in an opinion written by Judge Hanen, held that the DAPA program would likely be found to not have complied with the requirements of the APA and therefore, the states' request for a preliminary injunction against the program was granted.<sup>26</sup> The holding and injunction was eventually affirmed by the United States' Fifth Circuit and then by the Supreme Court in a narrow 4-4 ruling.<sup>27</sup> This led the DHS to rescind the November 20, 2014, memorandum, including DAPA, on June 15, 2017.<sup>28</sup>

*B. Department of Homeland Security v. Regents of the University of California and the Rescission of DACA Altogether*

The rescission of DAPA still allowed DACA to continue as originally implemented in 2012.<sup>29</sup> However, this did not last long, as a few months later the Trump Administration directed another blow to DACA by rescinding the entire program on September 5, 2017.<sup>30</sup> In the memorandum, the Supreme Court's ruling on DAPA was cited, as well as a letter from then-Attorney General Jefferson Sessions to then-Acting Secretary of Homeland Security Elaine Duke saying that, "Because the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA."<sup>31</sup> The Trump Administration provided Congress with a six-month

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24. *Id.* at 3-4.

25. *Texas v. United States*, 86 F. Supp. 3d 591, 604 (S.D. Tex. 2015).

26. *Id.* at 677.

27. *See generally* *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015); *United States v. Texas*, 579 U.S. 547 (2016).

28. Memorandum from John F. Kelly, Sec'y of Homeland Sec., *supra* note 22, at 3.

29. *Texas v. United States*, 86 F. Supp. at 678.

30. Memorandum from Elaine C. Duke, Acting Sec'y of Homeland Sec., the Dep't of Homeland Sec., to James McCament, Acting Dir., U.S. Citizenship and Immigr. Servs., Thomas Homan, Acting Dir., U.S. Immigr. and Customs Enf't, Kevin McAleenan, Acting Comm'r, U.S. Customs and Border Prot., Joseph Maher, Acting Gen. Couns., Ambassador James Nealon, Assistant Sec'y, Int'l Engagement, and Julie Kirchner, Citizenship and Immigr. Servs. Ombudsman (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/8H8B-DW96>].

31. *Id.* (citing a letter from Jefferson Sessions, Attorney General, to Elaine Duke, Acting Secretary of the Department of Homeland Security, dated September 4, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0904\\_DOJ\\_AG-letter-DACA.pdf](https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf) [<https://perma.cc/S2CA-6Z6A>].

grace period to allow them time to come up with a new program that would dictate the future of DACA recipients.<sup>32</sup> The rescission allowed current-recipients to apply for a two-year renewal if their deferred action was to expire within those six months, but the DHS stopped considering new applications.<sup>33</sup>

Parties, including DACA recipients, states, and universities, challenged the rescission of the policy and multiple courts ruled in favor of the plaintiffs, thereby allowing current DACA recipients to continue renewal while the cases went through the courts.<sup>34</sup> Three of these lawsuits were combined into one, *Department of Homeland Security v. Regents of the University of California*, and the case was granted certiorari to be heard by the Supreme Court. The main claim made by these plaintiffs was that Secretary Duke, in rescinding DACA, “violated the Administrative Procedure Act . . . by failing to adequately address important factors bearing on her decision.”<sup>35</sup> On June 18, 2020, the Supreme Court, in a 5–4 decision, ruled in favor of the plaintiffs, stating that while the DHS had the authority to rescind DACA, the way it went about doing so was the problem under the APA.<sup>36</sup> The court held that “the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients.”<sup>37</sup> Because of this decision, DACA was able to remain intact, as the Supreme Court’s ruling vacated the Trump Administration’s rescission and first-time applicants could be accepted once again.<sup>38</sup>

While the *Regents* decision was a relief to many DACA applicants, their futures in the United States still hang in the balance with DACA continuously being attacked in the courts and no true pathway to citizenship seemingly in the future.<sup>39</sup> The decision made in *Regents* only allowed DACA recipients to

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32. Mahita Gajanan, *Read Jeff Sessions’ Letter Calling for the End of DACA*, TIME MAG. (Sept. 5, 2017), <https://time.com/4927250/jeff-sessions-daca-rescind-letter/> [<https://perma.cc/P6DZ-P9ZU>].

33. Brian Wolfman, *Department of Homeland Security v. Regents of the University of California and its Implications*, 110 GEO. L.J. 135, 136 (2021).

34. *Status of Current DACA Litigation*, NAT’L. IMMIGR. L. CTR. (June 7, 2019), <https://www.nilc.org/issues/daca/status-current-daca-litigation/> [<https://perma.cc/D7G9-W245>]; *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1903 (2020).

35. *Dep’t of Homeland Sec.*, 140 S. Ct. at 1901.

36. *Id.* at 1905; see also Nina Totenburg, *Supreme Court Rules for DREAMers, Against Trump*, NPR (June 18, 2020), <https://www.npr.org/2020/06/18/829858289/supreme-court-upholds-daca-in-blow-to-trump-administration> [<https://perma.cc/C2BB-FRXX>].

37. *Dep’t of Homeland Sec.*, 140 S. Ct. at 1916.

38. Ben Harrington, *Supreme Court: DACA Rescission Violated the APA*, CONG. RSCH. SERV. 4 (June 18, 2020), <https://crsreports.congress.gov/product/pdf/LSB/LSB10497> [<https://perma.cc/B7R2-CFKW>].

39. Adam Liptak & Michael Shear, *Trump Can’t Immediately End DACA, Supreme Court Rules*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/us/trump-daca-supreme-court.html> [<https://perma.cc/W5VC-4QHZ>].

