

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

NURIMARO PARK and)
JONATHAN ALVARENGA RECINOS,)

Plaintiffs,)

v.)

Civ. No.:

JEFFERSON BEAUREGARD SESSIONS III,)
in his official capacity as Attorney General of)
the United States; ELAINE C. DUKE, in her)
official capacity as Acting Secretary of the)
Department of Homeland Security;)
UNITED STATES CITIZENSHIP AND)
IMMIGRATION SERVICES; UNITED)
STATES DEPARTMENT OF HOMELAND)
SECURITY,)

Defendants.)
_____)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. For more than five years, undocumented immigrants brought to the United States at a young age who fulfilled various other requirements, including an extensive background check, could request a form of deferred action called Deferred Action for Childhood Arrivals (“DACA”) that provided them with employment authorization and freedom from fear of arrest and deportation. More than 12,000 immigrant youth in Virginia, and more than 700,000 immigrant youth nationwide, came to rely on DACA and built their lives around the promises and expectations that the program created.

2. One express feature of the DACA program, published on the relevant U.S. government website, was that a DACA recipient could request renewal of their DACA up to one

year after it expired with no negative consequences to the approvability of that renewal request. Many DACA recipients relied on this feature, and would file their renewal requests after their previous DACA had already expired.

3. Suddenly and without any advanced public notice, on September 5, 2017, this changed. The Attorney General and Secretary of Homeland Security announced that the program would be entirely phased out over a two-and-a-half-year period. One change, however, was implemented immediately and without forewarning: those DACA recipients whose DACA had already expired prior to September 5, 2017 would no longer be allowed to request DACA renewal ever again. Because of this sudden and surprising change, thousands of DACA recipients in this situation unfairly lost their opportunity to renew their DACA for one more two-year period prior to the program's phase-out.

4. This suit arises out of violations of the Due Process Clause, the Administrative Procedure Act, and the Equal Protection Clause due to abrupt and unannounced material changes to the Deferred Action for Childhood Arrivals policy ("DACA"). Plaintiffs Nurimaro Park and Jonathan Alvarenga Recinos, both DACA beneficiaries whose DACA had expired not long before September 5, 2017, were abruptly and without notice denied the right to request renewal of their DACA and consequently lost their ability to work lawfully in the United States and the freedom from fear of arrest and deportation by the Department of Homeland Security.

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201(a).

6. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b)(2) and 1391(e)(1). A substantial part of the events or omissions giving rise to this action occurred in

this district, and Plaintiffs reside in this district. The defendants in this civil action are agencies of the United States or cabinet secretaries of the United States.

PARTIES

7. Plaintiff Nurimaro Park is a 26-year-old resident of Fairfax, Virginia. He was brought to the United States from South Korea at the age of nine.

8. Plaintiff Jonathan Alvarenga Recinos is a 19-year-old resident of Alexandria, Virginia. He was brought to the United States from El Salvador at the age of seven.

9. Defendant Jefferson Beauregard Sessions III is the Attorney General of the United States. He announced the sudden changes to the DACA program that abruptly denied Plaintiffs their right to request renewal, and authored the legal memorandum that purported to give the basis for these changes. He is sued in his official capacity.

10. Defendant Elaine C. Duke is the Acting Secretary of Homeland Security. She is responsible for overseeing the Department of Homeland Security and is the author of the September 5, 2017 Memorandum on the Rescission of DACA that suddenly denied Plaintiffs their right to request renewal. She is sued in her official capacity.

11. Defendant United States Department of Homeland Security (“DHS”) is a department of the executive branch of the United States Government, and is an agency within the meaning of 5 U.S.C. § 552(f)(1).

12. Defendant United States Citizenship and Immigration Services (“USCIS”) is the sub-agency of DHS that is responsible for administering DACA.

FACTS

Deferred Action for Childhood Arrivals Generally

13. This action arises out of the sudden end to constitutionally protected property and liberty interests based in the Deferred Action for Childhood Arrivals policy (“DACA”), which was announced on June 15, 2012 to “ensure that enforcement resources [were] not expended on [] low priority cases.” By this policy, the Department of Homeland Security (“DHS”) set forth how immigration laws would be enforced as they applied to young adults who first entered the United States as children.

