

DREAMcatcher

HOW CALIFORNIA CAN PROTECT ITS DACA RECIPIENTS' WORK
AUTHORIZATION

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Summary

This memorandum details the legal means by which the State of California may enact work authorization for DACA recipients in the event the program is rescinded. Using similar, previous state-level initiatives as inspiration, this memo examines the parameters constraining possible legislative action. Because work authorization is federally regulated, these constraints include preemption and supremacy clause limitations on state and local lawmaking. This means that, if DACA is rescinded, California could pass a law allowing former recipients to continue working. However, because of the Supremacy Clause, California would need permission from the federal government to implement the bill. After explaining the legal parameters of such a law, this memorandum will offer draft model legislation.

Furthermore, this memo identifies and analyzes pre-existing work protections for undocumented immigrants in California and discusses how the State can better strengthen and publicize these permissions. While these protections are not solely for DACA recipients, they may provide DREAMers with enhanced opportunities to preserve their livelihoods. Essentially, although the Immigration Reform and Control Act (“IRCA”) prevents employers from hiring unauthorized non-citizen workers, its application does not necessarily extend to undocumented immigrants themselves. This leaves two methods by which unauthorized non-citizens may work in the United States: (1) in a self-employed capacity, or (2) as an independent contractor. California could strengthen these approaches by implementing certain polices, such as prohibiting inquiries into an independent contractor’s immigration status and broadening the scope of the State’s employment discrimination laws. Finally, California can better publicize these protections by collaborating with immigration interest groups to educate both employers and DACA recipients about the scope of non-citizens’ legal right to work.

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I. Issue Presented and Statement of Purpose

Deferred Action for Childhood Arrivals (hereinafter “DACA”), created in 2012 by President Barack Obama’s Department of Homeland Security, granted deportation protections and work authorization to a class of undocumented persons who entered the United States as children. [On September 5, 2017, the Trump Administration announced its intention to rescind the program.](#)¹ The Department of Homeland Security (hereinafter “DHS”) revoked DACA through an internal memo.² Shortly thereafter, President Trump announced that he would give Congress six months to pass DACA protections through legislation.³ On April 1, 2018, President Trump announced via Twitter that he would [no longer accept any Congressional efforts to protect DACA recipients.](#)⁴ However, the full rescission of DACA is currently on hold, pending the outcome of three court cases: *New York v. Trump*, *Board of Regents of the University of California v. United States Department of Homeland Security*, and *NAACP v. Trump*.

Approximately 700,000 people in the United States are protected by DACA, of which roughly 223,000 live in the State of California—more than in any other state.⁵ [DACA recipients in California work in a variety of industries](#), ranging from law to medicine to finance.⁶ Moreover, thousands of students in California universities have DACA protections.⁷ The Trump Administration’s decision to end the program would disproportionately harm California both economically and socially.⁸

This memorandum seeks to analyze potential state-level responses to the Trump Administration’s decision to rescind DACA. Specifically, it will determine whether and how California can legally allow its DACA recipient population to continue working and studying within the state and to advise the California State Legislature on how to implement those

¹ Michael D. Shear and Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, The New York Times (Sept. 05, 2017) (<https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html>).

² Elaine C. Duke, *Recession of the June 15, 2012 Memorandum Entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children”*, Department of Homeland Security (Sept. 5, 2017) (<https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>).

³ Shear, *Supra* n. 1.

⁴ Maegan Vazquez, *‘Trump: No More DACA Deal’*, CNN Politics (April 1, 2018) (<https://www.cnn.com/2018/04/01/politics/trump-no-more-daca-deal/index.html>).

⁵ Dep’t of Homeland Security, U.S. Citizenship and Immigration Services, Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012-2017 (U.S. Department of Homeland Security, 2017).

⁶ Jie Zong, Ariel G. Ruiz Soto, Jeanne Batalova, Julia Gelatt, Randy Capps, *A Profile of Current DACA Recipients by Education, Industry, and Occupation*, Migration Policy Institute (November 2017) (<https://www.migrationpolicy.org/research/profile-current-daca-recipients-education-industry-and-occupation>).

⁷ Marnette Federis, Kenya Downs, Sophie Chou, *Nearly 40 Percent of DACA Recipients are High School or College Students. Now Their Future is in Limbo*, PRI, (Jan. 17, 2018) (<https://interactive.pri.org/2018/01/daca-coverage/index.html>).

⁸ Nicole Prchal Svajlenka, Tom Jawetz, Angie Bautista-Chavez, *A New Threat to DACA Could Cost States Billions of Dollars*, Center for American Progress (July 21, 2017) (<https://www.americanprogress.org/issues/immigration/news/2017/07/21/436419/new-threat-daca-cost-states-billions-dollars/>).

protections and assistances. Furthermore, it will explain how California can fortify preexisting protections for undocumented workers that will be helpful for DACA recipients in the event DACA is rescinded.

This memorandum will first examine DACA, the scope of its application, and the current efforts combating its rescission. It will then explain the economic, social, and political benefits of protecting DACA recipients, before examining the legal basis for state-level initiatives to do so. Next, the memo will offer example California State Legislature bills intended to keep recipients working in the state; it will also discuss the strengths and weaknesses of these proposals. Finally, this memo will assess additional methods to preserve DACA recipients' opportunity work in California and assess the feasibility of those options.

II. Explanation of DACA

A. Purpose and History of DACA

DACA is an immigration policy that allows certain undocumented individuals who entered the United States as minors to receive work authorization and temporary protection from deportation.⁹ The policy was enacted in June 2012, under the Obama Administration, largely in response to Congress' failure to pass the Development, Relief, and Education for Alien Minors (DREAM) Act, leading some to refer to DACA recipients as "DREAMers."¹⁰ DACA's legal basis is grounded on a Department of Homeland Security memo released by then-secretary Janet Napolitano, and signed by President Barack Obama on June 15, 2012.¹¹

If Congress had passed the DREAM Act, there would be no need for DACA. The DREAM Act first originated in August 2001, when it was introduced by Senators Dick Durbin and Orrin Hatch.¹² The DREAM Act would have conferred provisional residency and, eventually, permanent residency to undocumented immigrants who entered the United States as children and who remained in the country throughout their childhoods, had it been passed into law.¹³ After six years of conditional residency, DREAM Act recipients would have been eligible for permanent residency in the United States.¹⁴

The DREAM Act (and versions thereof) failed to gain significant traction in Congress, despite repeated reintroduction.¹⁵ This culminated in 2011, when the DREAM Act was reintroduced by then-Senator Harry Reid.¹⁶ The bill had already passed in the House of Representatives a year prior, but required 60 *yes* votes in the Senate.¹⁷ Unfortunately, several Senators who had previously pledged their support chose instead to withhold their votes, and the DREAM Act failed to break filibuster.¹⁸ In response, [California passed the California DREAM Act in 2011](#), which allows undocumented immigrants to receive scholarships to attend in-state colleges and universities.¹⁹ While named after the failed federal bill, the California DREAM Act does not offer the same breadth of protections.²⁰ Its sole purpose is to permit undocumented California

⁹ Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, Department of Homeland Security, (June 15, 2012).

¹⁰ Scott Stottlemire, *Strict Scrutiny for Illegal Childhood Arrivals*, *The Journal of Gender, Race, and Justice* (2015).

¹¹ Napolitano *Supra* note 8.

¹² "Senate Bill S. 1291".

¹³ Raul Hinojosa Ojeda, Paule Cruz Takash, *"No Dreamers Left Behind"*, North American Integration and Development Center, University of California, Los Angeles.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Karoun Demirjian, *"Harry Reid reintroduces the DREAM Act"*, *Las Vegas Sun*, (May 11, 2011).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Alex Dobuzinskis, *California "DREAM Act" Approved for Illegal Immigrants*, Reuters (July 25, 2011) (<https://www.reuters.com/article/us-usa-california-dream/california-dream-act-approved-for-illegal-immigrants-idUSTRE76O6FV20110725>).

²⁰ *Id.*

residents to obtain scholarships.²¹ Moreover, President Obama announced his Administration's intention to stop deporting people who matched the criteria outlined in the DREAM Act.²² This lead directly to the creation of DACA in 2012.²³

Secretary Napolitano's June 15, 2012 memorandum establishing DACA is titled, in full, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children".²⁴ United States Citizenship and Immigration Services (USCIS) began to accept DACA applications two months later, on [August 15, 2012](#).²⁵

B. Scope of DACA

To be eligible for DACA, potential recipients must meet a specific set of criteria.²⁶ In sum, prospective beneficiaries must have entered the United States before turning 16 years of age and before June 15, 2007, and must have lived continuously in the United States since that date.²⁷ They must either have a high school diploma or GED, or be currently enrolled in school, or have been honorably discharged from the United States armed forces.²⁸ Prospective beneficiaries of DACA cannot have been convicted of a felony or serious misdemeanor, or have been convicted of three or more misdemeanor offenses, or otherwise pose a threat to national security.²⁹

An estimated 1.76 million people in the United States met these requirements in 2012.³⁰ At that time, [the clear majority](#)—at 74% of the eligible population—was born in Mexico or Central America.³¹ People from South America and the Caribbean combined for another 11% of prospective DACA recipients. Persons from various Asian countries represented another 9%, and the remaining 6% came from elsewhere in the world.³²

²¹ *Id.*

²² Tom Cohen, "Obama administration to stop deporting some young undocumented immigrants", CNN Politics (June 16, 2012).

²³ *Id.*

²⁴ Napolitano, *Supra* note 8.

²⁵ Jeffrey S. Passel and Mark Hugo Lopez, *Up to 1.7 Million Unauthorized immigrant Youth May Benefit from New Deportation Rules*, Pew Research Center, (August 14, 2012) (<http://www.pewhispanic.org/2012/08/14/up-to-1-7-million-unauthorized-immigrant-youth-may-benefit-from-new-deportation-rules/>).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Jeanne Batalova, Michelle Mittelstadt, "Relief from Deportation: Demographic Profile of the DREAMers Potentially Eligible under the Deferred Action Policy", Migration Policy Institute (August 2012) (<http://www.migrationpolicy.org/research/DACA-deferred-action-DREAMers>).

³² *Id.*

C. DACA Recipients in California

An estimated 223,000 DACA recipients currently reside in California³³, making it the [state with the highest percentage](#)—at 29%—of all persons protected by the deferment across the country.³⁴ Roughly 90,000 live in the Los Angeles metropolitan area, an amount which represents 13% of recipients nation-wide.³⁵ [A significant number of DACA recipients](#) also live in Orange County, San Bernardino County, San Francisco County, San Mateo County, Alameda County, Ventura County, and Riverside County.³⁶

Los Angeles County has the most DACA recipient residents, particularly in Districts 29, 32, 34, 37, 40, 43, 44, and 47, all of which have at least 5,000 persons protected by DACA.³⁷ As such, Los Angeles County also sees the greatest economic gain from the DACA program.³⁸ California’s DACA recipient population is employed in a broad range of sectors, ranging from law to medicine to agriculture.³⁹ The rescission of DACA would cost the California economy an estimated \$11 billion annually; the Los Angeles and San Francisco-Oakland metropolitan areas would be hit the hardest.⁴⁰

Moreover, [there are roughly 70,000 current DACA-recipient students at California’s colleges and universities](#),⁴¹ the majority of whom are enrolled in community colleges throughout the state. Approximately 8,300 study in the California State University (“CSU”) system, and another 4,000 study in the University of California (“UC”) system.⁴² While these students receive financial benefits under state laws, such as the California DREAM Act, many fear that rescission of their protected status will force them either into the underground economy⁴³ or to violate federal

³³ U.S. Citizenship and Immigration Services, *Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012-2017*, (U.S. Department of Homeland Security (2017)).

³⁴ Lolita Lopez, *DACA Repeal’s Effect on Southern California*, NBC Los Angeles, <https://www.nbclosangeles.com/news/local/DACA-Repeals-Effect-on-Southern-California-443293333.html>

³⁵ Kurt Snibbe, *Here’s Where DACA’s Dreamers Come From, Where They Live, and What Their Economic Impact Is*, The Orange County Register (March 3, 2018) (<https://www.ocregister.com/2018/03/02/heres-where-dacas-dreamers-come-from-where-they-live-and-what-their-economic-impact-is/>).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Jie Zong, Ariel G. Ruiz Soto, Jeanne Batalova, Julia Gelatt, Randy Capps, *A Profile of Current DACA Recipients by Education, Industry, and Occupation*, Migration Policy Institute (November 2017) (<https://www.migrationpolicy.org/research/profile-current-daca-recipients-education-industry-and-occupation>).

⁴⁰ Nicole Prchal Svajlenka, Tom Jawetz, Angie Bautista-Chavez, *A New Threat to DACA Could Cost States Billions of Dollars*, Center for American Progress (2017) (<https://www.americanprogress.org/issues/immigration/news/2017/07/21/436419/new-threat-daca-cost-states-billions-dollars/>).

⁴¹ Larry Gordon, *Understanding DACA and Education in California: A Quick Guide*, EdSource (Oct. 23, 2017) (<https://edsources.org/2017/understanding-daca-and-education-in-california-a-quick-guide/586829>).

⁴² *Id.*

⁴³ The “underground economy” is formed of undocumented people who work without authorization or with false documents.

immigration law and work without official permission, thus potentially damaging any future opportunity to rectify their immigration status.⁴⁴

III. The Trump Administration's Rescission of DACA

On September 5, 2017, the Trump administration, through an announcement by Attorney General Jeff Sessions, ordered the end of DACA by [rescinding the DHS memo](#)⁴⁵ upon which the program is based.⁴⁶ Attorney General Sessions explained that the rescission would be suspended for six months, ostensibly to allow Congress to enact legislative protections for DACA recipients.⁴⁷ Moreover, [President Trump specifically called on Congress to pass the DREAM Act](#) or some variation thereof.⁴⁸ However, due to various political pressures, and inconsistency and disinterest from the Executive Branch, [no such Congressional protections have passed](#).⁴⁹

On April 1, 2018, President Trump announced, via Twitter, that the opportunity for political agreement on DACA had elapsed.⁵⁰ Furthermore, the President called on Congress to enact stricter anti-immigration legislation—going so far as to advocate for use of the “Nuclear Option” to destroy the possibility of filibustering any such bills.⁵¹

However, despite the President's insistence that the possibility of a deal to protect DACA recipients is nonexistent, [several current legal cases offer some respite](#).⁵² Such cases are *New York v. Trump*, which was filed on September 6, 2017, *Regents of University of California v. United States Department of Homeland Security*, filed on September 8, 2017,⁵³ and *NAACP v. Trump*, filed on September 18, 2017.⁵⁴

A. *New York v. Trump*

[New York v. Trump](#), which has been consolidated with *Batalla Vidal, et al. v. Duke, et al.*, is the first lawsuit filed against the rescission of DACA by the Trump administration. The case is

⁴⁴ Gordon, *Supra* n. 38.