“breathe a temporary sigh of relief,” while they continue to watch the fight in the courts.<sup>40</sup>

## II. JUDGE HANEN’S RULING IN *TEXAS V. UNITED STATES* AND DACA HELD AS UNCONSTITUTIONAL

A new DACA holding has now made recipients uneasy once again. On July 16, 2021, Judge Hanen issued a decision from the Southern District of Texas where he held that DACA was unconstitutional and illegal.<sup>41</sup> The Plaintiffs consist of Alabama, Arkansas, Kansas, Louisiana, Mississippi, Nebraska, South Carolina, Texas, and West Virginia (collectively known as “Plaintiff States”) and they are led by Texas.<sup>42</sup> The Plaintiff States argue that DACA’s creation violated the APA, both procedurally and substantively, and therefore, the implementation of the program was unconstitutional.<sup>43</sup>

### A. *Alleged Procedural Issues with DACA: Avoiding the APA’s Notice and Comment Process and the “General Statement of Policy” Exception*

Plaintiff States argue that, under the APA, the DHS was required to go through notice and comment rulemaking when implementing DACA, which it did not do.<sup>44</sup> The APA’s notice and comment procedure requires that:

[A]gencies must publish “[g]eneral notice of proposed rule making” in the *Federal Register*, give “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation,” and, after consideration of such comments, “incorporate in the rules adopted a concise general statement of their basis and purpose.”<sup>45</sup>

The Government and Defendant Intervenors state that the implementation of DACA fell under one of two exceptions that would allow the DHS to avoid the notice and comment requirement, arguing that DACA was a “general statement of policy,” instead of a general legislative rule.<sup>46</sup>

A general statement of policy is “issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a

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40. *Id.*

41. Miriam Jordan, *Judge Rules DACA is Unlawful and Suspends Applications*, N.Y. TIMES (Sept. 27, 2021), <https://www.nytimes.com/2021/07/16/us/court-daca-dreamers.html> [<https://perma.cc/7639-465L>].

42. *Texas v. United States*, MALDEF (Mar. 29, 2021), <https://www.maldef.org/2021/03/texas-v-united-states/> [<https://perma.cc/Z953-7QJL>].

43. *Texas v. United States*, 549 F. Supp. 3d 572, 576 (S.D. Tex. 2021).

44. *Id.* at 596.

45. *Id.* at 597 (citing 5 U.S.C. §§ 533(b)–(c)).

46. *Id.* (The Defendant-Intervenors include twenty-two individual DACA recipients, as well as the State of New Jersey).



discretionary power.”<sup>47</sup> However, Judge Hanen holds that DACA does not fall under this exception, as DACA confers rights and obligations on individuals and provides a strict framework for the DHS, instead of simply stating its future plans in exercising its discretionary power for providing deferred action.<sup>48</sup> The memorandum alleges that DACA confers rights onto its recipients because the program provides undocumented immigrants with the right to receive certain benefits such as work authorization and a social security number.<sup>49</sup>

Additionally, Judge Hanen contends that the 2012 DACA Memorandum does not provide the DHS with enough freedom to exercise its own discretion over DACA applications.<sup>50</sup> The opinion points to DACA’s imposed criteria and the question as to whether DHS agents have any discretion to deviate from such criteria.<sup>51</sup> The fact that no DACA applicant who has met all the criteria stated in the 2012 Memorandum has ever had his or her application denied is specifically cited.<sup>52</sup> The Defendant-Intervenors state that DACA has had an increase in denial rates, but the opinion rejects this argument, attributing this to the original *Texas v. United States* holding from 2015.<sup>53</sup> While the opinion recognizes that there is a question of fact as to whether the DHS’s agents have the discretion of accepting or denying DACA applicants, it eventually notes that disputed questions of fact, in the summary judgement context, are not relevant unless the fact is material.<sup>54</sup> It states that such a fact is not material in this case because agents are not able to vary from DACA’s required criteria for applicants.<sup>55</sup> However, Judge Hanen still ruled that DACA does not provide discretion to agents because they are not allowed to accept applicants under the program, unless they meet all of the criteria laid out in the memorandum.<sup>56</sup> Thus, the Southern District of Texas held that the APA’s notice and comment procedure was required in the implementation of the 2012 DACA Memorandum because it was not a general statement of policy.<sup>57</sup>

*B. Alleged Substantive Issues with DACA: Passing the Two-Step Chevron Test*

Even though the opinion holds that the DACA memorandum fails because it does not follow the APA’s procedural requirements, alleged substantive issues

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47. *Id.* at 597–98 (citing *Lincoln v. Virgil*, 508 U.S. 182, 197 (1993)).

48. *Texas v. United States*, 549 F. Supp. 3d 572, 600, 602–03 (S.D. Tex. 2021).

49. *Id.* at 599.

50. *Id.* at 600.

51. *Id.*

52. *Id.* at 601.

53. *Id.*

54. *Id.*

55. *Id.* at 602.

56. *Id.*

57. *Id.* at 603.

with DACA are also addressed by the Court because the procedural deficiencies of DACA could reasonably be fixed.<sup>58</sup> Here, Plaintiff States argue that the DHS did not have the authority to enact DACA because it violated Congress's own immigration scheme.<sup>59</sup>

Judge Hanen argues that the DHS's enactment of DACA was wrong because the program exceeded the department's authority.<sup>60</sup> In looking at an agency's interpretation of a statute, the courts use the *Chevron* test, which requires them to look at 1) "whether Congress has directly spoken to the precise question at issue" and 2) if so, "whether the agency's answer is based on a permissible construction of the statute."<sup>61</sup>