14. In the June 15, 2012 memorandum, “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children” (“2012 DACA Memorandum”), DHS explained that the policy would apply to those individuals who met the following criteria:

- a. came to the United States under the age of sixteen;
- b. resided in the United States on June 15, 2012, and had continuously resided in the United States for at least five years prior to June 15, 2012;
- c. was in school, had graduated from high school, had obtained a general education development certificate, or was an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- d. had not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety; and
- e. were not above the age of thirty.

15. The 2012 DACA Memorandum describes the appropriate measures to be taken regarding individuals who meet the above criteria and fall into one of three categories:

- a. Those who are encountered by US Immigrations and Customs Enforcement (“ICE”), US Customs and Border Protection (“CBP”), or US Citizenship and Immigration Services (“USCIS”);

b. Those who are in removal proceedings but not yet subject to a final order of removal; and

c. Those who are not in removal proceedings and who pass a background check.

The 2012 DACA Memorandum directed that the government “should” exercise prosecutorial discretion to defer action for two years, subject to renewal, as to those individuals who met the eligibility requirements and who fell into one of the three categories listed above.

16. In order to receive DACA, individuals were required to submit forms I-821D, I-765, and I-765WS, provide extensive documentation proving that they met the eligibility criteria laid out above, pay a \$495 filing fee, and complete a background check.

17. After two years, individuals could request a renewal of their DACA. Renewal requests used the same government forms and cost the same fee, but required a much lower evidentiary standard in terms of the documentation applicants needed to provide.

18. DACA’s official rules and requirements were made known to the public by means of a webpage on the website of defendant USCIS. A copy of that webpage is attached hereto as Exhibit A, and its contents are incorporated herein by reference. That webpage stated:

Can I file a renewal request outside the recommended filing period of 150 days to 120 days before my current DACA expires?

[. . .]

If you file after your most recent DACA period expired, but within one year of its expiration, you may submit a request to renew your DACA.

See Exh. A at p.16 ¶ 50.

19. A grant of deferred action brought with it freedom from fear of arrest and deportation by DHS. This became especially important in an era in which ICE officers have been formally instructed to “take enforcement action against all removable aliens encountered in

the course of their duties.”¹ An individual with DACA cannot be arrested by DHS nor removed from the United States without due process and a formal termination of that individual’s DACA.

20. A grant of deferred action also brought with it a legitimate claim of entitlement to a work permit, pursuant to 8 C.F.R. § 274a(a)(11) and (c)(14); to certain public benefits (including Social Security, disability benefits, and Medicare), pursuant 8 U.S.C. § 1611(b)(3); and, in Virginia, to a driver’s license, in-state tuition at public universities, and unemployment insurance, pursuant to Code of Va. §§ 46.2-328.1(B)(v); 23.1-503(D); 60.2-617(A).

21. By meaningfully limiting the discretion of immigration officials and directing them that they “should” grant deferred action to eligible individuals, the 2012 DACA Memorandum thus gave rise to constitutionally protected liberty and property interests.

Rescission of DACA

22. On September 5, 2017, without notice, Defendants Sessions and Duke announced that the DACA program would be phased out, but that applicants whose DACA was set to expire between September 5, 2017 and March 5, 2018 would be allowed to request one final renewal, and thus enjoy two more years of DACA and its associated benefits.

23. Defendant Duke promulgated her directive to rescind DACA, and deny any opportunity to renew DACA to individuals with an expired DACA, without any explanation and without first publishing it in the Federal Register or any other official government publication, and without otherwise providing any public notice or opportunity for public input.

24. The directives were announced by means of a press statement from Defendant Sessions on September 5, 2017, *available at* <https://www.justice.gov/opa/speech/attorney->

¹ Matthew T. Albence, Memorandum to All ICE Enforcement and Removal Operations Employees (Feb. 21, 2017), *available at* <https://www.documentcloud.org/documents/3889695-doc00801320170630123624.html>.

general-sessions-delivers-remarks-daca (“Defendant Sessions’ Press Statement”); and a memorandum from Defendant Duke, *available at* <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> (“Defendant Duke’s DACA Rescission Memorandum”).

25. In Defendant Sessions’ Press Statement and in Defendant Duke’s DACA Rescission Memorandum, they justified the rescission based on the fact that a *different* deferred action program entitled Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) had been enjoined in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015). Defendants Sessions and Duke went on to say that the DACA program was similarly unlawful, but they cited to no court opinion or other binding legal precedent and failed to acknowledge that on November 19, 2014, the White House Office of Legal Counsel had issued an opinion stating that DACA was lawful, *available at* <https://www.justice.gov/file/179206/download>.