⁴⁵ Elaine C. Duke, *Recession of the June 15, 2012 Memorandum Entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children”*, Department of Homeland Security (Sept. 5, 2017) (<https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>).

⁴⁶ Shear, *Supra* n. 2.

⁴⁷ *Id.*

⁴⁸ Kate Samuelson, *Read President Trump's Full Statement on Rescinding DACA*, Time (Sept. 5, 2017) (<http://time.com/4927495/donald-trump-statement-daca-rescind/>).

⁴⁹ UC Office of the President, *UC Urges Congress to Pass Bipartisan Legislation for Permanent Protection of DACA Recipients*, University of California (March 5, 2018) (<https://www.universityofcalifornia.edu/press-room/uc-urges-congress-pass-bipartisan-legislation-permanent-protection-daca-recipients>).

⁵⁰ Vazquez *Supra*, n. 3.

⁵¹ *Id.*

⁵² Dan Levine, *Second U.S. Judge Blocks Trump Administration from Ending DACA Program*, Reuters (Feb. 13, 2018) (<https://www.reuters.com/article/us-usa-immigration-ruling/second-u-s-judge-blocks-trump-administration-from-ending-daca-program-idUSKCN1FX2TJ>).

⁵³ *Id.*

⁵⁴ Jacqueline Thomsen, *NAACP Sues Trump for Ending DACA*, The Hill (Sept. 18, 2017) (<http://thehill.com/homenews/administration/351219-naacp-sues-trump-for-ending-daca>).

grounded in Fifth Amendment due process protections, information use, and equal protection.⁵⁵ Specifically, plaintiffs claimed discriminatory treatment based on national origin.⁵⁶ The case was filed on September 6, 2017, by former New York Attorney General Eric Schneiderman, leading a coalition of 16 State Attorneys General: those of New York, Massachusetts, Washington, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia.⁵⁷

New York v. Trump alleges that rescission of DACA discriminates against persons of Mexican national origin, who now make up roughly 78% of recipients, without lawful justification.⁵⁸ Plaintiffs contend that the Trump Administration has threatened the health, safety, and employment of, disproportionately, Mexican nationals in the United States.⁵⁹ Moreover, the case alleges that the Trump Administration has not guaranteed that it would secure the personal information of current DACA recipients, thereby raising fears that the information could be used in targeted removal proceedings.⁶⁰ Finally, Plaintiffs assert that rescission of DACA will cause irreversible harm not only to current recipients, but to States' colleges and universities, economies and companies, and statutory and regulatory interests.⁶¹

In February 2018, Judge Nicholas Garaufis of the Federal District Court in Brooklyn [issued an injunction halting the rescission of DACA](#), due to the potential for irrevocable harm it would cause to thousands of young immigrants.⁶² Under this ruling, the Trump Administration is required to maintain DACA as it was before the September 5, 2017, announcement of rescission.⁶³ However, the government does not have to accept new DACA applications and is still permitted to decide renewal requests on a case-by-case basis.⁶⁴ Judge Garaufis' decision is based on the Administrative Procedure Act, forbidding the government from acting arbitrarily or capriciously when changing federal policy; in other words, the judge found that the Trump Administration failed to explain why they were ending DACA in a satisfactory manner.⁶⁵

Most recently, on March 29, 2018, the District Court dismissed the Plaintiffs' claim that the rescission of DACA violated federal notice-and-comment requirements but sustained the claims

⁵⁵ Eric T. Schneiderman, A.G. *Schneiderman Files Lawsuit To Protect Dreamers and Preserve DACA*, NYS Attorney General (Sept. 6, 2017) (<https://ag.ny.gov/press-release/ag-schneiderman-files-lawsuit-protect-dreamers-and-preserve-daca>).

⁵⁶ *Id.*

⁵⁷ *New York v. Trump*, Complaint for Declaratory and Injunctive Relief, 1:17-cv-05228 (E.D.N.Y., September 6, 2017).

⁵⁸ Schneiderman, *Supra* n. 52.

⁵⁹ *Id.*

⁶⁰ *New York v. Trump*, Complaint for Declaratory and Injunctive Relief, 1:17-cv-05228 (E.D.N.Y., September 6, 2017).

⁶¹ *Id.*

⁶² Alan Feuer, Second Federal Judge Issues Injunction to Keep DACA in Place, *The New York Times* (Feb. 13, 2018) (<https://www.nytimes.com/2018/02/13/nyregion/daca-dreamers-injunction-trump.html>).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *New York v. Trump*, Complaint for Declaratory and Injunctive Relief, 1:17-cv-05228 (E.D.N.Y., September 6, 2017).

of discriminatory intent and disparate impact against Mexican nationals and Latinxs.⁶⁶ A month prior, on February 20, 2018, the government appealed the injunction to the Second Circuit Court of Appeals. No decision has yet been issued, and this case is ongoing.⁶⁷

B. Regents of University of California v. United States Department of Homeland Security

Regents of University of California v. United States Department of Homeland Security is the second lawsuit filed by a state's governmental branch against the Trump Administration's decision to rescind DACA.⁶⁸ The case was filed on September 8, 2017, in the United States District Court for the Northern District of California by the University of California System and its President, former Secretary of Homeland Security Janet Napolitano.⁶⁹ The lawsuit alleges violations of the Administrative Procedure Act and of the right to procedural due process under the Fifth Amendment.⁷⁰

On January 9, 2018, United States District Judge William Alsup [ordered the federal government to maintain DACA protections while the lawsuit is pending](#).⁷¹ He reasoned that the Department of Homeland Security used a "flawed legal premise" to rescind DACA and that recipients would suffer irreparable harm should they lose their protections.⁷² As such, the government was required to begin accepting DACA renewal applications again.⁷³ However, the Trump Administration announced that it had filed an appeal to the United States Court of Appeals for the Ninth Circuit, challenging the requirement to continue the DACA program.⁷⁴ Moreover, the government [filed a petition for certiorari before judgement with the Supreme Court](#) of the United States, asking the Court to decide the case prior to the Ninth Circuit ruling.⁷⁵ The Supreme Court [denied this request](#),⁷⁶ [preventing the Trump Administration from ending DACA on March 5](#), 2018, as it had originally intended.⁷⁷ The Ninth Circuit heard oral arguments on

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Regents of University of California v. U.S. Dep't of Homeland Security*, 3:17-cv-05211 (N.D. Cal.).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Immigrant Legal Resource Center, *DACA Rescission Case Summary*, (Jan. 2018) (https://www.ilrc.org/sites/default/files/resources/regents_of_uc_v_dhs_summary_2.pdf).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Regents of University of California v. U.S. Dep't of Homeland Security*, 3:17-cv-05211 (N.D. Cal.).

⁷⁵ Maria Sacchetti, *Justice Will Ask Supreme Court to Intervene, Allow Trump Administration to End DACA*, The Washington Post (Jan. 16) (https://www.washingtonpost.com/local/immigration/trump-administration-appeals-judges-order-that-daca-must-remain-for-now/2018/01/16/41a8c960-f6e8-11e7-beb6-c8d48830c54d_story.html?noredirect=on&utm_term=.7d8f9e9277d8).

⁷⁶ Domenico Montanaro, *Supreme Court Declines to Take DACA Case, Leaving it in Place for Now*, NPR (Feb. 26, 2018) (<https://www.npr.org/2018/02/26/588813001/supreme-court-declines-to-take-up-key-daca-case-for-now>).

⁷⁷ Robert Barnes, *Supreme Court Declines to Enter Controversy Over 'Dreamers,' Rejects Trump Administration's Request to Review Lower Court Rulings*, The Washington Post (Feb. 26) (https://www.washingtonpost.com/politics/courts_law/supreme-court-declines-trump-request-to-take-up-daca-controversy-now/2018/02/26/4fb2e528-132f-11e8-9570-29c9830535e5_story.html?utm_term=.c87bda8a7531).

[May 15, 2018](#), and this case is currently ongoing.⁷⁸

C. NAACP v. Trump

Finally, [NAACP v. Trump, consolidated with Princeton v. United States](#), has resulted in the [strongest repudiation of DACA's rescission](#).⁷⁹ Filed on September 18, 2017 in the Federal District Court for the District of Columbia, [the NAACP alleges violations of DACA recipients' due process rights](#) and that the government violated the Equal Protection Clause and the Administrative Procedures Act.⁸⁰ According to Plaintiffs, the Trump Administration acted arbitrarily and capriciously in rescinding DACA, and their actions disproportionately affected persons of Mexican national origin.⁸¹ The government argues that plaintiffs lack standing and that they have the legal right to rescind DACA at their discretion.⁸²

On April 24, 2018, Judge John Bates, who oversaw this case, reached his decision.⁸³ He found that the government's actions were based on nearly nonexistent grounds; the government claimed that DACA was illegal but provided no supporting evidence.⁸⁴ This lack of explanation meant that the rescission is arbitrary and capricious, thus making the government's actions unlawful.⁸⁵ However, Judge Bates [stayed his decision by 90 days](#), to give the government a chance to procure evidence of their claims.⁸⁶ If the government fails to do so, the Judge has ordered DACA fully reinstated—the government is required to process both new and renewal DACA applications.⁸⁷

D. Future Appeals and Constitutional Challenge from Texas

While the stays and decisions from the above cases are promising and offer some reprieve, they do not mean the DACA program is safe. First, [The government will likely appeal](#) the findings from *Board of Regents* and/or *New York v. Trump*, to say nothing of their chance to convince Judge Bates of the necessity of rescission.⁸⁸ Although three district court judges finding in favor of re-implementing DACA, in full or in part, is cause for optimism, they do not guarantee the outcomes of appeals to higher courts. Moreover, not all district courts are unified in their support

⁷⁸ *Regents of the University of California v. DHS ("DACA II")*, United States Courts for the Ninth Circuit (May 3, 2018) (https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000927).

⁷⁹ NAACP v. Trump, No. 17-1907 (https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2017cv1907-23).

⁸⁰ Jacqueline Thomsen, NAACP Sues Trump for Ending DACA, The Hill (Sept. 18, 2017) (<http://thehill.com/homenews/administration/351219-naacp-sues-trump-for-ending-daca>)

⁸¹ *Id.*

⁸² *Id.*

⁸³ NAACP v. Trump, No. 17-1907 (https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2017cv1907-23).

⁸⁴ *Id.*

⁸⁵ Miriam Jordan, *U.S. Must keep DACA and Accept New Applications, Federal Judge Rules*, The New York Times (April 24, 2018) (<https://www.nytimes.com/2018/04/24/us/daca-dreamers-trump.html>).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Alan Feuer, *Judge Permits Government to Appeal DACA Lawsuit*, The New York Times (April 30, 2018) (<https://www.nytimes.com/2018/04/30/nyregion/daca-lawsuit-federal-court-brooklyn.html>).

of the DACA program: [In Maryland, a judge sided with the government in favor of rescission](#).⁸⁹ In *CASA de Maryland v. Department of Homeland Security*, Judge Roger W. Titus decreed that, although the Trump Administration had weak justifications for ending the DACA program, [they were within their legal right to do so](#); so far, plaintiffs have not appealed the decision.⁹⁰

[Another threat to the future of DACA comes from Texas](#).⁹¹ On May 1, 2018, Texas Secretary of State Ken Paxton announced his filing of a lawsuit challenging the DACA program.⁹² Plaintiffs—[a coalition of Texas, Alabama, Arkansas, Louisiana, Nebraska, South Carolina, and West Virginia](#)—do not ask the court to review any of the ongoing challenges of the DACA rescission; rather, they challenge the legality of DACA itself.⁹³ This action is not entirely without legal basis, as, concerning for DACA advocates, [Texas once led a coalition of states in halting a proposed expansion of the DACA program](#).⁹⁴

In November 2014, President Obama attempted to [expand the scope of DACA](#).⁹⁵ He sought to move the required year of original entry into the United States from 2007 to 2010.⁹⁶ Furthermore, the expansion would have eliminated the requirement that potential recipients be under 31 years of age.⁹⁷ It is estimated that these changes would have conferred eligibility to 330,000 people who otherwise could not qualify for DACA protections.⁹⁸ However, a coalition of 26 Republican-led states—headed by Texas—[sued to halt the expansion](#).⁹⁹ The United States District Court for the Southern District of Texas [issued an injunction against the proposal](#), which

⁸⁹ Ilissa Mira, *Multiple Lawsuits Challenge DACA Rescission*, Catholic Legal Immigration Network, Inc. (April 27, 2018) (<https://cliniclegal.org/resources/multiple-lawsuits-challenge-daca-rescission>).

⁹⁰ *Casa de Maryland v. U.S. Dep't of Homeland Security*, 8:17-cv-02942-RWT (March 05, 2018) (<https://cdn.cnn.com/cnn/2018/images/03/06/maryland-daca-opinion.pdf>).

⁹¹ James Barragan, *Texas AG Ken Paxton Asks Federal Court to Block More DACA Permits from Being Issued*, Dallas News (May 2, 2018) (<https://www.dallasnews.com/news/politics/2018/05/01/texas-will-sue-federal-government-end-daca>).

⁹² *Id.*

⁹³ Maria Sacchetti, *Texas, Six Other States Sue Trump Administration to Force an End to DACA*, The Washington Post (May 1, 2018) (https://www.washingtonpost.com/local/immigration/texas-six-other-states-sue-trump-administration-to-force-an-end-to-daca/2018/05/01/f89a5780-4d71-11e8-b725-92c89fe3ca4c_story.html?noredirect=on&utm_term=.4c413fd8799b).

⁹⁴ Matt Ford, *A Ruling Against the Obama Administration on Immigration*, The Atlantic (Nov. 10, 2015) (<https://www.theatlantic.com/politics/archive/2015/11/fifth-circuit-obama-immigration/415077/>).