Judge Hanen first states that DACA fails the *Chevron* test's first step because Congress has already spoken on the issue as to whether or not the DHS has the ability to enact the DACA program.<sup>62</sup> Therefore, he holds that Congress says the DHS does not have the statutory authority to adopt the DACA program, as the DHS's prosecutorial discretion does not extend to creating such a program.<sup>63</sup> Here, it is argued that statutes governing the DHS's powers were interpreted too broadly by the DHS and that their interpretation would actually allow "the Secretary [of Homeland Security] to grant lawful presence and work authorization to every illegal alien."<sup>64</sup> Judge Hanen's explanation points to the fact that while the DHS does have authority and power over immigration issues, broad authority over immigration in the United States is still within the hands of Congress.<sup>65</sup> The memorandum specifically points to a statement from then-Secretary of Homeland Security, Janet Napolitano, from a 2011 Senate Hearing in which, when referring to children brought to the United States at a young age, she said, "[W]e believe that Congress should address . . . and provide a legislative fix for this problem."<sup>66</sup> The Plaintiff States use this to demonstrate that the DHS has previously acknowledged that the individuals which DACA covers is not an area over which they have authority, but one for Congress instead.<sup>67</sup>

Congress states in the Immigration and Nationality Act ("INA") that "Any alien . . . who has failed to maintain the nonimmigrant status in which the alien

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58. *Id.*

59. *Id.*

60. *Id.* at 605.

61. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

62. *Texas*, 549 F. Supp. 3d at 614.

63. *Id.*

64. *Texas v. United States*, 328 F. Supp. 3d 662, 715 (S.D. Tex. 2018).

65. *Id.* at 716.

66. *Texas*, 549 F. Supp. 3d at 607 (citing *DREAM Act: Hearing Before the Subcomm. on Immigr. Refugees & Border Sec. of the Comm. on the Judiciary*, 112th Cong. (2016)).

67. *Id.*

was admitted . . . is deportable.”<sup>68</sup> Judge Hanen points to this statement as Congress speaking directly to the issue of young undocumented immigrants in the United States and why the DHS does not have the authority to implement DACA under the *Chevron* test.<sup>69</sup> He argues that because Congress has also spoken on undocumented immigrants in general, it has spoken on the issue of whether the DACA population is able to receive deferred action.<sup>70</sup> While the INA specifies certain groups that can attain lawful presence in the United States, individuals that fall under DACA or DAPA are not specifically recognized by the INA.<sup>71</sup> Additionally, Congress has further stated that undocumented citizens “admitted for permanent residency with pending removal proceedings are *ineligible* for work authorization”<sup>72</sup> and that the Immigration Reform and Control Act even makes it illegal for unauthorized individuals to be knowingly hired by American employers.<sup>73</sup> In contrast, Judge Hanen argues that DACA’s policy specifically lets such people apply for work authorizations and even incentivizes employers to do so.<sup>74</sup>

Next, Judge Hanen argues that DACA allows individuals to obtain advance parole, which is only supposed to be given “on a case-by-case basis for urgent humanitarian reasons or significant public benefit.”<sup>75</sup> Advance parole allows undocumented individuals, including applicants for lawful permanent residence status, to enter back into the United States after travelling out of the country.<sup>76</sup> However, just because an individual has an advance parole document, it does not necessarily mean they will be allowed back into the United States, as a discretionary decision still must be made at the American port of entry.<sup>77</sup> Judge Hanen states that by allowing the entirety of DACA applicants to be eligible for parole, it negates the point of advance parole being an award for specific purposes.<sup>78</sup> Additionally, he notes that the ability to obtain advance parole also allows DACA recipients to change their immigration classification to that of a lawful permanent resident because they were able to enter back into the country legally.<sup>79</sup> Due to this ability to change their immigration classification, Judge Hanen argues that this directly goes against what Congress intended and

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68. *Id.* at 608 (citing 8 U.S.C. § 1227(a)(1)(C)(i)).

69. *Id.*

70. *Id.* at 609–10.

71. *Id.* at 609.

72. *Id.* at 610 (citing 8 U.S.C. § 1226(a)(3)).

73. *Id.*

74. *Id.*

75. *Id.* at 612 (citing 8 U.S.C. § 1182(d)(5)(A)).

76. Andorra Bruno, *Immigration Parole*, CONG. RSCH. SERV. 5 (Oct. 15, 2020), <https://crs.reports.congress.gov/product/pdf/R/R46570> [<https://perma.cc/V7GB-N38J>].

77. *Id.*

78. *Texas*, 549 F. Supp. 3d at 612–13.

79. *Id.* at 613.

additionally allows DACA recipients to ignore the “unlawful presence bars.”<sup>80</sup> These bars prevent those who entered the United States as undocumented or those that stayed beyond the time period they were allowed from coming back to the United States for a specified period of years if they leave.<sup>81</sup> Judge Hanen argues that DACA recipients are able to bypass this travel bar because of their ability to gain advance parole, which is contrary to Congress’s wishes.<sup>82</sup> Therefore, he concludes that DACA fails *Chevron*’s first step, as Congress has already spoken directly to whether or not the DHS has the ability to implement a program such as DACA that provides deferred action to a group of undocumented individuals who came to the United States when they were children.<sup>83</sup>

Next, Judge Hanen argues that even if DACA could pass *Chevron*’s first step that it would still fail the second, as the DHS’s interpretation of its power was unreasonable.<sup>84</sup> Specifically, he notes that it is unreasonable because “it usurps the power of Congress to dictate a national scheme of immigration laws and is contrary to the INA.”<sup>85</sup> The memorandum alleges that Congress has specifically made it so that other entities, including states and agencies, cannot create further regulation in immigration.<sup>86</sup> This is specifically in relation to the balance that Congress has created relating to the employment of undocumented immigrants, which affects individuals on both the employee and employer sides.<sup>87</sup> DACA influences this by enabling its recipients to obtain work.<sup>88</sup> Judge Hanen also argues that the implementation of DACA by the Executive Branch, effectively allows the Executive Branch through the DHS to grant lawful status to all undocumented immigrants in America, as long as it occurs over time through small groups.<sup>89</sup> Additionally, the memorandum simply contends that common sense recognizes that a decision as important as the implementation of DACA is not one that should be under the authority of an agency and instead is under Congress’s power. Therefore, Judge Hanen concludes that the implementation of DACA was not an action that the DHS had the Congressional authority to do and, accordingly, was not a reasonable exercise of the DHS’s discretion under step two of the *Chevron* test.<sup>90</sup>

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80. *Id.* at 614.