26. In none of the documents purporting to set forth the reasons for the cancellation of DACA did any Defendant explain why USCIS would no longer accept renewal applications for those individuals whose DACA had expired prior to September 5, 2017. Nor did any defendant explain why, if DACA was purportedly unlawful, USCIS would no longer process a renewal application for an individual whose DACA had expired on September 4, 2017; but it *would* continue to process a renewal application for an individual whose DACA had expired on September 6, *even if that renewal was not filed until September 7 or thereafter*, for up to four more weeks.

27. Before this sudden and unannounced change in policy, individuals whose DACA had expired reasonably expected that they could file a renewal request up to one year after its expiration, as explained in the rules publicized by USCIS. As a consequence, those whose

DACA expired prior to September 5, 2017 and were then forever barred from applying for a renewal were severely prejudiced by the fact that they had no notice of the abrupt change in policy, and had no opportunity to submit their renewal application before losing the property and liberty interests tied to their DACA.

28. Defendants failed to put forth any justification, much less a rational justification, for allowing DACA recipients whose DACA expired between September 5, 2017 and March 5, 2018 to renew their DACA but not allowing individuals whose DACA expired prior to September 5, 2017 to renew their DACA.

Plaintiff Nurimaro Park

29. Plaintiff Nurimaro Park is a 26 year-old resident of Fairfax, Virginia. He was brought to the United States from South Korea when he was nine years old. Mr. Park has lived in Northern Virginia since coming to the United States.

30. In the summer of 2012, Mr. Park learned from the news about the Deferred Action for Childhood Arrivals program. On his own, Mr. Park began researching and gathering the materials he would need to apply for the program. Mr. Park submitted his application on November 19, 2012, and received his first DACA on April 19, 2013, with an expiration date of April 18, 2015.

31. Due to financial reasons, Mr. Park was unable to submit his renewal application until April 6, 2015. Although his DACA lapsed while Mr. Park was awaiting renewal, USCIS ultimately approved it without incident on May 15, 2015.

32. Before receiving DACA, Mr. Park had to live carefully. All of his actions were measured against the risk of being detained. Even just driving carried a risk, as he could not obtain a driver's license. Mr. Park lived with the constant threat of deportation.

33. Receiving employment authorization and a driver's license through DACA allowed Mr. Park flexibility to work as a tutor and generate his own income after graduation. More importantly, it allowed him the freedom and peace of mind of living out a stable daily routine knowing he was not at risk for detention or deportation.

34. On May 14, 2017, Mr. Park's second two-year period of DACA expired. At that time, Mr. Park was experiencing a slow period, as is typical for tutors in the summer months when school is out. As a result, he could not afford the \$495 fee to renew his DACA. Knowing that his application could be processed up to one year after his previous DACA deferred action expired, however, Mr. Park continued to set aside a portion of his earnings, confident he would not have to wait long to submit the application.

35. Not long after September 5, 2017, Mr. Park learned that Defendants had announced a phase-out of the DACA program. But because his DACA had expired prior to that date, for him the rescission was effective immediately. Prior to that announcement, Mr. Park had no notice that he would not be able to renew as he had previously done, and no opportunity to plan accordingly. Had Defendants advised him of their plans to change the rules of the DACA program prior to changing those rules, Mr. Park would have been able to plan accordingly and borrow \$495 to make sure he renewed prior to any announced deadline.

36. Since losing his ability to renew DACA, Mr. Park is again at constant risk of being deported and losing his job. Losing the ability to renew DACA has also represented a loss of opportunity for Mr. Park, as going to college is no longer an option for him.

Plaintiff Jonathan Alvarenga Recinos

37. Plaintiff Jonathan Alvarenga Recinos is a 19-year-old resident of Alexandria, Virginia. He was brought to the United States from El Salvador at the age of seven.

38. When he first arrived in the United States, Mr. Alvarenga Recinos lived in Springfield, Virginia. A few months later Mr. Alvarenga Recinos moved to Alexandria, Virginia, where he has resided ever since.

39. In approximately March 2013, Mr. Alvarenga Recinos went to Just Neighbors, a nonprofit in Falls Church, Virginia, to obtain assistance in applying for DACA. On or about June 20, 2013, USCIS approved his DACA application. His initial DACA request was granted for the time period of June 20, 2013, to June 19, 2015.

40. Mr. Alvarenga Recinos returned to Just Neighbors in June 2015 for assistance in preparing his first DACA renewal request. He filed his first renewal request on or about June 23, 2015.