⁹⁵ Jens Manuel Krogstad, Jeffrey S. Passel, *Those from Mexico Will benefit Most From Obama's Executive Action*, Pew Research Center (Nov. 20, 2014) (<http://www.pewresearch.org/fact-tank/2014/11/20/those-from-mexico-will-benefit-most-from-obamas-executive-action/>).

⁹⁶ United States Customs and Immigration Service, *You may Be Able to Request Expanded DACA*, Department of Home Land Security (Nov. 20, 2014).

⁹⁷ *Id.*

⁹⁸ Jens Manuel Krogstad, Jeffrey S. Passel, *Those from Mexico Will benefit Most From Obama's Executive Action*, Pew Research Center (Nov. 20, 2014) (<http://www.pewresearch.org/fact-tank/2014/11/20/those-from-mexico-will-benefit-most-from-obamas-executive-action/>).

⁹⁹ Kalhan, Anil, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. Rev. Disc. 58, 63 (2015) (<https://www.uclalawreview.org/deferred-action-supervised-enforcement-discretion-rule-law-basis-executive-action-immigration/>).

was upheld by an appeals court.¹⁰⁰ President Obama then appealed to the Supreme Court of the United States, but a 4-4 split meant that no precedent would be set and the decision of the appeals court would stand.¹⁰¹ Unfortunately for DACA, this means that influential jurisprudence exists that could convince courts of the program's unconstitutionality. As such, in spite of the injunctions preventing the Trump Administration from rescinding DACA, it remains imperative for California to find a way to protect its residents and its interests.

¹⁰⁰ Adam Liptak, Michael D. Shear, *Supreme Court Tie Blocks Obama Immigration Plan*, The New York Times (June 24, 2016) (<https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-daca.html>).

¹⁰¹ *Id.*

IV. California DACA Work Authorization Bill Proposal

A. Economic Benefits of DACA

1. General Economic Benefits of DACA in the United States

Throughout DACA's existence, it has proven to be [eminently beneficial to the country's economy](#).¹⁰² It has created higher wages and increased the standard of living for many individuals. In fact, experts both from traditionally liberal¹⁰³ and [traditionally conservative](#) political leanings tend to agree that the DACA program has been a success.¹⁰⁴

There are myriad ways to measure DACA's economic benefits; however, the most direct measurement is [increased spending](#).¹⁰⁵ Economists agree that an amplified flow of capital is a sign of—and a contributing factor to—a healthy economy.¹⁰⁶ Since the DACA program was enacted, DACA recipients spend more freely, thus contributing to capital flow.¹⁰⁷ For example, a [2017 survey](#) notes that 65% of DACA recipients purchased their first car after receiving DACA protections, at an average cost of approximately \$16,500.¹⁰⁸ The same study indicates that another 16% of DACA recipients purchased their first home since the program's implementation—a number which jumps to 24% when the data is controlled to show only recipients aged 25 or older.¹⁰⁹ In fact, roughly 55% of DACA recipients report getting their first job after their applications were approved, and nearly [70% report finding a job with better pay](#) in the years since receiving DACA protections.¹¹⁰ The overlap can be explained by DACA recipients acquiring their first job and subsequently switching jobs in the years since DACA was implemented.¹¹¹ Furthermore, [three-fourths of Fortune 500 companies currently employ DACA recipients](#).¹¹²

¹⁰² Francesc Ortega, Ryan Edwards, Philip E. Wolgin, *The Economic Benefits of Passing the Dream Act*, Center for American Progress (Sept. 18, 2017) (<https://www.americanprogress.org/issues/immigration/reports/2017/09/18/439134/economic-benefits-passing-dream-act/>).

¹⁰³ *Id.*

¹⁰⁴ Ike Brannon, Logan Albright, *The Economic and Fiscal Impact of Repealing DACA*, CATO at Liberty (Jan. 18, 2017) (<https://www.cato.org/blog/economic-fiscal-impact-repealing-daca>).

¹⁰⁵ Tom K. Wong, Greisa Martinez Rosas, Adrian Reyna, Et. Al., *New Study of DACA Beneficiaries Shows Positive Economic and Educational Outcomes*, Center for American Progress (Oct. 18, 2016) (<https://www.americanprogress.org/issues/immigration/news/2016/10/18/146290/new-study-of-daca-beneficiaries-shows-positive-economic-and-educational-outcomes/>).

¹⁰⁶ Brannon, *Supra* n. 100.

¹⁰⁷ *Id.*

¹⁰⁸ Tom K. Wong, Greisa Martinez Rosas, Adam Luna, Et. Al., *DACA Recipients' Economic and Education Gains Continue to Grow*, Center for American Progress (Aug. 28, 2017) (<https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/>).

¹⁰⁹ *Id.*

¹¹⁰ Tom K. Wong, et al., *2017 National DACA Study*, Center for American Progress (Oct. 7, 2017) (https://cdn.americanprogress.org/content/uploads/2017/11/02125251/2017_DACA_study_economic_report_updated.pdf).

¹¹¹ *Id.*

¹¹² *Id.*

The financial benefits of the DACA program can be seen in recipients' economic integration, as well.¹¹³ For example, a 2014 study indicates that, beyond finding gainful employment or receiving pay increases, DACA recipients benefitted financially in several intangible ways.¹¹⁴ Specifically, about [half of DACA recipients opened their first bank account](#) and between 33%¹¹⁵ and 38% have applied for their first credit card.¹¹⁶ A 2013 survey found that another 20% of DACA recipients received paid internships, while 60% obtained American drivers' licenses.¹¹⁷ In sum, DACA recipients contribute an estimated \$60 billion annually to the American economy,¹¹⁸ and since DACA's implementation, [recipients have injected \\$480 billion](#) to the GDP of the United States.¹¹⁹

The economic impact of DACA recipients benefits the country as a whole—for example, by contributing substantially to American social welfare programs.¹²⁰ Since implementation, they have contributed an estimated [\\$2 billion to Social Security taxes and another \\$470 million to Medicaid taxes](#).¹²¹ Moreover, DACA recipients (and, indeed, undocumented immigrants generally) add approximately 13 times more to social welfare programs than they take out.¹²² Thus, the rescission of the DACA program would have noticeable impacts on the economic stability of the United States.

2. Economic Benefits of DACA in California

[California stands to lose the most, should DACA be rescinded](#).¹²³ With roughly 30% of the United States' DACA recipient population, California is home to the greatest number of affected persons.¹²⁴ Thus, California would be disproportionately affected should DACA be eliminated with no alternatives implemented; specifically, [California's economy would lose nearly \\$12 billion annually](#).¹²⁵ Other estimates put California's potential economic loss at, conservatively,

¹¹³ Roberto G. Gonzales, *Here's How DACA Changed the Lives of Young Immigrants, According to Research*, Vox (Feb. 16, 2018) (<https://www.vox.com/2017/9/2/16244380/daca-benefits-trump-undocumented-immigrants-jobs>)
¹¹⁴ *Id.*

¹¹⁵ Brannon, *Supra* n. 100.

¹¹⁶ *How DACA is Impacting the Lives of Those Who are Now DACAmented*, American Immigration Council (Aug. 15, 2013) (<https://www.americanimmigrationcouncil.org/research/how-daca-impacting-lives-those-who-are-now-dacamented>)

¹¹⁷ Gonzales, *Supra* n. 109.

¹¹⁸ Brannon, *Supra* n. 100.

¹¹⁹ Sean Devlin, *End of DACA Spells Trouble for Economy*, Observer (Oct. 9, 2017) (<http://observer.com/2017/10/economic-effects-of-daca-are-460-billion-per-year/>).

¹²⁰ Brannon, *Supra* n. 100.

¹²¹ Jeanine Thomas, *Economic Benefits of DACA*, Borgen Magazine (Nov. 5, 2017) (<http://www.borgenmagazine.com/economic-benefits-of-daca/>).

¹²² *Id.*

¹²³ Ike Brannon, *Rescinding DACA will Cost the US Economy \$200 Billion*, Newsweek (Sept. 17, 2017) (<http://www.newsweek.com/rescinding-daca-will-cost-us-economy-200-billion-666288>).

¹²⁴ *Id.*

¹²⁵ Nicole Prchal Svajlenka, Tom Jawetz, Angie Bautista-Chavez, *A New Threat to DACA Could Cost States Billions of Dollars*, Center for American Progress, (2017) (<https://www.americanprogress.org/issues/immigration/news/2017/07/21/436419/new-threat-daca-cost-states-billions-dollars/>).

\$84 billion over the course of a decade.¹²⁶ Moreover, DACA recipients will progressively become more productive as they complete their degrees and gain valuable work experience.¹²⁷ [The majority of this economic loss will be felt in the Los Angeles metropolitan area](#), where approximately 100,000 DACA recipients live.¹²⁸ [Other disproportionately-affected conurbations](#) include San Francisco-Oakland, San Jose, Riverside, Fresno, and San Diego.¹²⁹

The economic benefits from the DACA program, and the losses that would result from the program's rescission, [are felt most strongly in California's Latinx community](#).¹³⁰ About 61% of Latinx DACA recipients in California have reported the ability to pursue greater educational opportunity under the program's protections.¹³¹ This increased attainment leads to heightened economic opportunity for Latinx Californians, and in turn, stimulates the California economy.¹³²

Finally, there is reason to believe that [foreign investment into California could be negatively affected by the Trump Administration's decision to rescind the DACA program](#).¹³³ Currently, Latin American countries, specifically Mexico, invest heavily in Southern California, particularly in Los Angeles, Riverside, San Bernardino, and Orange Counties.¹³⁴ This investment is based on the counties' high Mexican, Mexican-American, and Latinx populations, naturally resulting in thousands of businesses owned by Latinx Californians.¹³⁵ However, the decision to end DACA has been viewed by Mexican officials—including the Secretary of Economic Development—as a direct attack on Mexico.¹³⁶ It is in Southern California's best interest to maintain cordial relations with Mexican foreign investors, and the State's decision to protect its DACA recipients could be the means to do just that.

B. Social Welfare Reasons to Protect DACA Recipients

The DACA program does more for undocumented immigrants than simply enable economic gains.¹³⁷ For example, 21% of DACA recipients reported increased access to medical care after

¹²⁶ Brannon, *Rescinding DACA*, *Supra* n. 119.

¹²⁷ *Id.*

¹²⁸ Jason McGahan, *How Can California Keep the DACA Dream Alive?*, LA Weekly, (Sept. 7, 2017) (<http://www.laweekly.com/news/after-the-end-of-daca-california-officials-pledge-to-protect-dreamers-with-lawsuits-and-legislation-8616919>).

¹²⁹ *Interactive Map: Deferred Action for Childhood Arrivals (DACA) Populations and their Economic Contributions by U.S. Congressional District*, USC Dornsife (Oct. 11, 2017) (<http://dornsife.usc.edu/csii/daca-map/>).

¹³⁰ Henry Gascon, *The Impact of DACA On Latino Households In California*, United Ways of California (Sept. 11, 2017) (<https://www.unitedwaysca.org/blog/entry/the-impact-of-daca-on-latino-households-in-california>).

¹³¹ *Id.*

¹³² *Id.*

¹³³ Brenda Gazzar, *Could the End of DACA Hurt Foreign Investment in Southern California?*, Los Angeles Daily News (Oct. 29, 2017) (<https://www.dailynews.com/2017/10/29/could-the-end-of-daca-hurt-foreign-investment-in-southern-california/>).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Roberto G. Gonzales, *Here's How DACA Changed the Lives of Young Immigrants, According to Research*, Vox (Feb. 16, 2018) (<https://www.vox.com/2017/9/2/16244380/daca-benefits-trump-undocumented-immigrants-jobs>).

receiving DACA status.¹³⁸ Moreover, [DACA recipients' protected status allows them to obtain drivers' licenses and state identification cards](#), which in turn leads to increased road safety and feelings of social inclusion.¹³⁹ In fact, after receiving protected status, and due in part to these opportunities to participate socially, DACA recipients reported having generally improved mental health.¹⁴⁰ Interestingly, [mental health benefits extend not just to DACA recipients, but to their children as well](#).¹⁴¹ A 2017 study indicates that the children of undocumented immigrants are more mentally healthy once their parents receive DACA protections.¹⁴²

Beyond improved health and increased social inclusion, DACA recipients should be protected simply because the United States is their home. By definition, recipients must have entered the country as children and lived more-or-less continuously within America's borders since then.¹⁴³ [DACA recipients are afraid of being sent to countries that they barely remember](#)—if they remember the country at all.¹⁴⁴ Given the economic, social, and medical gains DACA recipients have made since the program's inception, to undo that progress would be inhumane and unjust.¹⁴⁵ California has an imperative to do what it can to help its DACA recipient population.

C. Political Reasons to Protect DACA Recipients in California

DACA protections are uniformly popular among American voters; in fact, [nine out of ten people support keeping DACA recipients in the United States](#).¹⁴⁶ Specifically, Latinx voters have indicated that, going forward, enacting and protecting the DACA program will be of supreme import.¹⁴⁷ This is especially true of voters with DACA-eligible and DACA recipient family members.¹⁴⁸ Given the demographics of the region and its high DACA recipient populations, offering protections to California's DREAMers is [particularly viable to elected officials from](#)

¹³⁸ *Id.*

¹³⁹ Wong et al., *New Study of DACA*, *Supra* n. 101.; Tatiana Sanchez, *California Surpasses 1 Million Driver's Licenses for Undocumented Immigrants*, *The Mercury News* (April 4, 2018) (<https://www.mercurynews.com/2018/04/04/california-issues-1-millionth-drivers-license-to-undocumented-immigrants/>); Undocumented non-citizens in California may acquire drivers licenses without DACA (<http://driveca.org/apply/>).

¹⁴⁰ Gonzales, *Here's How DACA Changed the Lives*, *Supra* n. 133.

¹⁴¹ David D. Laitin et al., *The Little-Known Benefit of DACA: It Reduced Mental Illness in Dreamer's Children*, *The Washington Post* (Sept. 6, 2017) (https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/06/the-little-known-benefit-of-daca-it-reduced-mental-illness-in-dreamers-children/?utm_term=.2e285c5d81b6).