81. 8 U.S.C. § 1182(a)(9)(C)(i).

82. *Texas*, 549 F. Supp. 3d at 614.

83. *Id.*

84. *Id.* at 615.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 1.

89. *Texas*, 549 F. Supp. 3d at 616.

90. *Id.*

Finally, Judge Hanen writes that programs similar to DACA are historically used on a country-specific basis because of emergency situations, such as war, civil unrest, or a natural disaster.<sup>91</sup> The memorandum argues that DACA was implemented because Congress refused to pass legislation, which demonstrates Congress's current rejection of the policy and that this was the Executive Branch's response.<sup>92</sup> He also points to the fact that DAPA failed as it was deemed unlawful and the same reasoning stands behind why DACA is unlawful as well.<sup>93</sup>

As a result of his conclusion, Judge Hanen granted a permanent injunction against the DACA program, which vacated the policy.<sup>94</sup> The order noted that a large amount of people rely on DACA, not just the applicants themselves, but also their employers, friends, and family.<sup>95</sup> Therefore, the permanent injunction allows applicants that have already been accepted under the program and those that need to renew their application to continue doing so.<sup>96</sup> The most significant change that comes with this decision is that while new applications can continue to be accepted, they may not be granted until further court decisions are made, whether by the Southern District of Texas, the Fifth Circuit, or the Supreme Court.<sup>97</sup> This ruling will significantly impact those with new pending applications, approximately 50,000 as they are now "locked out of the program."<sup>98</sup>

The Biden Administration released a statement responding to the memorandum, calling Judge Hanen's ruling "deeply disappointing" and has appealed the decision, admonishing Congress's inability to provide a pathway to citizenship for DACA applicants.<sup>99</sup> Additionally, President Biden's statement called on Congress to pass more legislation for immigration reform that could provide Dreamers with a pathway towards citizenship.<sup>100</sup> In the meantime, as DACA continues to wind its way through the court system, both DACA

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91. *Id.* at 617.

92. *Id.* at 617–18.

93. *Id.* at 618.

94. Order of Permanent Inj. at 3, *Texas v. United States*, 549 F. Supp. 3d 572 (S.D. Tex. 2021) (No. 1:18-CV-00068).

95. *Id.*

96. *Id.* at 4.

97. *Id.*

98. Joe Walsh, *Texas Judge Cuts off New DACA Applications*, FORBES (July 16, 2021), <https://www.forbes.com/sites/joewalsh/2021/07/16/texas-judge-cuts-off-all-new-daca-applications/?sh=48277c14664b> [<https://perma.cc/7XUX-48D6>].

99. *Statement by President Joe Biden on DACA and Legislation for Dreamers*, WHITE HOUSE (July 17, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/17/state-ment-by-president-joe-biden-on-daca-and-legislation-for-dreamers/> [<https://perma.cc/VNQ4-BKRX>].

100. *Id.*

recipients and applicants will continue to worry about their futures and the possibility of deportation, as they face an uncertain future.

### III. THE ARGUMENT FOR DACA AND ITS VALIDATION BOTH PROCEDURALLY AND SUBSTANTIVELY UNDER THE APA

#### A. *The Argument Against DACA's Alleged Procedural Issues Under the APA*

Procedurally, Judge Hanen argues that the DHS did not undergo informal rulemaking through the notice and comment procedure and, therefore, Plaintiff States are entitled to summary judgment.<sup>101</sup> However, even he acknowledges that these alleged procedural deficiencies could be resolved by the DHS passing DACA through the notice and comment procedure and that if this was completed, the procedural APA claim would be resolved.<sup>102</sup> In fact, the DHS and the Biden Administration announced on September 27, 2021, that they would be opening a notice and comment period for sixty days.<sup>103</sup> This period was meant to allow any person, business, or entity to comment on the DACA program and its effects, and even provide alternative ideas or solutions.<sup>104</sup> Therefore, the alleged procedural issues that affect the implementation of DACA can be remedied and, in fact, the Government is in the process of doing so.

However, even though Judge Hanen's procedural problems can be fixed, the DHS's promulgation of DACA was still adequate in that it fell under an exception to notice and comment rulemaking. Under the APA, an agency can skip informal rulemaking if it is a "general statement of policy."<sup>105</sup> As stated in Judge Hanen's opinion, a general statement of policy test is whether the policy statement imposes rights and obligations and whether it allows decisionmakers, here DHS agents, to exercise discretion.<sup>106</sup>

Judge Hanen argues that DACA is not a general statement of policy because it confers benefits onto DACA applicants, such as a work permit, the ability to apply for a Social Security number, and the ability to obtain a license.<sup>107</sup> While it is true that DACA allows its recipients to obtain such things, it is not DACA itself that confers the "benefits," because as stated, DACA is an act of

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101. *Texas v. United States*, 549 F. Supp. 3d 572, 596 (S.D. Tex. 2021).

102. *Id.* at 603.

103. *DHS to Publish Notice of Proposed Rulemaking on DACA*, DEP'T OF HOMELAND SEC. (Sept. 27, 2021), <https://www.dhs.gov/news/2021/09/27/dhs-publish-notice-proposed-rulemaking-daca> [<https://perma.cc/HD5J-7G7Q>].

