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# REFLECTING ON THE SUPREME COURT DACA DECISION IN COMPARISON TO TRUMP'S IMMIGRATION BANS

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On June 18, 2020, the Supreme Court in Department of Homeland Security v. Regents of the University of California ruled that Elaine C. Duke, then-Acting Secretary of the Department of Homeland Security (DHS), violated the Administrative Procedure Act (APA) in 2017 when she rescinded the Deferred Action for Childhood Arrivals (DACA) program, in place since 2012, at the direction of the Attorney General. DACA granted certain people who entered the United States as children the ability to apply for a two-year "forbearance of removal" and to be eligible for work authorization and various benefits. There are approximately 700,000 DACA recipients.

The Court noted in its decision that the Department of Homeland Security may rescind DACA and that the dispute instead was primarily about the procedure the agency followed in doing so. The government had argued that its decision was unreviewable, but the Court disagreed. Duke's brief explanation -"Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated"- was so inadequate as to make the decision "arbitrary and capricious," Chief Justice Roberts said. While DHS Secretary Nielsen came up with a more elaborate explanation nine months later in response to an unfavorable Federal District Court ruling, Roberts said that it was a "foundational principle of administrative law" that an agency, once challenged, has to defend its action on the grounds it initially invoked, not on an after-the-fact rationalization, unless it wants to restart from scratch the process of arriving at a decision.

For several reasons, the Court found the rescission of DACA to be "arbitrary

and capricious," noting that "e do not decide whether DACA or its rescission are sound policies," but only "whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. Here 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." The appropriate recourse, the Court found, was "to remand to DHS so that it may consider the problem anew."

USCIS subsequently issued a statement calling DACA recipients "illegal aliens" and asserting that the Court's decision "has no basis in law and merely delays the President's lawful ability to end the illegal amnesty program."

While the Trump administration may think it is easy to rescind DACA again if it provides a better rationale, there is more to Chief Justice Roberts' opinion than meets the eye from page 24 onward as he faults the administration for not factoring reliance interests. DACA recipients have enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance on the DACA program. The consequences of the rescission would "radiate outward" to DACA recipients' families, including their 200,000 US citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. Justice Roberts also cited a Brief for 143 Businesses as Amici Curiae, which estimated that hiring and training replacements would cost employers $6.3 billion. In addition, excluding DACA recipients from the lawful labor force may result in the loss of $215 billion in economic activity and an associated $60 billion in federal tax revenue over the next ten years. Trump will be smacked down again as justifying the rescission with such heavy duty reliance interests will be a tall order for a xenophobe like him.

It is not hypocritical to support President Obama's executive action, DACA, while objecting to President Trump's executive actions. Indeed, a Presidential Proclamation is expected imminently to suspend the entry of many nonimmigrant workers, possibly until the end of the year. This comes closely following the heels of Trump's Presidential Proclamation that took effect April 23, 2020 suspending the entry of many immigrants outside the United States for 60 days, with some exceptions. I have fiercely criticized Trump's use of INA 212(f) to rewrite the INA. Trump's proclamations restrict immigration and cause great hardship to both immigrants and American families and businesses. The impending ban on suspending H-1B visas entries and scrapping H-4 work

authorization, have long been cherished by xenophobes in the Trump administration, under the big lie of speeding economic recovery during the pandemic crisis. Deferred action, or forbearance, under DACA is qualitatively different from Trump using INA 212(f) to preclude entire preference categories of immigrants, or entire countries' worth of immigrants, as Trump has done. Deferred action is not unprecedented in the way that barring whole countries or whole preference categories under 212(f) is. Trump's abuse of INA 212(f) to rewrite the INA is based on his hostility towards immigration and immigrants. It must be opposed, and notwithstanding Trump v. Hawaii, which upheld the Muslim ban, his subsequent bans are distinguishable as they conflict with provisions of the INA that have been crafted and enacted by Congress, in addition to being outright hostile and cruel.

Perhaps, the Supreme Court's emphasis on reliance interests would be a strong ground to challenge Trump's next suspension on nonimmigrant visa entrants. When an agency changes course, as DHS did with the DACA rescission, the Supreme Court stated that it must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" Encino Motorcars, LLC v. Navarro, 579 U. S. ___, ___ (2016) (quoting Fox Television, 556 U. S., at 515). "It would be arbitrary and capricious to ignore such matters." Id., at 515. The Duke memorandum did exactly that, and Trump's next ban will also do that.