

# Status of Current DACA Litigation

Last updated FEBRUARY 28, 2018

On September 5, 2017, U.S. Attorney General Jeff Sessions announced that the government was terminating the Deferred Action for Childhood Arrivals, or DACA, program. That same day, then-Acting Secretary of Homeland Security Elaine Duke issued a [memorandum](#) directing the U.S. Department of Homeland Security to reject all initial DACA applications and associated applications for work authorization received after Sep. 5, 2017; to reject all renewal applications after Oct. 5, 2017, from current DACA recipients whose status expires between Sep. 5, 2017, and March 5, 2018; and to reject all other renewal applications from DACA recipients.<sup>1</sup>

In the days and months following, multiple lawsuits challenging the Trump administration's actions to terminate DACA were filed across the country. Two courts have since enjoined, or halted, the government's termination of DACA and required U.S. Citizenship and Immigration Services (USCIS) to continue accepting DACA applications from individuals who have previously had DACA. This update summarizes the current status primarily of lawsuits filed in federal court in California, collectively known as *Regents of the University of California v. Department of Homeland Security*, and two lawsuits filed in federal court in New York, *Batalla Vidal v. Nielsen* and *State of New York v. Donald Trump*.

## Regents of the University of California, et al. v. Department of Homeland Security, et al.<sup>2</sup>

On January 9, 2018, Judge William Alsup of the U.S. District Court for the Northern District of California issued a [preliminary injunction](#) requiring the federal government to maintain the Deferred Action for Childhood Arrivals, or DACA, program on a nationwide basis by allowing individuals to submit applications to renew their enrollment in DACA, subject to a few exceptions.<sup>3</sup> Generally, parties objecting to a district court's order must wait

<sup>1</sup> Memorandum from Elaine C. Duke, Acting Secretary, U.S. Dept. of Homeland Security, to James W. McCament, Acting Director, U.S. Citizenship and Immigration Services, et al., re. Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," Sep. 5, 2017, <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

<sup>2</sup> The California litigation includes five cases that were consolidated before Judge William Alsup in the Northern District of California: *Regents of the University of California, et al. v. Dep't of Homeland Security, et al.*, No. 3:17-cv-05211; *State of California, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 3:17-cv-05235; *City of San Jose v. Donald J. Trump, et al.*, No. 3:17-cv-05380; *Garcia, et al. v. United States of America, et al.*, No. 3:17-cv-05380; and *Cty. of Santa Clara, et al. v. Donald J. Trump, et al.*, No. 3:17-cv-05813.

<sup>3</sup> The preliminary injunction is available at [www.nilc.org/wp-content/uploads/2018/01/Regents-v-DHS-prelim-injunction-2018-01-09.pdf](http://www.nilc.org/wp-content/uploads/2018/01/Regents-v-DHS-prelim-injunction-2018-01-09.pdf). For more information on it and its implications for DACA recipients, see FAQ: *USCIS Is Accepting DACA Renewal Applications* (NILC, last revised Jan. 16, 2018), [www.nilc.org/faq-](http://www.nilc.org/faq-)

LOS ANGELES (Headquarters)  
3450 Wilshire Blvd. #108 – 62  
Los Angeles, CA 90010  
213 639-3900  
213 639-3911 fax



WASHINGTON, DC  
1121 14th Street, NW, Ste. 200  
Washington, DC 20005  
202 216-0261  
202 216-0266 fax

until the litigation is completed before asking the court of appeals for review.<sup>4</sup> However, a preliminary injunction order is immediately appealable (a process referred to as an “interlocutory appeal”), meaning that the government can ask the Ninth Circuit Court of Appeals to review Judge Alsup’s order immediately.<sup>5</sup>