104. *Deferred Action for Childhood Arrivals*, 86 Fed. Reg. 185 (proposed Sept. 28, 2021) (to be codified at 8 C.F.R. pt. 106, 8 C.F.R. pt. 236, 8 C.F.R. 274a), <https://www.govinfo.gov/content/pkg/FR-2021-09-28/pdf/2021-20898.pdf> [<https://perma.cc/N632-TD6W>].

105. 5 U.S.C. § 553(b)(3)(A).

106. *Texas*, 549 F. Supp. 3d at 598 (citing *Pros. & Patients for Customized Care v. Shalala*, 56 F.3d 592, 505 (5th Cir. 1995)).

107. *Id.* at 599.

prosecutorial discretion.<sup>108</sup> First, deferred action has been in use for decades before DACA was promulgated, as it was first officially defined in 1975 by INS.<sup>109</sup> From the beginning, it has been up to the discretion of the DHS to recommend individuals for deferred action by looking at certain factors—such as age, physical and mental condition, family situation, and more—and deciding if adverse action would be appropriate or not.<sup>110</sup> Therefore, DACA does not actually provide deferred action and the supposed benefits that come along with it, but it just provides guidance as to who can request consideration under it.<sup>111</sup> The program does not force the DHS to give an individual deferred action and therefore the ability to get a work permit and other benefits. It simply provides additional requirements. The decision to provide deferred action continues to be up to the discretion of the DHS.<sup>112</sup> More importantly, DACA does not provide any kind of benefit in terms of the applicants' immigration status, nor does it provide a pathway to citizenship.<sup>113</sup> Finally, DACA's supposed "benefits" are not even permanent because the DHS can revoke or refuse to renew an individual's DACA application at any time due to it being an act of prosecutorial discretion.<sup>114</sup> Therefore, DACA does not confer benefits onto individuals, no more than just providing guidelines as to how the DHS can apply deferred action at its discretion.<sup>115</sup>

Additionally, contrary to Judge Hanen's opinion, DACA is discretionary; in fact, that is one of the main points of the program. He specifically points to the requirements that need to be met to be considered under DACA and argues that these requirements do not provide discretion to officers because they cannot accept anyone who does not meet them.<sup>116</sup> However, this is a limited way to understand discretion, as officers still have discretion in accepting or denying someone in addition to the ability to "terminate or renew deferred action at any time, at the agency's discretion."<sup>117</sup> Meeting the required criteria set out by the DHS does not guarantee an applicant anything, only that they will be considered.<sup>118</sup> The goal of DACA, and prosecutorial discretion generally, is to help low priority individuals obtain deferred action and the requirements only

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108. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 1.

109. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. L.J. 243, 246 (2010).

110. *Id.* at 248.

111. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 1.

112. *Id.*

113. Giulia McDonnell Nieto del Rio & Miriam Jordan, *What is DACA? And Where Does It Stand Now?*, N.Y. TIMES (July 16, 2021), <https://www.nytimes.com/article/what-is-daca.html> [<https://perma.cc/EYR9-E9RY>].

114. *Frequently Asked Questions*, *supra* note 5.

115. *Id.*

116. *Texas v. United States*, 549 F. Supp. 3d 572, 602 (S.D. Tex. 2021).

117. *Frequently Asked Questions*, *supra* note 5.

118. *Id.*

provide guidelines to help agents meet this objective. DHS agents still have the discretion and ability to deny a person deferred action, even if they meet all the criteria.<sup>119</sup> Secretary Napolitano stated that deferred action would not be given out to groups of people, but instead would continue to go on a case-by-case basis.<sup>120</sup> In fact, the DHS has denied multiple individuals that met DACA's requirements for other reasons.<sup>121</sup> For example, in *Garcia Herrera v. McAleenan*, Plaintiff Christian Garcia Herrera's application to renew his deferred action status under DACA was denied.<sup>122</sup> This is despite the fact that Garcia Herrera was a valid DACA recipient for the previous six years, met all the DACA requirements, and continued to do so.<sup>123</sup> The DHS did not provide any explanation to Garcia Herrera as to why his renewal application was denied, but the court held that such an explanation was unnecessary as it is ultimately at the DHS's discretion to accept or deny applications and Garcia Herrera was not entitled to such a renewal.<sup>124</sup> The fact that the majority of applicants who meet DACA's requirements are accepted does not mean that DHS agents have lost their discretion or that the discretion they do have is extremely narrow. DACA applicants can still be denied for a multitude of reasons, and it is up to the opinion and judgment of DHS agents to decide.<sup>125</sup>

Altogether, the DHS properly skipped notice and comment rulemaking because the implementation of DACA is a "general statement of policy" and therefore, subject to exemption from informal rulemaking.<sup>126</sup> More importantly, these purported procedural errors can be corrected and in fact, the DHS and the Biden Administration are working hard to make these issues a moot point, so that the legality of the implementation of DACA has a stronger foundation.<sup>127</sup>

#### B. *The Argument Against DACA's Alleged Substantive Issues Under the APA*

Judge Hanen also argues that there are substantive issues with the implementation of DACA as a program under the APA.<sup>128</sup> Under the *Chevron*

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119. *Id.*

120. SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 91 (2015) [hereinafter BEYOND DEPORTATION].

121. See *Medina v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 1224, 1227 (W.D. Wash. 2019) (noting the DHS terminated Ramirez's DACA status relying solely on speculative arguments and old, minor transgressions that "would not otherwise disqualify him for DACA"); *Garcia Herrera v. McAleenan*, 379 F. Supp. 3d 1143, 1146 (E.D. Wash. 2019).

122. *McAleenan*, 379 F. Supp. 3d at 1146.

123. *Id.* at 1146.

124. *Id.* at 1151.

125. *Id.*

126. 5 U.S.C. §553(b)(3)(A).