¹⁴² *Id.*

¹⁴³ Napolitano, *Exercising Prosecutorial Discretion*, *Supra* n. 8.

¹⁴⁴ Stuart Anderson, *Dreamer Wants to be a U.S. Citizen and Live at Peace*, *Forbes* (Jan. 29, 2018) (<https://www.forbes.com/sites/stuartanderson/2018/01/29/dreamer-wants-to-be-a-u-s-citizen-and-live-at-peace/#9f6e89d709cc>).

¹⁴⁵ Gonzales, *Here's How DACA Changed*, *Supra* n. 133.

¹⁴⁶ Max Greenwood, *Poll: Nearly 9 in 10 Want DACA Recipients to Stay in US*, *The Hill* (Jan. 18, 2018) (<http://thehill.com/blogs/blog-briefing-room/news/369487-poll-nearly-nine-in-10-favor-allowing-daca-recipients-to-stay>)

¹⁴⁷ Wong, *New Study of DACA*, *Supra* n. 101.

¹⁴⁸ *Id.*

[metropolitan Los Angeles](#).¹⁴⁹ As previously mentioned, Districts 29, 32, 34, 37, 40, 43, 44, and 47 all have at least 5,000 residents protected by DACA; however, the economic and social benefits of DACA recipients are prevalent throughout Los Angeles County, Riverside County, San Bernardino County, Orange County, metropolitan San Diego, metropolitan Fresno, and the San Francisco Bay Area.¹⁵⁰ Politicians in these regions looking to make a positive statement with their constituents would do well to consider at least attempting to implement some form of protections for DACA recipients.

Once it is accepted that the DACA program is beneficial to society, popular, and an effective way to garner political support throughout California, the question becomes how to protect California's DACA recipients in the face of federal action. Unfortunately, due to overarching federal regulations, options for state immigration actions are limited. Luckily, several states have offered legislative guidance as to how California can, at the very least, offer work authorization to its DACA recipient residents.

¹⁴⁹ Kurt Snibbe, *Here's Where DACA's Dreamers Come From, Where They Live, and What Their Economic Impact Is*, The Orange County Register (March 2, 2018) (<https://www.ocregister.com/2018/03/02/heres-where-dacas-dreamers-come-from-where-they-live-and-what-their-economic-impact-is/>).

¹⁵⁰ *Id.*

V. Legal Parameters of a California DACA Work Authorization Bill Proposal

A. IRCA/Real ID Act Issues

A significant roadblock that states face when attempting to enact legislation that offers work authorization to their undocumented populations is the [Immigration Reform and Control Act \(hereinafter “IRCA”\)](#).¹⁵¹ IRCA amended the Immigration and Nationality Act (hereinafter “INA”) to prohibit employers from hiring non-citizens who are unauthorized to work in the United States.¹⁵² [Employers must verify their employees’ authorization to work in the U.S.A.](#) before employing them.¹⁵³ If an employer hires a non-citizen without work authorization, they may face fines, lose their business license, and even trigger an investigation by federal enforcement agencies.¹⁵⁴ Specifically, INA section 274(A)(10) imposes a criminal fine of up to \$3,000 for each unauthorized alien and imprisonment for up to six months for the entire “pattern or practice.”¹⁵⁵ Violation of INA 274(A) can also result in civil suits by the federal government against the employer, which may lead to steeper fines.¹⁵⁶

Generally, the [federal government controls the implementation of the U.S.’s immigration laws, although states may play an important role](#).¹⁵⁷ Thus, it would be impractical for California to unilaterally pass an immigration bill that would grant work authorization to DACA recipients, in the event DACA is rescinded.

[Some states have attempted to pass their own state-level immigration policies granting work authorization to non-citizens](#).¹⁵⁸ However, even the bills that passed into law have not been implemented¹⁵⁹ due to lack of necessary federal permission.¹⁶⁰ In other words, states cannot unilaterally enact immigration laws that affect work authorization; they must acquire express consent either from the Department of Homeland Security or the President of the United States prior to implementation.¹⁶¹

¹⁵¹ U.S. Citizenship and Immigration Services, *Immigration Reform and Control Act of 1986 (IRCA)*, Department of Homeland Security (Sept. 29, 2016) (<https://www.uscis.gov/tools/glossary/immigration-reform-and-control-act-1986-irca>)

¹⁵² Immigration and Nationality Act (INA) Sec. 274A.

¹⁵³ U.S. Citizenship and Immigration Services, *Employment Authorization*, Dep’t of Homeland Security (Oct. 24, 2017) (<https://www.uscis.gov/working-united-states/information-employers-employees/employer-information/employment-authorization>).

¹⁵⁴ See INA Sec. 274(A).

¹⁵⁵ INA Sec. 274(A)(10)

¹⁵⁶ *Id.*

¹⁵⁷ Jennifer Chacon, *Who Is Responsible for U.S. Immigration Policy?*, American Bar Association (https://www.americanbar.org/publications/insights_on_law_and_society/14/spring-2014/who-is-responsible-for-u-s--immigration-policy-.html)

¹⁵⁸ See Brendan Kirby, Colorado Lawmakers Debate ‘Purple Card’ for Illegal Immigrants, Polizette (Feb. 22, 2018) (<https://www.lifezette.com/polizette/colorado-lawmakers-debate-purple-card-for-illegal-immigrants/>) (discussing purple card work authorization for undocumented people residing in Colorado).

¹⁵⁹ See Part IV.5.a.b.c.

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

In theory, California can pass a state-level immigration law granting former DACA recipients work authorization, bypassing the INA 274(A) provision, and they have attempted to do similar before.¹⁶² However, even if the bill succeeds, California must ask permission from either President Trump or the Department of Homeland Security to implement the law. Practically speaking, attempting to pass a state law granting work authorization to non-citizens is impossible due to Supremacy Clause issues.¹⁶³

Thus, in the event DACA is rescinded, California cannot, as a means to protect DREAMers, unilaterally issue work authorization for its non-citizen residents. Employment authorization is a federally mandated issue,¹⁶⁴ and employers are required to verify their employees' work permission under penalty of criminal and civil fines.¹⁶⁵ This also means that California cannot simply forbid employers from asking potential hires about their immigration status.

Because INA 274(A) generally [prohibits employers from hiring unauthorized non-citizens and penalizes them if they do](#)¹⁶⁶ and USCIS mandates that employers verify prospective employees' work authorization, California cannot bar employers from asking about immigration status when making hiring decisions.¹⁶⁷ Doing so would be a violation of federal law and would be problematic under the auspices of the Supremacy Clause.¹⁶⁸ Luckily, as will be discussed later in greater detail, implementing a "Do not ask" policy for hiring *contractors*, who are not *employees*, would be more successful, since there is no federal legal need for employers to check the citizenship status of those with whom they contract.¹⁶⁹ Finally, California cannot simply grant residency or identification cards to undocumented immigrants to satisfy IRCA. Non-citizen documentation must fulfill Real ID Act requirements for I-9 validation.

Under the Real ID Act of 2005, the [Federal Government sets standards for issuing identification cards, such as drivers' licenses](#).¹⁷⁰ The Act further prohibits Federal agencies from accepting non-compliant forms of ID for official purposes, which can include traveling on an airline.¹⁷¹ Thus, if a state identification card does not meet minimum standards under Real ID, it cannot be used for official reasons. States that issue non-compliant forms of identification may continue to do so; however, recipients are limited to using those ID's for non-federal functions.¹⁷²

¹⁶² *See id.*

¹⁶³ *See* discussion of IRCA, Real ID Act, and Supremacy Clause discussion in Part IV.4.

¹⁶⁴ *Employment Authorization, Supra* n. 149.

¹⁶⁵ *Employment Authorization, Supra* n. 149; INA Sec. 274(A)(10).

¹⁶⁶ INA Sec. 274(A).

¹⁶⁷ U.S. Citizenship and Immigration Services, *Employment Authorization*, Dep't of Homeland Security (https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Custom%20Service%20Reference%20Guide/Employment_Authorization.pdf).

¹⁶⁸ INA Sec. 274(A).

¹⁶⁹ *See* Part V.3.

¹⁷⁰ *Real ID Frequently Asked Questions for the Public*, Department of Homeland Security (April 30, 2018) (<https://www.dhs.gov/real-id-public-faqs>).

¹⁷¹ *Id.*

¹⁷² *Id.*

For example, California has implemented a law that allows undocumented non-citizens to [acquire driver's licenses](#).¹⁷³ These driver's licenses look different compared to those compliant with Real ID and cannot be used for official purposes—such as working.¹⁷⁴ Work authorization in the U.S. is controlled by federal law.¹⁷⁵ Thus, [recipients of California's A.B. 60 driver's licenses cannot utilize them as ID to satisfy I-9 requirements for employment authorization](#), because acceptable I-9 documents must be Real ID compliant (NOTE: Even if the A.B. 60 licenses were I-9 Real ID compliant, they alone would not confer work authorization because the state would need to receive federal permission for any worker program).¹⁷⁶

To make California-issued identification documents acceptable under the Real ID Act and IRCA, the State would need to request an extension from the Secretary of Homeland Security.¹⁷⁷ The odds of acquiring such an extension, however, are bleak considering the federal government's [pre-existing hostility towards California's sanctuary state laws](#).¹⁷⁸ IRCA represents the greatest hinderance to any effort by California to issue state-level work authorization documents to shield employers from violating the INA 274(A) provision.

Luckily, several states' legislatures, including a past California State Assembly, offer guidance for a possible workaround. In other words, despite the challenges and limitations posed by IRCA, California's legislature could still protect the state's DACA recipients—this memorandum will include an example of how such a bill might look.

B. Prior Legislation and Inspiration for Bill Proposal

[Starting in the late 2000's and continuing into the early 2010's, states have attempted to implement their own immigration reforms and foreign worker programs](#).¹⁷⁹ Most of these proposals revolve around guest worker initiatives, and many apply only to persons seeking to undertake specific employment—commonly in agriculture.¹⁸⁰ Some states, such as Utah and Colorado, actually passed their proposals into state law; however, threats of suit from the federal government stymied implementation.¹⁸¹ Still, these bills proved instrumental in framing this current proposal. As such, brief summaries of each follow. They are organized from most to least valuable to the formation of the model legislation offered in this memorandum.

¹⁷³ *AB 60 Drivers License*, State of California Department of Motor Vehicles, (<https://www.dmv.ca.gov/portal/dmv/detail/ab60>).

¹⁷⁴ *Id.*

¹⁷⁵ *Employment Authorization*, *Supra* n. 149.

¹⁷⁶ U.S. Citizenship and Immigration Services, *Acceptable Documents*, Dep't of Homeland Security (July, 17, 2017) (<https://www.uscis.gov/i-9-central/acceptable-documents>); *AB 60 Drivers License*, *Supra* n. 158.

¹⁷⁷ *Real ID Frequently Asked Questions*, *Supra* n. 155.

¹⁷⁸ Sarah N. Lynch, *U.S. Justice Department Sues California over 'Sanctuary' Policies*, Reuters (March 6, 2018) (<https://www.reuters.com/article/us-usa-justice-immigration/u-s-justice-department-sues-california-over-sanctuary-policies-idUSKCN1GJ07T>).

¹⁷⁹ Matthew La Corte et al., *The Legislative History of State-based Guest Worker Programs*, Niskanen Center (May 2017) (<https://niskanencenter.org/wp-content/uploads/2017/05/TheLegislativeHistoryofState-BasedGuestWorkerPrograms.pdf>).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

1. Utah

In 2011, [Utah passed a series of laws implementing state-level immigration](#).¹⁸² The four bills contained three main provisions.¹⁸³ First, they [granted Utah residents the right to sponsor foreign nationals](#) to live, work, or study in the state by assuming financial responsibility.¹⁸⁴ Second, Utah would create a [partnership with the state of Nuevo León, Mexico to establish a migrant worker program](#) between the two.¹⁸⁵ This would, in theory, have allowed residents of Nuevo León to travel to Utah on expedited work permission, and vice versa.¹⁸⁶ Finally, Utah would have [allowed undocumented residents in the state to apply for work permission after declaring their lack of documentation and paying a fine](#).¹⁸⁷

2. Kansas

In 2012, in response both to labor shortages in the state and to concern for undocumented residents, Kansas introduced the [Kansas Business Workers and Community Partnership Act](#), which would have granted work permission to undocumented residents who passed a background check.¹⁸⁸ In spite of widespread support, [the bill died amid concerns that DHS would not grant the necessary waiver](#).¹⁸⁹

3. California

[In 2012, the California State Assembly introduced a bill to implement state-level work permission for undocumented immigrants](#).¹⁹⁰ Under the proposal, California would have issued work permits to undocumented persons seeking employment in the agricultural industry.¹⁹¹ Applicants and their families would also receive deportation protections.¹⁹² [This bill died on the floor, amid concerns relating to implementation](#).¹⁹³

¹⁸² *Summary of Selected Immigration-Related Legislation*, Utah Office of Legislative Research and General Counsel (2011) (<http://le.utah.gov/lrgc/immigrationsummary.pdf>).

¹⁸³ *Id.*

¹⁸⁴ *HB 469. Immigration Related Amendments*, Utah State Legislature (2011) (<http://le.utah.gov/~2011/bills/static/HB0469.html>).

¹⁸⁵ *HB 466. Migrant Workers and Related Commission Amendments*, Utah State legislature (2011) (Available at: <http://le.utah.gov/~2011/bills/static/HB0466.html>).

¹⁸⁶ *Id.*

¹⁸⁷ *HB 116. Utah Immigration Accountability and Enforcement Amendments*, Utah State legislature (2011) (<http://le.utah.gov/~2011/bills/static/HB0116.html>).

¹⁸⁸ *HB 2603. Kansas Business Workers and Community Partnership Act*, Kansas State Legislature (2012) (http://www.kslegislature.org/li_2012/b2011_12/measure/hb2603/).

¹⁸⁹ John Hanna, *Kansas Business Coalition: Allow Illegal Immigrants to Stay, Work*, *The Wichita Eagle* (Jan. 31, 2012) (<http://www.kansas.com/news/business/agriculture/article1085432.html>).

¹⁹⁰ *Assembly Bill (AB) 1544, Undocumented Workers' California Agricultural Jobs and Industry Stabilization Program*, California Legislative Information (2011-2012) (http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201120120AB1544).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Kurt Chirbas, *California Measure Would Allow Work Permits for Farmworkers Here Illegally*, *Los Angeles Times* (July 12, 2015) (<http://www.latimes.com/local/politics/la-me-pol-farm-workers-20150713-story.html>).