***Supreme Court denies government’s request for unusual “cert. before judgment” review.*** In this case, however, the government took the unusual step of seeking to skip review in the Ninth Circuit and instead appeal directly to the U.S. Supreme Court through a rarely used legal mechanism called “[cert. before judgment](#).”<sup>6</sup> The government filed its request, or [petition for certiorari](#), with the Supreme Court on Jan. 18, 2018.<sup>7</sup> This kind of request is rarely granted, as Supreme Court rules warn that the Court will grant this kind of early review only “upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.”<sup>8</sup>

On Feb. 26, 2018, the Supreme Court [announced that it had “denied cert.”](#), meaning that it declined to hear the government’s direct appeal from the district court. Therefore, the case will return to the lower courts, and appeals will be heard first by the Ninth Circuit Court of Appeals.<sup>9</sup> In other words, although the Supreme Court could hear the case eventually, the appeals process will be the normal one, beginning with the court of appeals.

***Government continues to accept DACA renewal applications.*** Although the government could have sought a stay of Judge Alsup’s preliminary injunction — i.e., while it could have asked the judge or the Supreme Court to allow the government to continue with its process of shutting down DACA<sup>10</sup> — it did not do so. Therefore, the government must continue to accept DACA renewal applications in accordance with the preliminary injunction.

***Other orders subject to appeal.*** In the order issued on Jan. 9, Judge Alsup also ruled against the government on its claim that the decision to terminate DACA was unreviewable by the courts under the Administrative Procedure Act, because the decision was within the agency’s discretion, and under the Immigration and Nationality Act. On Jan. 12, Alsup issued an additional order that addresses the issue of whether the plaintiffs had pled enough facts to support additional legal claims. Usually, these kinds of intermediate

---

[uscis-accepting-daca-renewal-applications/](#); *USCIS and DACA Renewal Applications: What You Need to Know* (NILC, Jan. 14, 2018), [www.nilc.org/five-things-know-latest-uscis-announcement/](#); and *Alert: Court Orders the Dept. of Homeland Security to Allow Individuals with DACA to Apply to Renew It* (NILC, Jan. 10, 2018), [www.nilc.org/daca-preliminary-injunction-regents-v-dhs/](#).

<sup>4</sup> See 28 U.S.C. § 1291, <https://www.law.cornell.edu/uscode/text/28/1291>.

<sup>5</sup> See 28 U.S.C. § 1292(a), <https://www.law.cornell.edu/uscode/text/28/1292>.

<sup>6</sup> The petition for certiorari before judgment was filed pursuant to 28 U.S.C. § 2101(e), <https://www.law.cornell.edu/uscode/text/28/2101>, and 28 U.S.C. § 1254(1), <https://www.law.cornell.edu/uscode/text/28/1254>. For an explanation of “cert. before judgment,” see Kevin Russell, “Overview of Supreme Court’s Cert. Before Judgment Practice,” *SCOTUSblog*, Feb. 9, 2011, [www.scotusblog.com/2011/02/overview-of-supreme-court-s-cert-before-judgment-practice/](http://www.scotusblog.com/2011/02/overview-of-supreme-court-s-cert-before-judgment-practice/).

<sup>7</sup> Petition for writ of certiorari before judgment: [https://www.supremecourt.gov/DocketPDF/17/17-1003/28381/20180119100226711\\_DACA%20Rule%2011%20Petition.pdf](https://www.supremecourt.gov/DocketPDF/17/17-1003/28381/20180119100226711_DACA%20Rule%2011%20Petition.pdf).

<sup>8</sup> See Supreme Court Rule 11, <https://www.supremecourt.gov/filingandrules/2017RulesoftheCourt.pdf>.

<sup>9</sup> See Supreme Court, Order List (Feb. 26, 2018), [https://www.supremecourt.gov/orders/courtorders/022618zor\\_j426.pdf](https://www.supremecourt.gov/orders/courtorders/022618zor_j426.pdf).