41. Because USCIS had a policy to accept renewal requests from individuals with already-expired DACA deferred action, USCIS accepted and approved Mr. Alvarenga Recinos's 2015 request for renewal without incident.

42. Mr. Alvarenga Recinos's DACA approval allowed him to begin working part-time while attending high school. He first worked as a sales associate at a shoe store, and later worked as a busboy, host, and food runner at a restaurant.

43. Before obtaining DACA, Mr. Alvarenga Recinos felt fearful and insecure due to his lack of immigration status. Obtaining DACA allowed him to live his life without fear of deportation and provided him the opportunity to seek out stable employment.

44. Mr. Alvarenga Recinos graduated from high school in June 2017 and sought full time employment to pay for his expenses as well as assist his family. He was also considering furthering his education by taking classes at Northern Virginia Community College.

45. In early August 2017, Mr. Alvarenga Recinos went to a “notario”² for assistance in renewing his DACA for a second time. Mr. Alvarenga Recinos went to the notario with his mother because it was closer to their home than Just Neighbors, the nonprofit organization that had previously assisted him with his application. His DACA was set to expire on August 30, 2017.

46. On information and belief, USCIS received Mr. Alvarenga Recinos’s application for his second DACA renewal on August 14, 2017. Two days later, USCIS rejected his application by means of a letter informing him that the paperwork he had submitted (and for which he had paid the notario) was on an outdated version of the application form.

47. Mr. Alvarenga Recinos promptly returned to the same notario to insist that the notario correct his DACA renewal application.

48. Mr. Alvarenga Recinos’s DACA renewal application was resubmitted to USCIS by U.S. mail in late August 2017.

49. On information and belief, USCIS received Mr. Alvarenga Recinos’s application for his second DACA renewal on or just days after September 6, 2017.

50. By notice dated September 20, 2017, USCIS informed Mr. Alvarenga Recinos that his DACA renewal application was rejected because his DACA had already expired before September 4, 2017.

51. Losing DACA has had a significant impact on Mr. Alvarenga Recinos. His feelings of insecurity have returned, and his options for stable full-time employment have been

² A “notario” is a notary public who provides immigration legal services, even though he is not lawfully permitted or licensed to provide such services. Notarios frequently advertise services for immigration assistance and many immigrants are unaware that notarios are not licensed to complete legal work.

drastically reduced. Further, Mr. Alvarenga Recinos does not think he will be able to pursue his education at Northern Virginia Community College without DACA.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

Procedural Due Process

(All Defendants)

52. Plaintiffs incorporate by reference the allegations set forth above.

53. The Due Process clause of the Constitution protects all persons who are physically present in the United States, and dictates that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”

54. DACA conferred legitimate claims of entitlement to benefits including a driver’s license, employment authorization, and federal public benefits, thus giving rise to protected property interests.

55. DACA prevented individuals from being arrested and deported, thus giving rise to a protected liberty interest.

56. Based on the Defendants’ administration of DACA until September 5, 2017, Plaintiffs had a reasonable expectation of entitlement to the benefits of the DACA program as long as they met certain criteria.

57. By means of their actions as set forth herein, and their decision not to allow Plaintiffs to renew their DACA for no reason other than the fact that their DACA expired before September 5, 2017, Defendants have deprived Plaintiffs of their constitutionally protected property and liberty interests, in violation of the Due Process clause, to Plaintiffs’ injury. Such injury could be alleviated were the Defendants to allow Plaintiffs to request renewal of their DACA one more time.

SECOND CAUSE OF ACTION
Administrative Procedure Act, 5 U.S.C. § 706(2)(A):
Arbitrary and Capricious Agency Action
(All Defendants Except Defendant Sessions)

58. Plaintiffs incorporate by reference the allegations set forth above.

59. Defendants DHS and USCIS are agencies subject to the Administrative Procedure Act, 5 U.S.C. §§ 551(1), 703.

60. The rescission of DACA is a final agency action subject to judicial review because it is a legislative rule. *See* 5 U.S.C. § 704; *see also National Min. Ass’n. v. McCarthy*, 758 F.3d 243, 251 (explaining “[a]n agency action that purports to impose legally binding obligations or prohibitions on regulated parties . . . is a legislative rule.”).