In 2015, California proposed slightly adjusted immigration legislation. Under this bill, [the California state government would create a working group to consult with the federal government in search of an agreement on allowing state-level work permission](#).¹⁹⁴ The bill died in committee.¹⁹⁵

Several other states have passed or proposed federalist work permission laws for undocumented residents.¹⁹⁶ That said, any future proposals would be largely based on these bills from Utah, Kansas, and California, especially because of how they address implementation—which, given limitations imposed by IRCA, will require federal cooperation.

C. Implementation of the Bill Proposal

The main barrier to state-level immigration control generally—and to any proposed state-level response to DACA rescission, including the model legislation suggested here—involves the need for federal cooperation.¹⁹⁷ Either the Legislative or Executive Branch of the [United States Federal Government would need to create and grant a waiver](#), allowing California to implement immigrant work permission in violation of IRCA.¹⁹⁸ The difficulty therein is that the necessary waiver literally has never been created.¹⁹⁹ The positive, however, is that there are three different ways by which such a waiver could be established.²⁰⁰

First, the Secretary of Homeland Security (currently Kirstjen Nielsen) can write the waiver herself.²⁰¹ While the Secretary of Homeland Security has not traditionally created immigration waivers—[meaning the exact mechanism by which she would do so is unclear](#)—examples of other DHS actions could provide insight.²⁰² For example, in 2013, [DHS created the I-601A waiver through an internal memo](#).²⁰³ The I-601A is a discretionary waiver granted by the United States Citizenship and Immigration Services.²⁰⁴ Essentially, it waives any unlawful presence and entry into the United States.²⁰⁵ While the specific terms of this action do not apply to the present case, the means by which it was implemented could be of use.²⁰⁶ The Secretary of Homeland

¹⁹⁴ AB-20, Undocumented Workers: California Agricultural Act. California Legislative Information (2015-2016) (http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB20).

¹⁹⁵ La Corte, *Legislative History of State-Based Guest Worker Programs*, *Supra* n. 164.

¹⁹⁶ *See Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Sutherland Staff, The Truth About HB 116: FAQ, Sutherland Institute (<https://sutherlandinstitute.org/the-truth-about-hb-116-faq/>).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Devin Dwyer, *Utah Approves Guest Worker program for Illegal Immigrants*, ABC News (March 7, 2011) (<http://abcnews.go.com/Politics/utah-approves-guest-worker-program-illegal-immigrants/story?id=13071198>).

²⁰³ *I-601A Provisional Waiver Process*, Immigrant Legal Resource Center (Dec. 20, 2016) (https://www.ilrc.org/sites/default/files/resources/i-601a_practice_advisory_final.pdf); U.S. Citizenship and Immigration Services, *I-601A, Application for Provisional Unlawful Presence Waiver*, Dep't of Homeland Security (April, 11, 2018) (<https://www.uscis.gov/i-601a>) (Generally, The I601A waiver waives the unlawful presence penalty for a person seeking to immigrate to the United States who had entered the United States unlawfully).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

Security drafted the I-601A memo and implemented it without input from the President or from Congress.²⁰⁷ Thus, the most efficient way to acquire a waiver is through a unilateral DHS action. Unfortunately, this makes the waiver [susceptible to the whims of future Secretaries of Homeland Security](#).²⁰⁸ In other words, the current DHS Secretary could rescind the I-601A waiver if she saw fit to do so, just as any subsequent Secretary could rescind a hypothetical waiver in this case.

The waiver could also be created by the President of the United States of America through executive order.²⁰⁹ However, if there was limited precedent for the creation of a waiver through unilateral action by DHS, there is even less here.²¹⁰ Generally, when the President signs an executive order relating to immigration, the action's text comes from DHS; indeed, DACA itself is an example of the President signing a DHS order.²¹¹ Ordinarily, having DHS create the waiver to be enacted by Presidential action would be the recommendation. Unfortunately, it is unclear the extent to which President Trump would be amenable to such a deed as this. He has, thus far, proven to be [inordinately hostile towards both DACA](#) and the State of California, and there is little reason to believe he would soften his views for the benefit of both of the above.²¹²

Finally, the waiver could be created through an act of Congress, which would amend the Immigration and Nationality Act (INA).²¹³ This is by far the most secure means by which the waiver could be established. Moreover, there is substantial precedent for this.²¹⁴ An entire section of the INA is devoted to waivers created by Congressional action.²¹⁵ However, while this method of both creating and implementing of a hypothetical waiver is the most secure—given that a law passed by Congress must be repealed and cannot be unilaterally revoked by the executive leadership of a subsequent Presidential administration—it is the most arduous. Passing laws through Congress can be time consuming and success is far from guaranteed, especially given the political make-up of the current Legislature. With regard to protecting California's DACA recipient population, time is of the essence.

As such, encouraging unilateral action from DHS is probably the best option. Such an action would be insecure and can be rescinded by any subsequent Secretary—or even by the current DHS Secretary at a later date—but a short-term solution is better than no solution at the present moment. It behooves the State of California to encourage the DHS Secretary to release an internal memorandum instructing DHS—specifically the United States Citizenship and Immigration Services—to allow California to implement this bill, should it pass in the state's legislature.

²⁰⁷ *Id.*

²⁰⁸ Ruchi Thaker, *Expansion of Provisional Waiver (I-601A)*, Law Office of Ruchi Thaker (July 28, 2016) (<https://www.thakerlaw.com/blog/expansion-of-provisional-waiver-i-601a/>).

²⁰⁹ Sutherland Staff, *Supra* n. 183.

²¹⁰ Dwyer, *Supra* n. 187.

²¹¹ Napolitano, *Exercising Prosecutorial Discretion*, *Supra* n. 8.

²¹² Maegan Vazquez, *Trump: 'No More DACA Deal,'* CNN Politics (April 1, 2018) (<https://www.cnn.com/2018/04/01/politics/trump-no-more-daca-deal/index.html>).

²¹³ Sutherland Staff, *Supra* n. 183.

²¹⁴ INA Sec. 212(a).

²¹⁵ *Id.*

Unfortunately, this means that if the California State Legislature wants their DACA work authorization law implemented, they have to write the bill with DHS in mind. As such, any work authorization bill would need to have a narrow scope—one that does not significantly threaten the federal government’s authority to enforce immigration.

D. Scope and Limitation of Bill Proposal

1. Scope of the Bill’s Application

When considering possible state-level responses to DACA’s rescission, the first step is to determine the scope of the bill’s application. The proposed bill should apply to any current DACA recipient who resides in California at the time of its passing and who has a clean criminal record and did not lose their DACA status due to default. The state is free to implement a residency time requirement as well, to ensure that DACA recipients from across the country cannot come to California and exploit the law. The bill should not discriminate against, or favor, any industry; in fact, the proposal’s language should not require California or potential applicants to establish a worker shortage to apply for work permission. DACA recipients currently work across a broad spectrum of industries, after all.

Any state legislation that seeks a waiver from the federal government should focus only on *work authorization*. The bill should not address USCIS, Immigration and Customs Enforcement (ICE), or any possible paths to citizenship. [Due to Supremacy Clause issues](#),²¹⁶ California cannot unilaterally implement any provision that confers immigration status to its residents, since that is the sole power of the federal government under the INA.²¹⁷ Furthermore, the bill is less likely to attract criticism or federal lawsuits if it does not address citizenship. Moreover, bipartisan support might be more likely if the proposed bill were framed as an economic issue, as opposed to an immigration issue.

Additionally, when requesting a waiver from the federal government, California should specify that the law does not apply to undocumented non-citizens who did not have DACA status at the time of its passage, even if that person had prior DACA protections. Moreover, the bill should not apply to undocumented non-citizens who lost their DACA status as a result of violating the program’s requirements, such as being convicted of a felony, significant misdemeanor, or three or more misdemeanors.²¹⁸ Eligible non-citizens seeking to benefit from this bill should be heavily screened to ensure they have no criminal records or serious immigration violations. By narrowly tailoring the law, California improves its chances of obtaining federal permission for implementation.

²¹⁶ Eric Posner, *The Imperial President of Arizona*, Slate (June 26, 2012) (http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/the_supreme_court_s_arizona_immigration_ruling_and_the_imperial_presidency_.html) (Generally, federal law that directly speaks on an issue will supersede state law that contradicts the same issue. The state law will be deemed invalid.)

²¹⁷ See generally INA (<https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/act.html>).

²¹⁸ U.S. Citizenship and Immigration Services, DHS DACA *Frequently Asked Questions*, Dep’t of Homeland Security, (March 8, 2018) (<https://www.uscis.gov/archive/frequently-asked-questions>).

2. Limitations of the Bill's Protections

It is important that states who seek to implement a work protection bill do not address or limit federal immigration enforcement policies. Although protecting DACA recipients from deportation and ICE raids is of major concern to immigrant advocates, if DACA is rescinded there is no legal way that a state-level bill could do so due to the Supremacy Clause. Luckily, [California has already implemented Sanctuary State regulations](#) that may help the general non-citizen population, which includes former DACA recipients.²¹⁹ That issue, however, is outside the scope of this memorandum and will not be discussed.

Implementing limitations to curb or even bar ICE activity could [infringe upon the powers of the federal government to enforce immigration laws, potentially resulting in a federal lawsuit against California](#).²²⁰ The federal government would likely couch this lawsuit, in part, on the Supremacy Clause.²²¹ Furthermore, given that California is currently in litigation with the Department of Justice over its Sanctuary State laws,²²² attempting to limit or curb ICE activity would probably subject the state to further federal suits over its immigration policies.

California, nonetheless, may be considering inviting litigation to make a political statement. However, an invitation to litigate might be abused as a Conservative talking point. This could risk eroding overall support for the proposed bill specifically, and for undocumented immigrants generally.

Lastly, California could include a noncompliance clause – namely, that state-level law enforcement or the Department of Labor in California will not comply with ICE requests pertaining to former DACA recipients. Assuming the proposed bill passes, ICE would be inclined to ask for a list of former DACA recipients now working in California and covered under the new law; the non-compliance clause would establish a bright line that California cannot comply with such requests. However, given the current Sanctuary State legislation and the commonness of sanctuary cities in California, we believe this would be superfluous.

3. Proposed Bill Examples

As the analysis above suggests, any state proposals to counter DACA rescission should include: (1) a narrow scope (2) applicability only to DACA recipients living in the state at the time the bill was passed (3) prohibitions against addressing immigration enforcement activities, such as

²¹⁹ Mary Fan, *How Sanctuary Cities Can Protect Dreamers*, Fortune (Sept. 7, 2017)

(<http://fortune.com/2017/09/07/daca-program-sanctuary-cities-donald-trump-dreamers/>).

²²⁰ See Doina Ciacu, *Trump Criticizes Oakland Mayor as 'Disgrace' Over immigrant Warning*, Reuters (March 8, 2018) (<https://www.reuters.com/article/us-usa-immigration-oakland/trump-criticizes-oakland-mayor-as-disgrace-over-immigrant-warning-idUSKCN1GK2PG>) (discussing Trump's criticism of Oakland Mayor Libby Schaaf for having warned the population of Oakland of impending ICE raids. Trump's criticism stemmed from Mayor Schaaf's efforts to impede the federal government from doing their job).

²²¹ See Sarah N. Lynch, Dan Levine, *U.S. Justice Department Sues California Over 'Sanctuary' Policies*, Reuters (March 6, 2018) (Discussing the federal lawsuit against California for its Sanctuary State policies based upon the supremacy clause) (<https://www.reuters.com/article/us-usa-justice-immigration/u-s-justice-department-sues-california-over-sanctuary-policies-idUSKCN1GJ07T>).

²²² *Id.*

those undertaken by ICE (4) care not to confer any immigration status to recipients (5) an economic framing. It may also be useful for lawmakers to include a Joint Resolution requesting federal cooperation. The Joint Resolution should detail the benefits and limitations of the proposed bill. Combining these elements, this memorandum now presents a draft model California State Assembly bill and Joint Senate Resolution, within the enumerated legal and political parameters.

a. Proposed Bill

The proposed bill should have two sections. First, it should detail the act's necessity in such a way that it highlights the both economic benefits of passing the bill and the economic detriment of not doing so. The second phase should detail the specific substantive legal changes that the proposed bill would make.

ASSEMBLY BILL

No. _____

Introduced by Assembly Member _____

Month Day, Year

An act to add Chapter 6 (commencing with Section 14600) to Division 7 of the Unemployment Insurance Code, relating to undocumented recipients of Deferred Action for Childhood Arrivals (DACA).

LEGISLATIVE COUNSEL’S DIGEST

_____, as introduced, _____. DACA Recipients: Work Authorization in the State of California.

Existing provisions of federal law regulate immigration. Under federal law, state laws regulating immigration are preempted.

This bill would, upon the state receiving the necessary authority under federal law, require the California Workforce Development Board to create and administer work permission to undocumented persons receiving DACA protections at the time of passage. This bill would require the Board to certify that a loss of DACA recipients would have a negative effect on California’s economy. Upon certification, this bill would authorize the California Workforce Development Board to establish and issue permits to undocumented persons receiving DACA protections as of the time of passage. This bill would furthermore authorize the Board to issue permits to the immediate family members, as defined, of undocumented persons permitted as workers under the program. This bill would also require the Board, in conjunction with the Legislative Analyst’s Office, to publish an annual report analyzing whether the program has caused the displacement of employable legal residents of the United States in California.

Vote: _____. Appropriation: _____. Fiscal committee: _____. State-mandated local program: _____.

The people of the State of California do enact as follows:

1 SECTION 1: This act shall be known, and may be cited, as the California Deferred Action
2 for Childhood Arrivals Protection Act of 201_.

3 SEC. 2: The Legislature finds and declares all of the following:

4 (a) Deferred Action for Childhood Arrivals (DACA) was implemented under President
5 Obama in June of 2012. The program was created by executive order, rather than by an act of
6 Congress; however, because of similarities to various DREAM Act proposals, it is not uncommon
7 for DACA recipients to be called “Dreamers.” DACA is intended to grant a form of amnesty to
8 undocumented immigrants who entered the United States as children.