127. Deferred Action for Childhood Arrivals, 86 Fed. Reg. 185 (proposed Sept. 28, 2021) (to be codified at 8 C.F.R. pt. 106, 8 C.F.R. pt. 236, 8 C.F.R. 274a) <https://www.govinfo.gov/content/pkg/FR-2021-09-28/pdf/2021-20898.pdf> [<https://perma.cc/HD5J-7G7Q>].

128. *Texas v. United States*, 549 F. Supp. 3d 572, 621 (S.D. Tex. 2021).



test, the two questions that exist when an agency, such as the DHS, promulgates a new rule are 1) whether Congress has already addressed the issue in question and 2) if not, whether the agency's interpretation of Congress's statute is appropriate and reasonable.<sup>129</sup> Here, Judge Hanen alleges that Congress has already spoken on the issue as to whether or not DACA individuals can receive deferred action and that even if Congress has not spoken to the issue, the DHS's implementation of the program is still not a reasonable discretion of its power.<sup>130</sup>

Judge Hanen's argument does not focus on Congress "directly" addressing young undocumented immigrants that entered the United States when they were minors, but instead argues that because Congress has addressed undocumented immigrants generally, this covers DACA recipients as well.<sup>131</sup> While perhaps Congress has stated that "the DACA-eligible population is removable,"<sup>132</sup> this is not necessarily the same thing as saying that they cannot obtain deferred action. Despite what Judge Hanen claims,<sup>133</sup> receiving DACA does not completely bar the Government from removing a person, as DACA can be revoked or not renewed at any time and for any reason, allowing a recipient to be removed after.<sup>134</sup> Judge Hanen's argument seems to be that Congress has already discussed other groups and their ability to obtain lawful presence and work authorization and that by not including DACA applicants, Congress has said that they are not allowed to do so.<sup>135</sup> However, the opinion does not point to any instance where Congress explicitly said that the allocation of lawful presence or work authorization is not allowed for young undocumented immigrants that came to the United States as minors.<sup>136</sup> DACA is simply an act of prosecutorial discretion, which has been used in the context of immigration for decades, allowing the DHS to identify cases that are not a priority in order to reserve both money and personnel for more important cases.<sup>137</sup> It is not different than what the DHS has done before in providing undocumented individuals with deferred action.

One of Plaintiff States' complaints is that DACA allows recipients to get advance parole, which allows them to leave the country and re-enter without being turned away.<sup>138</sup> Their biggest point of contention is that advance parole

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129. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

130. *Texas v. United States*, 549 F. Supp. 3d at 614–15.

131. *Id.* at 604, 606–07.

132. *Id.* at 607–08.

133. *Id.* at 608 (claiming that "DACA prevents the removal of its recipients").

134. *Frequently Asked Questions*, *supra* note 5.

135. *Texas*, 549 F. Supp. 3d at 604.

136. *See id.*

137. Memorandum from Sam Bersen, Gen. Counsel, on Legal Opinion Regarding Service Exercise of Prosecutorial Discretion to Commissioner 1 (July 15, 1976) (first memo outlining prosecutorial discretion arising under the Immigration and Nationality Act), <http://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf> [<https://perma.cc/P9XS-C6GS>].

138. *Texas*, 549 F. Supp. 3d at 612.

allows DACA recipients to lawfully re-enter the country and that they “can now adjust status because he or she has been paroled legally back into the United States.”<sup>139</sup> Plaintiff States argue that DACA in fact provides a way for recipients to change their immigration status and in certain instances, even provides a clearer way to citizenship.<sup>140</sup> Therefore, they assert that DACA goes against Congress’s wishes, which usually implements a three- or ten-year bar on individuals who leave the country after being illegally present.<sup>141</sup>

Even Judge Hanen notes that out of the 1.5 million people that are DACA eligible, only 3,000 were granted an adjustment in their status.<sup>142</sup> While he argues that the number “is not insignificant,” 3,000 is just .2% of the 1.5 million DACA population and therefore, arguably insignificant.<sup>143</sup> Charles Tiefer, a professor at the University of Baltimore School of Law and Harvard Law School graduate, contends that, “Normally, one expects the courts to defer to the immigration agencies on the implementation of a program like the one for ‘advance parole.’ One does not expect the courts to pile on and assail a program like ‘advance parole’ because one 500th of the Dreamers win by it.”<sup>144</sup> Also, just because a DACA recipient has the chance to apply for advance parole does not necessarily mean that he or she will obtain it, as advance parole is also up to the discretion of the DHS and only appropriate in limited circumstances.<sup>145</sup> It can also be revoked at any time by the DHS, meaning lawful re-entrance is not guaranteed.<sup>146</sup> In addition, Judge Hanen’s opinion itself notes that the loophole contested by the Plaintiff States is not even necessary for *many* DACA recipients because they just overstayed their visas but were lawfully admitted upon first entrance.<sup>147</sup> Finally, for a DACA recipient to become a legal permanent resident, an individual still has to go through the same process and meet the requirements needed for a green card, such as having immediate relatives that are American citizens, getting a business sponsor, or winning one through the Green Card

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139. *Id.* at 613.

140. *Id.* at 614.

141. *Id.*

142. *Id.* at 613.

143. Charles Tiefer, *Judge Hanen’s Opinion Against DACA is Legally Wrong*, FORBES (July 16, 2021), <https://www.forbes.com/sites/charlestiefer/2021/07/16/judge-hanens-opinion-against-daca-is-legally-wrong/?sh=25ec8f731546> [<https://perma.cc/95W4-NG9R>].

144. *Id.*

145. *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 12, 2021), <https://www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-for-individuals-outside-the-united-states> [<https://perma.cc/6ZGC-WAJQ>].

146. *Id.*

147. *Texas*, 549 F. Supp. 3d at 613.

lottery.<sup>148</sup> While DACA may provide recipients a chance to apply for advance parole, it nowhere near guarantees an adjustment in status, and the number of those who did adjust their status are arguably inconsequential to the entire DACA population.