61. Agency action must not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

62. By means of their actions as set forth herein, and their decision not to allow Plaintiffs to renew their DACA for no reason other than the fact that their DACA expired before September 5, 2017, Defendants have acted arbitrarily and capriciously, in violation of the Administrative Procedure Act, to Plaintiffs’ injury. Such injury could be alleviated were the Defendants to allow Plaintiffs to request renewal of their DACA one more time.

THIRD CAUSE OF ACTION
Administrative Procedure Act, 5 U.S.C. § 553(b), (d) and 5 U.S.C. § 552(a)(1):
Rulemaking without notice and comment
(All Defendants Except Defendant Sessions)

63. Plaintiffs incorporate by reference the allegations set forth above.

64. Defendants DHS and USCIS are agencies subject to the rulemaking provisions under the Administrative Procedure Act. *See* 5 U.S.C. §§ 551, 553, 703.

65. The rescission of DACA significantly impacted Plaintiffs' interests in property rights and liberty, and thus, Defendants' rescission was subject to notice and comment rulemaking.

66. Defendants promulgated the directive to rescind DACA and deny any opportunity to renew DACA to individuals with an expired DACA status without first publishing in the Federal Register, in violation of the Administrative Procedure Act, 5 U.S.C. §553.

67. Defendants promulgated and implemented significant, substantive changes to DACA renewal eligibility without first publishing the proposed changes 30 days before its effective date in violation of 5 U.S.C. §553(d). By means of their actions as set forth herein, and their failure to provide Plaintiffs notice or the opportunity to comment, Defendants have violated the Administrative Procedure Act, to Plaintiff's injury. Such injury could be alleviated were the Defendants ordered to provide notice and the opportunity to comment prior to implementing such a change in the rules of an important government program.

FOURTH CAUSE OF ACTION
Equal Protection

68. Plaintiffs incorporate by reference the allegations set forth above.

69. The Equal Protection clause of the Constitution protects all persons who are physically present in the United States, and dictates that government may not "deny to any person within its jurisdiction the equal protection of the laws." This requires that there be a rational basis for any government action that discriminates between two classes of people (where such classes are not suspect classes), and that such discrimination be rationally related to a legitimate government interest.

70. Defendants' actions as set forth herein discriminate between two classes of people: namely, the class of DACA beneficiaries whose DACA expired prior to September 5,

2017; and the class of DACA beneficiaries whose DACA expired on or after to September 5, 2017.

71. September 5, 2017 was an arbitrary and meaningless date, and there is no rational basis to discriminate between those two classes. No legitimate government interest is advanced by such discrimination, or if any legitimate government interest exists, it is not rationally related to such discrimination.

72. By means of their actions as set forth herein, and their discrimination between the class of DACA beneficiaries whose DACA expired prior to September 5, 2017 and the class of DACA beneficiaries whose DACA expired on or after to September 5, 2017, Defendants have deprived Plaintiffs (members of the former class) equal protection of the law without any rational basis for doing so, in violation of the Equal Protection clause, to Plaintiffs' injury. Such injury could be alleviated were the Defendants to treat Plaintiffs as they treated members of the class of DACA beneficiaries whose DACA expired on or after to September 5, 2017.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court provide the following relief:

1. Declare the immediate cancellation of DACA as to those individuals whose benefits ended prior to September 5, 2017 to have been "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2)(A);

2. Declare the immediate cancellation of DACA as to those individuals whose benefits ended prior to September 5, 2017, without notice and comment, to have been in violation of the Administrative Procedure Act, 5 U.S.C. § 553(b), (d) and 5 U.S.C. § 552(a)(1);

3. Declare that the immediate cancellation of DACA as to those individuals whose benefits ended prior to September 5, 2017 was a discriminatory action not rationally related to any legitimate government interest, in violation of the Equal Protection clause;

4. Declare that the immediate cancellation of DACA as to those individuals whose benefits ended prior to September 5, 2017 was a deprivation of constitutionally-protected property and liberty interests, in violation of the Due Process clause;

5. Enjoin Defendants, their agents, servants, employees, attorneys, and all persons in active concert or participation with any of them, from implementing or enforcing the rescission of DACA as to Plaintiffs;

6. Order Defendants to provide Plaintiffs one month to reapply for DACA deferred action, consistent with those DACA recipients whose benefits expired between September 5, 2017 and March 5, 2018, and to process those applications as they would have been processed prior to September 5, 2017;

7. Award plaintiffs their costs and reasonable attorney's fees; and

8. Any other relief this Court deems just and proper.

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Respectfully submitted,

By: _____
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