9 (b) DACA was implemented on June 15, 2012 by a memorandum from the current
10 Secretary of Homeland Security, Janet Napolitano, and signed by President Obama. The memo
11 was titled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the
12 United States as Children.”

13 (c) To be eligible for DACA, applicants must have entered the United States when they
14 were under the age of 16. Furthermore, they must have been younger than 31 on June 15,
15 2012, and they must have lived in the USA since 2007. Finally, they must have been physically
16 present in the United States on June 15, 2012 and at the time of making their application
17 request, they must have a criminal record devoid of felony or serious misdemeanor convictions
18 (or have fewer than three misdemeanors), and have completed high school or a GED, or have
19 been honorably discharged from the military or have been presently enrolled in school. As of
20 August 2012, this standard included an approximate 1.7 million people.

21 (d) In September 2017, Acting Secretary of Homeland Security Elaine Duke rescinded the
22 Napolitano memo. The Trump administration then announced that it would give Congress six
23 months to rework the DREAM act upon which DACA was based. However, due to various
24 political pressures, an agreement has not yet been reached.

25 (e) California has allowed over 220,000 people to receive DACA protections, enabling
26 them to work openly in the state. Since the implementation of DACA, California residents have
27 renewed their protected status with the Department of Homeland Security over 200,000 times.
28 Currently, DACA recipients in California add over \$11.5 billion dollars to the state’s annual GDP.
29 Furthermore, between over 50,000 students in California colleges and universities have DACA
30 status.

31 (f) Should the Federal Government fail to continue offering DACA protections, California,
32 with over 30 percent of DACA recipients, will bear the highest cost of all 50 states. Factoring in
33 budgetary and economic effects, California’s total cost over a ten-year window would be \$84.2
34 billion.

35 (g) There are unquantifiable benefits from DACA as well, such as providing increased
36 access to private health insurance, driver’s licenses, and auto insurance, all of which generate
37 spillover benefits to the rest of society. This analysis also leaves out the effects of simply having
38 more productive minds in the country capable of producing innovations and increasing labor
39 productivity.

40 (h) Recognizing the significant contribution of California’s DACA recipients to the state’s
41 economy, and, understanding that the state’s success is highly dependent on the unauthorized
42 work force, it is imperative that state policy be created to assist current DACA recipients, their

- 1 families, and their employers by providing a safe and legal way for affected people to work
- 2 legally in California.

1 SEC. 3: Chapter 6 (commencing with Section 14600) is added to Division 7 of the
2 Unemployment Insurance Code, to read:

3
4 CHAPTER 6. CALIFORNIA DEFERRED ACTION FOR CHILDHOOD ARRIVALS PROTECTION ACT OF 201_

5
6 14600. As used in this chapter:

7 (a) "DACA" means Deferred Action for Childhood Arrivals, the policy enacted under the
8 Obama administration which grants work authorization and protection from deportation to
9 qualified undocumented persons.

10 (b) "DACA Recipient" means any undocumented person receiving Deferred Action for
11 Childhood Arrivals protections at the time of the passage of this bill.

12 (c) "Undocumented person" means a person who is an unauthorized alien as defined in
13 Section 1324a(h)(3) of Title 8 of the United States Code.

14 (d) "Immediate family member" means a parent, spouse, or child of a DACA Recipient.

15 (e) "California resident" and "resident of California" mean a person who is able to show,
16 through identification, driver's license, or tax returns that they have resided at a permanent
17 address within the state of California for one year before the passage of this bill.

18 (e) "Board" means the California Workforce Development Board.

19 (f) "Serious crime" means any conviction that results in two years or more in prison, is
20 considered a deportable offense under Section 237(a)(2) of the Immigration and Nationality Act
21 (INA), or that is described as a "crime of moral turpitude" under Section 212(a)(2)(a)(i) of the
22 INA.

23 14601. The California Workforce Development Board shall have the authority to grant
24 work authorization to any applicant who is, at the time of passage of this bill, a resident of
25 California and a DACA recipient. There will be no discrimination based upon industry,
26 employment status, or level of education beyond what is already required to receive DACA.

27 14602. The Board shall furthermore be authorized to grant work authorization to the
28 immediate family of any qualified DACA recipient provided:

29 (a) They have resided in the State of California for one full year at the time of
30 application.

31 (b) They pass a criminal background check, showing that they have never been
32 convicted of a serious crime.

33 (c) They have paid taxes for the duration of their residency in California.

34 14603. Current DACA recipients will not have to show continued employment after work
35 authorization has been granted. However, immediate family members of DACA recipients must
36 show, after one year, that they have either been employed or have been continuously seeking
37 employment during that period. After one year, they may have their work authorization
38 renewed and will not have to show employment again.

39 14604. An employer of a person permitted to work in this state pursuant to this chapter
40 shall provide a written record of employment to the employee issued a permit and shall
41 provide a copy to the Board. This record shall include information demonstrating the hours
42 worked and wages paid to the employee. This information will be used to study whether DACA
43 recipients or their families are adversely affecting the employment of legal residents of the
44 United States in California.

1 14605. Undocumented persons permitted to work in this state pursuant to this chapter
2 is entitled to all the same wage and hour and working conditions protections under existing law
3 provided to an employee who is a legal resident of California. Furthermore, undocumented
4 persons permitted to work in this state pursuant to this chapter may be employed by multiple
5 employers.

6 14606. Beginning one year after the passage of the bill, the Board, in conjunction with
7 the Legislative Analyst’s Office, shall annually publish a report analyzing whether the California
8 Deferred Action for Childhood Arrivals Protection Act has caused the displacement of
9 employable legal residents of the United States in California.

10 14607. The protections granted pursuant to this chapter are not intended to confer legal
11 status in a manner that would restrict the enactment of superseding federal legislation that
12 seeks to alter that status.

13 14608. By _____, 201_, the Director of the Board shall submit a formal request to the
14 federal government to receive the necessary authority to administer the provisions of this
15 chapter.

16 14609. This chapter, except this section, shall not be implemented unless the Director of
17 the Board receives the necessary authority, consistent with federal law, to administer this
18 chapter.

b. Joint Senate Resolution

The Joint Senate Resolution is a request for federal cooperation to grant the proposed waiver. The state may pass the bill into law but must acquire federal cooperation to *implement* it. California should include a Joint Resolution to inform the federal government of the bill, detail the state benefits therefrom, outline its limitations, and ultimately ask for permission to implement the law. Moreover, the Legislature might request that Federal Congress passes some version of the DREAM Act. This would protect DACA recipients on a national scale, which is decidedly beneficial to the State of California.

Introduced by _____

Month Day, Year

Senate Joint Resolution No. _____ —Relative to Federal Cooperation with Work Permission for DACA Recipients in California.

LEGISLATIVE COUNSEL’S DIGEST

SJR __, as introduced, _____. Federal permission to implement state-level work permission.

This measure would encourage the Department of Homeland Security to create and grant a waiver to the State of California, allowing for the implementation of state-level work permission in accordance with Assembly Bill No. ____.

- 1 WHEREAS approximately 223,000 people residing in California
- 2 receive protections and work authorization through Deferred Action for
- 3 Childhood Arrivals (DACA); and
- 4 WHEREAS approximately 30% of current DACA recipients reside in
- 5 the State of California; and
- 6 WHEREAS DACA recipients in California contribute an estimated
- 7 \$11.6 billion to the state’s GDP; and
- 8 WHEREAS the failure to extend DACA at the federal level would
- 9 have a disproportionate effect on the State of California, its economy,
- 10 and its residents; and
- 11 WHEREAS the California legislature has developed a plan by which
- 12 resident DACA recipients could continue to contribute freely to the
- 13 state’s economy; and
- 14 WHEREAS implementation of the proposed law would not
- 15 interfere with Immigration and Customs Enforcement activity within
- 16 California and would not deign to effect federal immigration standards;
- 17 and
- 18 WHEREAS the State of California requires federal cooperation to
- 19 implement the proposed law; and
- 20 WHEREAS the Secretary of Homeland Security could, in his or her
- 21 official capacity, create and grant a waiver allowing California to
- 22 implement the proposed law; now, therefore, be it

1 *Resolved by the Senate and the Assembly of the State of California*
2 *jointly*, That the Legislature urges the Secretary of Homeland Security to
3 create and grant a federal waiver authorizing California to implement its
4 proposed state-level work authorization law to protect its resident DACA
5 recipients; and be it further

6 *Resolved*, That the Secretary of Homeland Security cooperates
7 with the State of California to address the scope of the requested waiver;
8 and be it further

9 *Resolved*, That the Secretary of Homeland Security instructs the
10 Department of Justice not to file suit against the State of California as it
11 pertains to implementation of the proposed law; and be it further

12 *Resolved*, That the Secretary of the Senate transmit copies of this
13 resolution to the President and Vice President of the United States, to the
14 Speaker of the House of Representatives, to the line Majority Leader of
15 the Senate, and to each Senator and Representative from California in
16 the Congress of the United States.

Introduced by _____

Month Day, Year

Senate Joint Resolution No. _____ —Relative to the Development, Relief, and Education for Alien Minors (DREAM) Act.

LEGISLATIVE COUNSEL’S DIGEST

SJR __, as introduced, _____. Development, Relief, and Education for Alien Minors Act.

This measure would encourage the Department of Homeland Security to create and grant a waiver to the State of California, allowing for the implementation of state-level work permission in accordance with Assembly Bill No. ____.

1 WHEREAS Deferred Action for Childhood Arrivals (DACA) was
2 implemented under President Obama in June of 2012; and

3 WHEREAS DACA is intended to grant work permission and
4 protection from deportation to qualified undocumented immigrants who
5 entered the United States as children; and

6 WHEREAS DACA was enacted largely in response to the 2011
7 filibuster preventing the Senate passage of the Development, Relief, and
8 Education for Alien Minors (DREAM) Act, which would have granted
9 amnesty and a path to legal permanent residency to undocumented
10 immigrants brought to the United States as children; and

11 WHEREAS in September 2017, Acting Secretary of Homeland
12 Security Elaine Duke rescinded the memo upon which DACA protections
13 are enacted; and

14 WHEREAS the Trump administration then announced that it
15 would give Congress six months to rework the DREAM act upon which
16 DACA was based. However, due to various political pressures, an
17 agreement has not yet been reached; and

18 WHEREAS DACA moved between 50,000 and 75,000 immigrants
19 into employment from either outside the formal labor force or
20 unemployment, and increased the average income of immigrants in the
21 bottom of the income distribution; and

1 WHEREAS 59 percent of DACA recipients reported getting their
2 first job, 45 percent received a pay increase, 49 percent opened their first
3 bank account, and 33 percent applied for their first credit card due to
4 their participating in DACA; and

5 WHEREAS DACA affords other, unquantifiable, benefits, such as
6 providing undocumented immigrants with increased access to private
7 health insurance, driver’s licenses, and auto insurance, all of which
8 generate spillover benefits to the rest of society; and

9 WHEREAS the loss of DACA would cost the United States GDP
10 roughly \$460 billion annually; now, therefore, be it

11 *Resolved by the Senate and the Assembly of the State of*
12 *California, jointly,* That the Legislature urges the United States Congress
13 to act swiftly to pass the DREAM Act, codifying federal protection for
14 DACA recipients; and

15 *Resolved,* That the Secretary of the Senate transmit copies of this
16 resolution to the President and Vice President of the United States, to the
17 Speaker of the House of Representatives, to the line Majority Leader of
18 the Senate, and to each Senator and Representative from California in
19 the Congress of the United States.

The passing and implementation of these bills would be beneficial for both California's DACA recipient population and to the State of California as a whole. Specifically, DREAMers would benefit by acquiring work authorization, dissuading the need to work unlawfully and allowing access to better-paying and more stable jobs. This, in turn, can lead DACA recipients to improved social mobility, superior access to healthcare, and enhanced feelings of social inclusion. Furthermore, the State of California benefits because DACA recipients attract spending and investment and produce significant revenue in taxes.

Unfortunately, there is no guarantee that the necessary state-level work authorization bills will pass. Even if they do, implementation will prove difficult and rely heavily on federal cooperation. Luckily, the bills do not reflect the only possible option for DREAMers. California has already made certain employment and educational opportunities available to undocumented residents. While these pre-existing options would not require new legislation, they can still be strengthened and better publicized.

VI. Existing Work Protections Available Regardless of the Existence or Rescission of DACA

In the event DACA is rescinded, and the proposed work protection bill does not gain traction or cannot be implanted, this section will discuss the current ways that former DACA recipient residents can continue working and/or studying in California.²²³ The DACA population encompasses a myriad of laborers, professionals, and students. According to a [figure published by CNN](#), 20% of DACA recipients are in middle school or high school, and 18% are in college.²²⁴ DACA recipients who are not in school [work in varied industries and professions](#), such as food services, retail, hospitality, construction, education, health care, business operations, and technology.²²⁵ President Trump's recent announcement that there will be no more DACA deal invites the question of whether there are preexisting protections for DACA recipient students and workers in California.²²⁶ Luckily, there are options available to DREAMers in the event DACA is rescinded, such as acquiring a primary, secondary, or post-secondary education, working as independent contractors, or becoming entrepreneurs.

A. Undocumented DACA Students

1. Attending and Admissions

In the event DACA is rescinded, former recipients may continue with their middle and high school, undergraduate, and graduate educations in California.²²⁷ The seminal case that speaks directly to this issue is *Plyler v. Doe*, 457 U.S. 202 (1982), which held that a primary and secondary education is mandated and is a right that states cannot deny even to non-citizens.²²⁸ [According to the College Board website](#), undocumented students “are guaranteed an education in U.S. public schools through grade 12.”²²⁹

After high school graduation, though, access to higher education for undocumented students is not guaranteed. Fortunately, federal laws do not prohibit the admission of undocumented immigrants to U.S. colleges, public or private. Individual states, however, may maintain different rules regarding access to their institutions of higher learning. Some universities in Virginia, for example, adopted policies which require aspiring students to foster proof of citizenship or legal residency as an application requirement.²³⁰ In contrast, California does not maintain any

²²³ Please Note: the following discussion and materials in this periodical are for educational and informational purposes only and not for the purpose of providing legal advice. You should contact an attorney to obtain advice with respect to any particular issue or problem in your case.

