Dear President Trump:

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

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

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


3 DHS requires that DACA applicants: “1. Were under the age of 31 as of June 15, 2012; 2. Came to the United States before reaching your 16th birthday; 3. Have continuously resided in the United States since June 15, 2007, up to the present time; 4. Were physically present in the United States on June 15, 2012, and at the time of making your
Individuals who are granted DACA 2012 receive a two-year period in deferred action and also gain eligibility to apply for employment authorization.

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

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

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

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

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

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4 U.S. Const. art. II, § 3.
7 567 U.S. 387, 396.
“[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens . . .”

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

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

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

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15 8 C.F.R. § 274a.12(c)(14).
17 Memorandum from Sam Bernsen, supra, at 2.
18 (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii) (1975); see also
guidance documents. Guidance documents are common in administrative law and are a recognized form of agency action under the Administrative Procedure Act.

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

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


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

23 Crane v. Johnson, 783 F.3d 244, 252 (5th Cir. 2015).


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

Thank you for your attention.

Shoba Sivaprasad Wadhia

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

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

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

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

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

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

Hiroshi Motomura
Susan Westerberg Prager Professor of Law
University of California Los Angeles
Lenni Benson
Professor of Law, Director Safe Passage Project Clinic
New York Law School

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

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

Maryellen Fullerton
Professor of Law
Brooklyn Law School

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

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

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

Linda Bosniak
Distinguished Professor
Rutgers Law School

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

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

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

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

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

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

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

Melynda Barnhart
Visiting Associate Professor
New York Law School

Randi Mandelbaum
Distinguished Clinical Professor of Law
Rutgers Law School

Janet Beck
Visiting Assistant Clinical Professor
University of Houston Law Center
Kevin Ruser
Professor of Law
University of Nebraska College of Law

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

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

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

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

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

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

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

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

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

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

Rubén G. Rumbaut
Distinguished Professor
University of California, Irvine

Hiroko Kusuda
Clinic Professor
Loyola New Orleans College of Law

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

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

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

Elissa Steglich
Clinical Professor
University of Texas School of Law

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

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

Kate Griffith
Associate Professor
Cornell University School of Industrial and Labor Relations
Stephen Wizner  
William O. Douglas Clinical Professor  
Emeritus and Professorial Lecturer  
Yale Law School

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

Peter Margulies  
Professor of Law  
Roger Williams University School of Law

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

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

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

Theo Liebmann  
Clinical Professor of Law  
Hofstra Law School

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

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

Estelle M. McKee  
Clinical Professor  
Cornell Law School

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

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

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

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

Denise Gilman  
Director, Immigration Clinic  
University of Texas Law School

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

Stella Burch Elias  
Professor  
University of Iowa College of Law

Sabi Ardalan  
Assistant Clinical Professor  
Harvard Law School
Charles H. Kuck  
Adjunct Professor  
Emory Law School

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

Rebecca Sharpless  
Clinical Professor  
University of Miami School of Law

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

Jennifer Nagda  
Lecturer  
University of Pennsylvania Law School

Maria Woltjen  
Lecturer  
University of Chicago Law School

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

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

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

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

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

Ericka Curran  
Immigration Clinic Professor  
Florida Coastal School of Law

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

Jennifer Lee Koh  
Professor of Law  
Western State College of Law

Peter L. Markowitz  
Professor of Law  
Cardozo School of Law

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

Christina Pollard  
Visiting Assistant Professor  
University of Arkansas School of Law

Kari Hong  
Assistant Professor  
Boston College Law School

Laura A Hernandez  
Professor of Law  
Baylor Law School

Holly S. Cooper  
Lecturer and Co-Director of the Immigration Law Clinic  
U.C. Davis School of Law
Julia Vazquez
Directing Attorney & Lecturer of Law
Southwestern Law School

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

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

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

Victor C. Romero
Professor of Law
Penn State Law

Kathleen Kim
Professor of Law
Loyola Law School Los Angeles

Alan Hyde
Distinguished Professor
Rutgers Law School

Susan Hazeldean
Assistant Professor
Brooklyn Law School

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

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

Mary Holper
Associate Clinical Professor
Boston College Law School

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

Jon Weinberg
Professor of Law
Wayne State University

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

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

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

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

Andrew Moore
Associate Professor of Law
University of Detroit Mercy School of Law
Jayesh Rathod  
Professor of Law  
American University, Washington College of Law

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

Mariela Olivares  
Associate Professor of Law  
Howard University School of Law

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

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

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