The first part of the *Chevron* test asks whether Congress has directly spoken to the issue at question because, if so, Congress's intent must be followed.<sup>149</sup> While Congress may have spoken on the issue of general undocumented immigrants, there is no indication that it has specifically addressed the issue of those that fall under DACA requirements.<sup>150</sup> Judge Hanen recognizes that Congress has specifically discussed other groups of undocumented individuals, but that does not mean Congress has spoken "directly" on DACA recipients by not mentioning them in relation to obtaining lawful presence or work authorization.<sup>151</sup> Therefore, DACA should pass the first part of the *Chevron* test because Congress has not explicitly or specifically discussed the population of undocumented citizens that came to America as young children due to their parents' actions and not their own.

If an agency's decision passes the first step of the *Chevron* test, next comes the question of "whether the agency's answer is based on a permissible construction of the statute."<sup>152</sup> Judge Hanen argues that "DACA is an unreasonable interpretation of the law because it usurps the power of Congress to dictate a national scheme of immigration laws and is contrary to the INA."<sup>153</sup> He contends that Congress only wants legal permanent residents to have work permits, which would not include the DACA population.<sup>154</sup> However, the DHS's implementation of DACA is fully a reasonable interpretation of the law and fully falls within their powers of prosecutorial discretion.

Judge Hanen repeatedly complains that DACA provides its recipients with lawful presence and the ability to get a work permit.<sup>155</sup> He argues that if the DACA population is allowed to obtain deferred action through the DHS, then the agency could "theoretically" give every undocumented immigrant the same, through the same means.<sup>156</sup> However, this interpretation discounts the idea that deferred action was not created by DACA and the fact that it is a tool that the

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148. Andy Semotiuk, *Seven Ways To Get Your Green Card In The United States*, FORBES (July 30, 2021), <https://www.forbes.com/sites/andysemotiuk/2021/07/30/seven-ways-to-get-your-green-card-in-the-united-states/?sh=315229aa487c> [<https://perma.cc/R68Q-VSH5>].

149. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

150. *See generally* *Texas v. United States*, 549 F. Supp. 3d 572, 572 (S.D. Tex. 2021).

151. *Id.* at 614.

152. *Chevron*, 467 U.S. at 843.

153. *Texas*, 549 F. Supp. 3d at 615.

154. *Id.*

155. *Id.*

156. *Id.* at 616.

DHS has used before to apply to specific groups.<sup>157</sup> For example in 2009, the DHS issued a memorandum that granted deferred action to widows and widowers of U.S. citizens and their unmarried children under twenty-one for a period of two years, if they resided in the United States and had married their spouse less than two years prior to his or her death.<sup>158</sup> Additionally, because of the power of prosecutorial discretion, the DHS is able to provide lower priority individuals and groups with deferred action.<sup>159</sup> To argue that the Government would be able to provide all undocumented immigrants with deferred action and, therefore, legal status and a work permit is absurd. The DHS exclusively is meant to provide deferred action to those individuals that are of a low priority and risk.<sup>160</sup> Congress meant for the DHS to have prosecutorial discretion so that it could focus resources on priority cases.<sup>161</sup> Therefore, it would be unreasonable for the DHS and against the purpose of prosecutorial discretion to provide deferred action to groups of individuals with felonies or misdemeanors, or other higher priority persons. However, that is not what DHS is doing with DACA. Individuals that entered the United States in the way the DACA population did are considered low priority cases, because they lacked an intent to violate the law and are contributing members to society, which has been specifically stated by the DHS multiple times.<sup>162</sup>

The *Texas* memorandum also looks towards historical precedent arguing that DACA is not supported by such, as the previous granting of deferred action for groups have been from one legal status to another and that DACA does not do so.<sup>163</sup> However, this ignores the fact that literally any person who is “in the United States without authorization may apply for deferred action before any component of DHS.”<sup>164</sup> Judge Hanen also notes that these instances of group deferred action have come in response to events such as war, civil unrest, or natural disasters on a country-specific basis.<sup>165</sup> While deferred action has been

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157. Wadhia, *supra* note 109, at 263.

158. *DHS Establishes Interim Relief for Widows of U.S. Citizens*, DEP’T OF HOMELAND SEC. (June 9, 2009), <https://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens> [<https://perma.cc/7K7Z-TLGJ>].

159. *Frequently Asked Questions*, *supra* note 5.

160. *Id.*

161. *Id.*

162. See Memorandum from Doris Meissner, Comm’r of Immigr. & Naturalization Ser. to the Dep’t of Just.’s Reg’l Directors, Dist. Dirs., Chief Patrol Agents, and Reg’l & Dist. Counsel (Nov. 17, 2000), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Memo-Pros-Discretion.pdf> [<https://perma.cc/2V48-729Y>]; Memorandum from John Morton, Dir. of U.S. Immigr. & Customs Enf’t, to the All Field Off. Dirs., Special Agents in Charge, & Chief Counsel (July 17, 2011) <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/HL7P-CB87>].

163. *Texas v. United States*, 549 F. Supp. 3d 572, 617 (S.D. Tex. 2021).

164. *BEYOND DEPORTATION*, *supra* note 120, at 55.