²²⁴ Parija Kivilanz, *Who is Covered by DACA? Teachers, Caregivers and More*, CNN Money (Nov. 18, 2017) (<http://money.cnn.com/2017/11/18/news/economy/dreamers-jobs-education-profile/index.html>).

²²⁵ *Id.*

²²⁶ Katie Rogers, *Venting On Immigration, Trump Vows ‘No More DACA Deal’ and Threatens NAFTA*, The New York Times (April 1, 2018) (<https://www.nytimes.com/2018/04/01/us/politics/trump-immigration-daca.html>).

²²⁷ This discussion may also generally apply to undocumented non-citizens who are studying in California.

²²⁸ See *Plyler v. Doe*, 457 U.S. 202 (1982).

²²⁹ *Advising Undocumented Students*, College Board (<https://professionals.collegeboard.org/guidance/financial-aid/undocumented-students>).

²³⁰ *Id.* Nevertheless, undocumented students who previously held DACA status may continue attending school and college programs lawfully, so long as the university policy allows for the admission of undocumented students.

prohibitions on undocumented student admissions to private and public colleges within the state.²³¹

2. Financial Issues for Higher Education

Gaining admission to higher education, however, may not be the limiting factor for many undocumented students. Despite admission, the financial barriers of attending college may dissuade former DACA recipient students from enrolling. Several states charge undocumented students out-of-state tuition fees, regardless of the length of time the student has lived in the state.²³² [California, however, provides qualified undocumented students with in-state tuition and state-funded financial aid through A.B. 540, A.B. 130, and A.B. 131.](#)²³³ This helps relieve pressure on aspiring college students' financial situations and allows greater access to the in-state university system.

However, many students, including those with DACA protections, work part-time jobs in order to pay for their college tuition. Since undocumented students cannot legally receive any federally funded student financial aid—such as loans, grants, or scholarships—DACA is critical to the continuance of their undergraduate programs. In the event DACA is rescinded, these students will not be eligible to work, because employers cannot employ non-citizens.²³⁴ In other words, they will be ineligible for work-study, paid internships, or part-time jobs to help with their tuition.²³⁵ Unfortunately, options for students are limited; beyond funds offered through the above laws, the only alternatives for DACA recipient students are private scholarships. Luckily, at the very least, DACA recipients can legally continue their educations in the event DACA is rescinded due to A.B. 540, A.B. 130, and A.B. 131.

B. Self-Employment & Professionals

Undocumented immigrants may lawfully continue operating businesses to maintain a steady revenue stream. Thus, in the event DACA is rescinded, this option remains open to former DACA beneficiaries. Many unauthorized workers are business owners or self-employed entrepreneurs.²³⁶ Data from the 1990 Census and the Legalized Population Survey (LPS) found that the rate of self-employment among undocumented immigrants in 1989 was 4.6 percent for males, 3.6 percent for females, and in 1999 was 8.3 percent for males, and 5.1 percent for females.²³⁷ Based on this figure, about 450,000 undocumented persons are self-employed, assuming the percentages remained roughly constant over the last thirty years.²³⁸ In fact, after

²³¹ *Id.*

²³² *Id.*

²³³ *California Policy*, ULEAD Network (Jan. 22, 2018) (<https://uleadnet.org/map/california-policy>).

²³⁴ INA Sec. 274(A).

²³⁵ *Advising Undocumented Students*, *Supra* n. 212.

²³⁶ See Cindy Carcamo, *Immigrants Lacking Papers work legally – As their own Bosses*, L.A. Times (Sept. 14 2013); Michael Mastman, *Undocumented Entrepreneurs: Are Business Owners “Employees” Under the Immigration Laws?*, 12 N.Y.U. J. Legis.&Pub. Pol’y 225, 252 (2008).

²³⁷ Robert W. Fairlie, Christopher Woodruff, *Mexican Entrepreneurship: A Comparison of Self-Employment in Mexico and the United States*, in GEORGE J. BORJAS, MEXICAN IMMIGRATION TO THE UNITED STATES, 154 (2007).

²³⁸ Geoffrey Heeran, *The Immigrant Right to Work*, 31 Geo. Immigr. L.J. 243, 246 (n. 17) (2017).

Arizona implemented a mandatory E-Verify law in 2007, the state saw about 25,000 undocumented non-citizens becoming self-employed by 2009—an 8 percent spike.²³⁹ For undocumented immigrants who do not have employment authorization in the U.S., owning their own business is an attractive form of working and producing revenue.

A common legal misconception is that working without authorization is a criminal violation under federal law. However, that is untrue: “There are no laws that prohibit unauthorized work, but restrict it . . . As a result, most people assume that unauthorized work is illegal – not because it is, but because unauthorized workers are treated as if they had done something illegal.”²⁴⁰ In other words, there is no law that makes it a crime for non-citizens to work; rather, the INA, under IRCA, penalizes *employers* who hire or knowingly contract non-citizens without work authorization.²⁴¹ The employment of one’s self, however, does not violate the INA and many unauthorized workers are self-employed entrepreneurs.²⁴² The intention of INA 274(A) is to minimize employment opportunities and access to legal protections for unauthorized immigrants by targeting employers.²⁴³ IRCA does not make it illegal for non-citizens without work authorization to work, limiting undocumented immigrants to self-employment, independent contracting, or simply working without authorization.²⁴⁴ Moreover, the INA does not prohibit unauthorized immigrants from owning businesses.²⁴⁵ Thus, non-citizens who once held DACA can utilize their skills to create their own businesses and work in that capacity without worrying about federal or state penalties.

In essence, non-citizen unauthorized workers can create and operate their own businesses and hire employees. [Moreover, unauthorized workers can also pay taxes by acquiring an Individual Tax Identification Number](#) (hereinafter “ITIN”).²⁴⁶ The IRS created the ITIN in 1996 for people who do not have authorization to work.²⁴⁷ Furthermore, the IRS does not share ITIN information with immigration authorities, which makes creating a business an attractive means for generating revenue for one’s self.²⁴⁸

1. DACA Lawyers

Some DACA recipients are licensed professionals and may want to continue working in their capacities as such in the event DACA is rescinded. The top professional degrees are Juris Doctorate, Medical Doctor, Doctor of Dental Surgery, and Doctor of Pharmacy.²⁴⁹ Whether

²³⁹ Cindy Carcamo, *Immigrants Lacking Papers Work Legally—As Their Own Bosses*, L.A. TIMES, Sept. 14, 2013.

²⁴⁰ Geoffrey Heeran, *The Immigrant Right to Work*, 31 Geo. Immigr. L.J. 243, 266-68 (2017).

²⁴¹ INA Sec. 274(A).

²⁴² Cindy Carcamo, *Immigrants Lacking Papers Work Legally—As Their Own Bosses*, L.A. TIMES, Sept. 14, 2013.

²⁴³ Geoffrey Heeran, *The Immigrant Right to Work*, 31 Geo. Immigr. L.J. 243, 270-71 (2017).

²⁴⁴ *Id.*

²⁴⁵ Cindy Carcamo, *Immigrants Lacking Papers Work Legally—As Their Own Bosses*, L.A. TIMES, Sept. 14, 2013.

²⁴⁶ Alexia Fernandez Campbell, *Undocumented Immigrants Pay Taxes Too. Here’s How They Do It.*, Vox (Apr. 17, 2017) (<https://www.vox.com/policy-and-politics/2017/4/17/15290950/undocumented-immigrants-file-tax-returns>)

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *List of Degrees: Most Popular Degree Programs by level*, Study.com (https://study.com/list_of_degrees.html)

former DACA recipients can be professionally licensed depends on the field.²⁵⁰ For example the California Supreme Court held that [undocumented immigrants can legally practice law in California](#).²⁵¹ This means that non-citizen DACA lawyers can lawfully start and operate their own law firm and work in their own capacity taking clients. Thus, in the event DACA is rescinded, non-citizens who once held DACA can become properly licensed to practice law in California, set-up their own law firm, and work in that capacity to generate an income.

2. DACA Professional Health Care Providers²⁵²

Generally, the path to becoming a licensed medical doctor is complicated for non-citizens without work authorization. This is because medical doctors (hereinafter “M.D.”) must complete a [residency program where the prospective M.D. applicant is “employed.”](#)²⁵³ Hence, in the event DACA is rescinded, many M.D. applicants will not be eligible to apply for an M.D. license because they will no longer be eligible to work.²⁵⁴ Nevertheless, for those DACA recipients who are currently doctors, licensure for M.D.’s has not yet been challenged like it has for lawyers or other professions.²⁵⁵ As it stands, [DACA recipients can become M.D.’s](#),²⁵⁶ and if DACA is rescinded, former DACA M.D.’s can continue their own practices under their own business, but likely will be unable to secure employment elsewhere due to IRCA. The M.D. application process requires either a social security number or an ITIN, making it readily available to non-citizens.²⁵⁷ Moreover, DACA recipients cannot be barred from obtaining a medical license on account of their citizenship status, although some states, such as New Jersey, have required that applicants for a medical license be U.S. Citizens.²⁵⁸ This means that the greatest challenge facing prospective M.D.’s who formerly held DACA is completing their residency prerequisites.

²⁵⁰ Interested unauthorized immigrant professionals seeking to set up their own businesses should refer to their respective licensing board to determine whether they qualify for licensing notwithstanding their immigration status.

²⁵¹ Catherine E. Schoichet, Tom Watkins, *No Green Card? No Problem - - Undocumented Immigrant Can Practice Law, Court Says*, CNN (Jan. 3, 2014) (<https://www.cnn.com/2014/01/02/justice/california-immigrant-lawyer/index.html>).

²⁵² Due to the large number of professional degrees in the health care sector, this article will focus on the top health care degrees according to Study.com, *Supra* n. 234.

²⁵³ Mallika Kallingal, *She’s Undocumented and in Med School. Now What?*, CNN (March 16, 2017) (<https://www.cnn.com/2017/03/15/health/undocumented-medical-students-trump-trnd/index.html>).

²⁵⁴ *See id.*

²⁵⁵ *Id.*

²⁵⁶ Nadia N. Sawicki, *Doctors Who DREAM: Clearing Up Confusion on Citizenship Requirements*, Harvard Law (Sept. 24, 2013) (<http://blogs.harvard.edu/billofhealth/2013/09/24/doctors-who-dream-clearing-up-confusion-on-citizenship-requirements/>).

²⁵⁷ *Physician and Surgeon – Apply Online*, Medical Board of California, (http://www.mbc.ca.gov/Applicants/Physicians_and_Surgeons/Apply_Online.aspx).

²⁵⁸ Sawicki, *Doctors Who DREAM*, *Supra* n. 241.

[Dental surgeons](#) and [nurses](#) face similar obstacles to M.D.'s, in that they must complete a residency to become licensed.²⁵⁹ Nonetheless, under the California Business and Professions Code, they generally [do not need to prove citizenship or residency to acquire a license](#).²⁶⁰

Still, if the non-citizen successfully acquires a professional license, they may continue practicing in their field as a business owner. It is important that applicants check the licensing requirements in their field of interest to determine whether the licensing board allows for non-citizens to apply. Moreover, in order to complete residency programs in certain fields, non-citizens can resort to working as “volunteers” rather than in a paid position. Non-citizens can generally start their own medical businesses because self-employment is not a violation of the INA, and non-citizens can report their earnings to the IRS by acquiring an ITIN.²⁶¹

C. Ramifications

Although there are no criminal implications for working without authorization, there are immigration related penalties. Working without authorization may result in ineligibility for other benefits under the INA.²⁶² For example, and most notably, an undocumented non-citizen seeking to adjust their status²⁶³ will be deemed ineligible to apply, for having worked without authorization.²⁶⁴ Also, asylum seekers who work without authorization, in some situations, are deemed to have violated an immigration law equivalent to unlawful presence, thus barring their admission to the U.S.²⁶⁵ Most severely of all ramifications is that unauthorized workers may attract suspicion from ICE and risk deportation.²⁶⁶ Because of these risks, non-citizens without work authorization should remain cautious to ensure they do not make themselves ineligible to adjust their immigration status in the future.

D. Independent Contractors

In the event DACA is rescinded, non-citizens may be contracted to work, as opposed to employed.²⁶⁷ INA 274(A) allows people to contract unauthorized workers whom they do not

²⁵⁹ Licensed Dentists, *Oral and Maxillofacial Surgery Permits*, Dental Board of California, http://www.dbc.ca.gov/licensees/dds/permits_oms.shtml; *Steps to Become a California Registered Nurse*, California Board of Registered Nursing (<http://www.rn.ca.gov/careers/steps.shtml>).

²⁶⁰ Bus. & Prof. Code 1638

(http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=2.&title=&part=&chapter=4.&article=2.4); *Steps to Become a California Registered Nurse*, California Board of Registered Nursing (<http://www.rn.ca.gov/careers/steps.shtml>).

²⁶¹ Different professions and working sectors require permits or licensing to perform job duties. Each working sector is different, and some permits/licenses require that the recipient be a U.S. Citizen to qualify for the permit. For example, construction companies require the owner to be a U.S. Citizen to qualify for a permit. Cindy Carcamo, *Immigrants Lacking Papers Work Legally—As Their Own Bosses*, L.A. TIMES, Sept. 14, 2013; please visit an attorney for assistance in setting up a business for any profession.

²⁶² Geoffrey Heeren, *The Immigrant Right to Work*, 31 Geo. Immigr. L.J. 243, 268 (2017).

²⁶³ Adjustment of status is a process for obtaining a green card within the U.S.

²⁶⁴ INA § 245(c)(2) and (c)(8)

²⁶⁵ Geoffrey Heeren, *The Immigrant Right to Work*, 31 Geo. Immigr. L.J. 243, 268 (2017).

²⁶⁶ Geoffrey Heeren, *The Immigrant Right to Work*, 31 Geo. Immigr. L.J. 243, 268 (2017).