<sup>10</sup> See 28 U.S.C. § 2101(f), <https://www.law.cornell.edu/uscode/text/28/2101>.

orders in a case would not be directly appealable to the court of appeals, but Judge Alsup also granted the government's request to appeal these portions of his January 9 decision and his January 12 decision to the Ninth Circuit through a special appeal mechanism that allows immediate appeals of intermediary orders.<sup>11</sup> The government has filed its opening brief on February 13, 2018, and briefing should be complete by April or May 2018. A hearing date has not yet been set.

### **Batalla Vidal, et al. v. Nielsen, et al., and State of New York, et al. v. Trump, et al.**<sup>12</sup>

On Feb. 13, 2018, a U.S. district court in Brooklyn, New York, issued a second [preliminary injunction](#) requiring USCIS to accept DACA applications from people who have had DACA previously.<sup>13</sup> The preliminary injunction was the same in scope as the order from the U.S. district court in California. The court in New York held that there was a substantial likelihood that the plaintiffs would prevail on their claim that the Trump administration ended DACA in a way that was arbitrary and capricious, and therefore unlawful.

The order was issued in two lawsuits currently pending before Judge Nicholas Garaufis. The *Batalla Vidal* case was brought by six New Yorkers who had benefited from DACA and stood up to challenge the administration's decision to end the program. The plaintiffs in that case are represented by NILC, along with the Jerome N. Frank Legal Services Organization at Yale Law School and Make the Road New York. The *State of New York* case was brought by a coalition of seventeen attorneys general.<sup>14</sup>

The government has appealed the decision to the Second Circuit Court of Appeals. Briefing and hearing dates have not yet been set.

### **Other Litigation**

In addition to the consolidated cases brought in California and New York, other court cases challenging the termination of DACA include:

- *CASA de Maryland, et al. v. Dept. of Homeland Security, et al.*, 8:17-cv-02942 (D.Md.)
- *NAACP v. Trump, et al.*, 1:17-cv-01907 (D.D.C.)
- *Trustees of Princeton, et al. v. United States of America et al.*, 1:17-cv-02325 (D.D.C.)

<sup>11</sup> See 28 U.S.C. § 1292(b), <https://www.law.cornell.edu/uscode/text/28/1292>.

<sup>12</sup> *Batalla Vidal, et al. v. Nielsen, et al.*, 1:16-cv-04756 (E.D.N.Y.); *State of New York, et al. v. Trump, et al.*, 1:17-cv-05228 (E.D.N.Y.)

<sup>13</sup> See <https://www.nilc.org/wp-content/uploads/2018/02/Batalla-Vidal-v-Nielsen-updated-pi-order-2018-02-13.pdf>.

<sup>14</sup> The lawsuit is led by New York Attorney General Schneiderman, Massachusetts Attorney General Maura Healey, and Washington Attorney General Bob Ferguson, and filed by attorneys general from New York, Massachusetts, Washington, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia. See "A.G. Schneiderman Files Lawsuit to Protect Dreamers and Preserve DACA," New York State Office of the Attorney General press release, Sep. 6, 2017, <https://ag.ny.gov/press-release/ag-schneiderman-files-lawsuit-protect-dreamers-and-preserve-daca>, and "AG Coffman Statement on Governor Joining Democrat DACA Lawsuit," Colorado Attorney General's Office press release, Sep. 13, 2017, <https://coag.gov/press-room/press-releases/09-13-17-0>.

- Park et al. v. Sessions, et al., 1:17-cv-01332 (E.D. Va.)

These cases are proceeding in the U.S. district courts in which they were filed. For example, in the District Court for the District of Columbia, Judge John D. Bates will hear argument on March 14, 2018, about whether to grant a preliminary injunction in the *Trustees of Princeton* case.

Judge Bates — or other courts hearing similar challenges around the country — could issue rulings that are different from the previous two injunctions. They could, for example, expand the scope of the injunction (for example, by requiring U.S. Citizenship and Immigration Services to accept DACA applications from individuals who have never previously received DACA) or grant an injunction for different legal reasons.