165. *Texas*, 549 F. Supp. 3d at 617.

granted to those facing such issues,<sup>166</sup> it has also been provided to groups such as widows and widowers mentioned above<sup>167</sup> and spouses faced with an abusive partner.<sup>168</sup> DACA has been used in the past to address groups facing difficult life circumstances and there are similarities to such events and what the DACA population faces. Similarly to how refugees from war or civil unrest feel, many DACA recipients have “deep fears of return [to their country of birth] and the potential harms that they could face if they lost their protection and were deported.”<sup>169</sup> An overwhelming majority of respondents to a DACA survey noted that they were concerned for both themselves and their families in terms of being able to access health care, education, and food, as well as concerns over physical safety and the risk of homelessness.<sup>170</sup> The idea of being deported to a country where one may not know anyone and has few memories of, if any, is a terrifying reality that many DACA recipients would have to face if the program were to be rescinded. These concerns for the DACA population strongly correspond to those of other individuals that have received deferred action in the past, such as those noted by Judge Hanen.<sup>171</sup>

Even though the opinion says that DACA is not an interstitial Congressional action because the DREAM Act failed to pass,<sup>172</sup> DACA continues to be a program in place to protect a low priority and vulnerable group before a permanent fix is issued, which the Biden Administration has recognized.<sup>173</sup> Additionally, the Biden Administration has continued to push for a more permanent solution for these individuals, specifically in the form of the passing of the American Dream and Promise Act.<sup>174</sup> If passed, this bill would provide certain undocumented citizens, including many DACA recipients, with the ability to achieve permanent resident status if they meet certain requirements.<sup>175</sup> Therefore, the DACA program is still arguably an interstitial action, awaiting for continuing immigration reform to be passed by Congress, which the Biden Administration is strongly supporting.

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166. BEYOND DEPORTATION, *supra* note 120, at 56–57.

167. *Id.* at 57.

168. *Id.* at 58–59.

169. Tom K. Wong, et al., *DACA Recipients’ Livelihoods, Families, and Sense of Security Are at Stake This November*, CTR. FOR AM. PROGRESS (Sept. 19, 2019), <https://www.americanprogress.org/article/daca-recipients-livelihoods-families-sense-security-stake-november/> [<https://perma.cc/A4CU-UHHD>].

170. *Id.* at 2.

171. *Texas v. United States*, 549 F. Supp. 3d 572, 617 (S.D. Tex. 2021).

172. *Id.* at 618.

173. *Statement by President Joe Biden on DACA and Legislation for Dreamers*, *supra* note 99.

174. *Id.*; see also American Dream and Promise Act of 2021, H.R. 6, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/6> [<https://perma.cc/33VB-H9X8>].

175. American Dream and Promise Act of 2021, H.R. 6, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/6> [<https://perma.cc/33VB-H9X8>].

Finally, Judge Hanen's concerns that allowing DACA recipients to work would take away jobs from citizens is easily rebuffed by the benefits DACA has on the economy.<sup>176</sup> While DACA recipients themselves have been able to greatly benefit from the implementation of the program,<sup>177</sup> there has been a positive impact on the American public in general, including important and significant economic effects. It was found that over 75% of employed DACA recipients had jobs that fell under the DHS's criteria for "essential" jobs, including healthcare workers, educators, and jobs on the food supply chain that make sure Americans have food on their tables.<sup>178</sup> DACA has allowed individuals to obtain higher education, purchase cars and homes, and earn higher wages, which all results in more money going into the American economy through higher purchasing power and higher taxes paid.<sup>179</sup> Additionally, the DACA population is important in their local communities, as DACA households have about \$25.3 billion in spending power, own 68,000 homes, and, of course, pay federal, state, and local taxes, which are higher due to the work advancement opportunities that the program has provided them.<sup>180</sup> DACA recipients have also started businesses at a higher rate than the general American population, which also employ other individuals, providing more jobs in the economy.<sup>181</sup> It is because of DACA that all of these benefits are able to exist and if the program was rescinded, there could be significant consequences, not just for DACA recipients, but for the general public and American economy as well.

Therefore, the implementation of DACA by the DHS passes both parts of the *Chevron* test, as Congress has never explicitly addressed the DACA population before and DACA is a reasonable use of the DHS's authority from Congress under prosecutorial discretion. In addition, DACA has immense benefits, not just for the recipients, but also for the American public and economy in general, which would be greatly impacted if the program was rescinded.

#### CONCLUSION

Judge Hanen's argument that DACA was not implemented properly under the APA is not a correct conclusion.<sup>182</sup> The DHS was not required to undergo

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176. *Texas*, 549 F. Supp. 3d at 610.

177. Wong, *supra* note 169 (providing detailed statistics demonstrating that DACA recipients have been able to improve their lives and the lives of their families due to DACA).

178. Nicole Prchal Svajlenka & Trinh Q. Truong, *The Demographic and Economic Impacts of DACA Recipients: Fall 2021 Edition*, CTR. FOR AM. PROGRESS (Nov. 24, 2021), <https://www.americanprogress.org/article/the-demographic-and-economic-impacts-of-daca-recipients-fall-2021-edition/> [<https://perma.cc/Q76Q-WLEK>].

179. *Id.*

180. *Id.*

181. Wong, *supra* note 169.

182. *See Texas v. United States*, 549 F. Supp. 3d 572, 597 (S.D. Tex. 2021).

notice and comment rulemaking because DACA is a general statement of policy, as it is an act of prosecutorial discretion, simply providing guidelines to the DHS as to who can receive deferred action. More importantly, even though there are no actual procedural issues, the Biden Administration has already taken steps to remedy these complaints by opening a notice and comment period for a proposed DACA promulgation.<sup>183</sup> DACA is a reasonable interpretation of the DHS's authority to use prosecutorial discretion to prioritize resources and personnel to immigration cases and individuals that are of higher concern. While Congress may have spoken on the issue of the general undocumented immigrant population in the country, it has not spoken directly on young undocumented individuals that came over when they were minors and had no control over their situation. Additionally, providing the DACA population with work permits does not go against Congress's wishes, as they have provided deferred action and work opportunities to other undocumented groups and it not only helps the individuals, but the general American public and economy as well. Therefore, the DHS properly implemented the DACA program, and it was not unconstitutional, contrary to Judge Hanen's opinion and holding.

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183. *Id.*

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