²⁶⁷ This also applies to unauthorized workers who did not previously hold DACA

know are unauthorized.²⁶⁸ This is because the laws surrounding contractors, as opposed to employees, are less strict.²⁶⁹ Specifically, employers are not mandated to check for work authorization of the people they contract.²⁷⁰ Companies or individuals do not, for the most part, face sanctions under the INA if they hire unauthorized immigrant workers who are independent contractors.²⁷¹ Under the INA and IRCA, independent contractors fall outside the definition of “employee”, and thus employers have no obligation to check their citizenship status or work authorization.²⁷² To be penalized under the INA, the employer would have to have independent knowledge that a contractor is not authorized to work.²⁷³

Moreover, employers can hire “sporadic, irregular, or intermittent” domestic workers without checking their immigration status.²⁷⁴ In essence, undocumented, unauthorized workers can lawfully provide domestic services in a private home, so long as the type of work is irregular or temporary—such as carpentry or house cleaning. Of course, this type of work might not interest former DACA recipients, many of whom hold degrees or possess special skills that could lead to higher pay. However, in the event DACA is rescinded, this could be an outlet for former DACA students to acquire some form of work to pay for their tuition.

Because there are no requirements that companies or people check the immigration status of contractors, former DACA recipients can continue working in such capacity, unless the hiring party *knows* that the contractor is in fact a non-citizen unauthorized worker. This means that, for example, an undocumented lawyer without work authorization can work as a contract attorney without the employer law firm facing ramifications under the INA—although this would only be possible if the employer does not ask about the contractor’s immigration status.

1. “Knowingly” Hiring Under INA 274(A)

Employers may want to understand what “knowingly” means, under the INA, before hiring independent contractors that may be undocumented.

Case law has shaped this issue, since “knowingly” is not defined in the statute.²⁷⁵ Case law has held that “knowledge” can be actual or constructive,²⁷⁶ meaning inferred through notice of facts and circumstances which would lead a person, through exercise of reasonable care, to know about a certain condition.²⁷⁷ Thus, “when an employer receives specific information that casts doubt on the employment authorization of a contractor, and the employer continues to employ

²⁶⁸ INA §274(A); Immigration Reform and Control Act of 1986, Publ. L. No. 99-603, §§ 115, 274(A), 100 Stat. 3359, 3360, 3385 (making employment of unauthorized immigrants unlawful).

²⁶⁹ See INA § 274(A)

²⁷⁰ See INA § 274(a)(1); *but also see* INA § 274(a)(4)

²⁷¹ Geoffrey Heeren, *The Immigrant Right to Work*, 31 Geo. Immigr. L.J. 243, 266-68 (2017).

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* (citing 8 C.F.R. §274a.1(h) (2009)).

²⁷⁵ See generally INA Sec. 274(A).

²⁷⁶ *Mester Mfg. Co. v. I.N.S.*, 879 F.2d 561, 566-68 (1989); *Split Rail Fence Company, Inc. v. United States*, 852 F.3d 1228, 1243 (2017).

²⁷⁷ *Split Rail Fence Company, Inc. v. United States*, 852 F.3d 1228, 1243 (2017) (citing *Mester Mfg. Co. v. I.N.S.*, 879 F.2d 561, 566-67 (1989)).

the individual without taking adequate steps to re-verify their employment eligibility, a finding of constructive knowledge may result.”²⁷⁸ Furthermore, receipt of a warning from immigration enforcement agencies is sufficient to establish notice.²⁷⁹ Even if the employer does not receive a warning from immigration agents, constructive notice can still be inferred from facts available to the employer that raise suspicion.²⁸⁰ The Ninth Circuit relied on criminal cases to formulate this standard and held that, like in criminal law, “deliberate failure to investigate suspicious circumstances imputes knowledge.”²⁸¹

The Ninth Circuit holding, unfortunately, makes hiring undocumented independent contractors unattractive. Moreover, it could raise further questions of employment equality and civil rights, because an undocumented person of color may trigger greater “suspicion” compared to a Caucasian foreign national. Still, in the event DACA is rescinded, California would do well to consider fortifying these current options available to some former DACA recipients.

²⁷⁸ *Split Rail Fence Company, Inc. v. United States*, 852 F.3d 1228, 1243 (2017).

²⁷⁹ *Id.*

²⁸⁰ *Mester Mfg. Co. v. I.N.S.*, 879 F.2d 561, 566-67 (1989).

²⁸¹ *Id.* at 566 (Citing *United States v. Jewell*, 532 F.2d 697 (9th Cir.)).

VII. California Initiatives to Publicize/Strengthen Pre-existing Work Protections

In the event DACA is rescinded, former recipients can utilize California’s pre-existing work protections without the need for legislative action. However, California could better publicize or strengthen these protections by enacting state-level regulations with no federal underpinnings. Specifically, the state can expand California Fair Employment and Housing Act protections to independent contractors, to ensure that they are not refused work on the basis of their national origin. California can also enact a regulation that provides its professional DACA population access to medical care, state loans, or other benefits. Lastly, California may publicize pre-existing regulations by holding entrepreneur and employer training conferences with the assistance of immigration interest groups. These training conferences could be aimed at identifying how an employer may hire a person who is suspected of being a non-citizen without facing legal ramifications. The conferences could further educate the non-citizen population about entrepreneurship and the different ways to set up a business. These are only a few of the means by which California may publicize or strengthen pre-existing work protections for DACA recipients and for other non-citizens.

A. Formalize Policy/State Law for Independent Contractors

California can launch an initiative to formalize a “Do not ask” state policy when hiring independent contractors, by amending the California Fair Employment and Housing Act (Hereinafter “FEHA”) or the California Constitution. [FEHA makes it unlawful for employers to discriminate against their employees on the basis of race, color, and national origin.](#)²⁸² For example, FEHA prohibits employers from implementing an “English-only” policy, absent business necessity.²⁸³ However, [FEHA provisions do not generally apply to independent contractors.](#)²⁸⁴ The same is true of the California Constitution’s employment provisions.²⁸⁵ The only clear FEHA provision that applies to independent contractors is the rule against harassment.²⁸⁶

DACA’s rescission would result in the loss of former DACA holders’ employment authorization. However, because former DACA recipients can lawfully work as business owners or independent contractors, California can take action to broaden the scope of people protected under FEHA and the California Constitution. First, it is critical that FEHA or the California

²⁸² *Filing a Discrimination Claim – California*, Workplace Fairness (https://www.workplacefairness.org/file_CA).

²⁸³ *Id.*

²⁸⁴ *What are the California Rules Regarding Workplace Harassment, and How Do They Differ From Federal Law?*, Society for Human Resource Management (June 13, 2016) (<https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/californiaworkplaceharassment.aspx>).

²⁸⁵ Cal. Gov. Code § 12940(a); *Sistare-Meyer v. Young Men’s Christian Assoc.* (1997) 58 Cal. App. 4th 10, 16-17 (holding that wrongful termination based on race pursuant to Cal. Const., Art 1., § 8 does not apply to independent contractors).

²⁸⁶ *See generally What are the California Rules Regarding Workplace Harassment, and How Do They Differ From Federal Law?*, Society for Human Resource Management (June 13, 2016) <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/californiaworkplaceharassment.aspx>

Constitution employment provisions sufficiently cover independent contractors. Next, California can, by amending the Constitution or FEHA, include a provision that generally reads: “When entering into a contract with an independent contractor, the employer must not ask the contractor about his/her citizenship status. A violation of this provision will constitute discrimination on the basis of national origin” (“do not ask” policy). The “do not ask” policy can be specified under protections from discrimination based on national origin or color, which already exist under FEHA.²⁸⁷ This policy, however, could face backlash from employers who wish to ask the status of workers when conducting their due diligence for determining whether they will be clear from INA 274(A) violations.

The [top independent contractor occupations](#) include grounds keeping, farming, domestic labor, child care work, and construction work.²⁸⁸ Several professional occupations can be contracting positions as well, such as lawyers, real estate agents, and dentists.²⁸⁹ The proposed independent contractor protection policy would also extend to professionals, such as, lawyers engaging in contract work for law firms, but who are not “employees” under the law.

B. Immigration Employer Conferences

California can attempt to educate employers about the role of independent contractors and the unnecessary of asking about their citizenship status under the INA. If employers understand the nuances and intricacies of the relationship between immigration and employment law, they may be more willing to hire independent contractors for their businesses.²⁹⁰ In order to drive this initiative, California can coordinate with immigration interest groups such as the [American Immigration Law Association \(AILA\)](#)²⁹¹ or the [Immigrant Legal Resource Center \(ILRC\)](#)²⁹² to lead conferences or webinars. AILA, ILRC, or other similar immigrant interest groups can also lead these conferences unilaterally, without California contracting them.

C. Entrepreneur/Self-Employment Trainings for Former DACA Recipients

Similar to the immigration employer conferences, immigrant interest groups, sponsored by the State of California, can also lead workshops or trainings for interested non-citizen entrepreneurs. Although entrepreneurs are not required to have held DACA previously, former DACA recipients with entrepreneurial skills would benefit greatly from learning about setting up their own businesses, which type of business to set up, tax issues, and other business ownership skills. For example, trainings could discuss setting up a sole proprietorship, LLP, LLC, or even a corporation, strategically, so that non-citizen business owners do not violate any federal or state working provisions.

²⁸⁷ *Filing a Discrimination Claim – California*, Workplace Fairness (https://www.workplacefairness.org/file_CA).

²⁸⁸ Laura Zulliger, *Which Industries Have the Most 1099 Workers?*, Payable (Sept. 10, 2015) (<https://payable.com/blog/industries-most-1099-workers>).

²⁸⁹ *Id.*

²⁹⁰ This initiative would work best if the California “Don’t ask policy” discussed in Part VI.1., of this memorandum, is implemented.

²⁹¹ American Immigration Lawyers Association (<http://www.aila.org/>).

²⁹² Immigrant Legal Resource Center (<https://www.ilrc.org/>).

D. Expanding the DACA Licensing Law for Former DACA Professionals

To allow former DACA recipients with professional or advanced degrees to continue working in their current capacities, California can adjust licensing laws to ensure that DREAMers with professional licenses maintain their certifications and acquire access to certain benefits. For example, the state could grant former DACA recipients who hold professional licenses with the opportunity to apply for insurance and state loans. Because many DACA professionals provide important services to the public, their businesses and overall wellbeing should be protected to ensure they are working efficiently.

New York has implemented a law similar to this.²⁹³ Although written in the context of DACA's continued existence, New York passed a law that allows current DACA recipients to acquire professional degrees.²⁹⁴ Over fifty professions are covered under this law including health-related occupations, midwives, mental health practitioners, psychologists, athletic trainers, veterinarians, and language therapists.²⁹⁵ New York saw this as an opportunity to strengthen their state's economy by allowing DACA recipients to continue working in a professional capacity and by keeping that specific workforce healthy.²⁹⁶ In fact "a national study concluded that DACA recipients continue to make positive and significant contributions to the economy and that a significant number have 'a bachelor's degree or higher' or are currently in school."²⁹⁷

The New York law also allows DACA recipients working as professionals to receive state benefits, such as Medicaid, and grants them the ability to purchase insurance and apply for state loans.²⁹⁸ Under this provision, New York sought to promote public health goals and curb illnesses and diseases early, considering that the cost of medical care for young adults is cheaper compared to older adults, and most DACA recipients are young.²⁹⁹ This also improves the overall public health of New York.³⁰⁰

[California, similar to New York, has implemented a professional licensing provision which allows for certain immigrants to apply for and obtain any of the 40 enumerated professional licenses offered in the state.](#)³⁰¹ The licenses include professions such as law, medicine, dentistry, and teaching.³⁰² However, California should amend this law to include a trigger statute³⁰³ expanding the professional licensing provision to *former* DACA recipients, in the event DACA

²⁹³ See generally N.Y. Comp. Codes R. & Regs. Tit. 8, § 80-1.3 (2017).

²⁹⁴ *Id.*

²⁹⁵ Janet M. Calco, *Protecting the Rights of DACA Recipients as Persons Residing Under Color of Law in New York*, 21 CUNY L. Rev. (2018).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Professional Licenses for Undocumented Immigrants*, Catholic Legal Immigration Network, Inc. (<https://cliniclegal.org/resources/professional-licenses-undocumented-immigrants>)

³⁰² *Id.*

³⁰³ A trigger statute is embedded in a statute which triggers the implementation of an additional provision in the event a particular event occurs.

is rescinded. Moreover, California should mirror New York's law to allow former DACA professionals to apply for in-state health benefits, which would increase the overall health of Californians. Finally, California should encourage greater business growth by allowing former DACA professionals to apply for in-state loans.

Preserving DACA workers and professionals should be important to California. There are about 223,000 DACA recipients in the state, per USCIS figures.³⁰⁴ [According to reports by the Center for the Study of Immigrant Integration and the Center for American Progress](#), California may lose about \$12 billion in annual Gross Domestic Product if DACA recipients are no longer able to work.³⁰⁵ DACA rescission is as much an economic issue as it is an immigration issue. Introducing a DACA bill for working professionals, and expanding the protections to *former* DACA recipients, will move California towards preserving the revenue that DREAMers generate.

³⁰⁴ U.S. Citizenship and Immigration Services, *Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012-2017*, U.S. Dep't of Homeland Security (2017).

³⁰⁵ Alejandra Molina, *California Could Lose Big Money If DACA Recipients Aren't Allowed to Work*, The Press-Enterprise (Oct. 17, 2017) (<https://www.pe.com/2017/10/17/how-are-counties-affected-by-daca-changes-new-interactive-map-shows-economic-impacts-of-removing-daca-recipients-from-the-workforce/>); Dr. Jessica Herrera, *Opinion: Consequences of Ending DACA Will be Huge to California*, East Bay Times (Sept. 17, 2017) (<https://www.eastbaytimes.com/2017/09/17/opinion-consequences-of-ending-daca-will-be-huge-to-california/>)

VIII. Conclusion

Unfortunately, in the event DACA is rescinded, the actions California can undertake to protect its substantial DACA recipient population are limited. Supremacy Clause issues and IRCA restrict the means by which the state could ensure its DREAMers remain employed. However, this is not to say that nothing can be done. With cooperation from the Department of Homeland Security, California could implement state-level work control. Furthermore, the sole act of passing the bill into law would be politically popular, especially for Congresspersons representing the Los Angeles, San Diego, Riverside, Fresno, San Francisco-Oakland, and San Jose metropolitan areas. Moreover, certain protections and loopholes already exist protecting or assisting undocumented immigrants seeking educational attainment and certain types of employment. It would behoove the State of California to publicize and strengthen these protections. The DACA program is popular, economically stimulating, and good for society. It is in the best interest of the California State Legislature to do everything possible to protect DREAMers' work authorization.