Protecting Essential Workers and Families: **Expanding ACA Access to DACA Holders in Response to COVID-19**

Masa Group

May 2020

ACKNOWLEDGEMENTS

Jose Magaña-Salgado of Masa Group and Lora Adams co-authored the report, with assistance from Ellen Findley.

This report and the #ACA4DACA campaign was made possible in part with support from the Roddenberry Foundation.

Founded in 2017, Masa Group is a boutique consulting firm located in Washington, D.C. focusing on federal, state, and local immigration advocacy in the legislative, administrative, and judicial spheres. Many of Masa Group's current and former clients include nationally known and recognized immigration non-profit organizations.

For more information on Masa Group, visit masadc.com.

Table of Contents

I. Executive Summary

The United States is currently in the midst of a global pandemic initiated by the spread of COVID-19 (colloquially known as "coronavirus"). And yet, the administration remains reticent to expand health care access in response to the pandemic—including re-opening the enrollment period for the Patient Protection and Affordable Care Act (ACA) or expanding access to the ACA for Deferred Action for Childhood Arrivals (DACA) recipients, the subject of this report.

Through executive actions, the previous administration implemented two key immigration and health care policy changes that affect close to 700k young immigrants to this day—the establishment of DACA and the exclusion of those very same DACA recipients from the ACA. Through DACA, the Obama administration provided employment authorization and a deferment from deportation to young undocumented immigrants through "deferred action." As holders of deferred action, DACA recipients were eligible for health care benefits, including tax subsidies and access to the health care marketplaces, under the ACA, the historic health care bill that dramatically expanded access to health care for citizens and noncitizens alike. However, the Obama administration subsequently carved out DACA recipients from access to the ACA through a regulation that stands to this day. But there are opportunities for this administration, Congress, advocates, Congress, and the next administration to rectify this exclusion, particularly in light of COVID-19.

The key takeaways of this report include:

- The U.S. Department of Health and Human Resources (HHS) regulation excludes approximately 650,000 young immigrants who currently hold DACA, excluding a pool of young, healthy adults—the exact type of participants that Congress sought to encourage to participate in the ACA and who would benefit from health care access during the current pandemic;
- Rescission of the regulation would *immediately* expand eligibility for the ACA to 650,000 (current DACA holders) individuals and potentially upwards of 1.7 million individuals (e.g. future potential DACA recipients if DACA were restarted);
- According to the Center for American Progress, there are over 200,000 DACA recipients who are essential critical infrastructure workers as classified by the U.S. Department of Homeland Security (DHS); and, according to New American Economy, there are 62,600 DACA-eligible individuals in the healthcare industry—populations that would potentially benefit under an expansion of the ACA for DACA recipients;
- The regulation promotes worse health outcomes for DACA recipients by foreclosing access to health care, including unsubsidized purchases on the health care exchanges;
- The regulation is likely unconstitutional and contrary to the U.S. Constitution as a violation of the Equal Protection Clause because it treats similarly situated individuals with deferred action differently without an appropriate basis;

- The regulation violates the Administrative Procedure Act (APA) as it is irrational, arbitrary, and capricious, particularly because it undermines congressional intent and worsens health care outcomes and markets; and
- Opportunities for action include litigation from advocates, legislation from Congress, and new regulations from a future administration.

II. Background

A. COVID-19

The United States and countries across the globe are contending with a pandemic of a respiratory disease caused by a new strand of coronavirus that began its spread in late 2019, named in full "coronavirus disease 2019" and later abbreviated to "COVID-19."[1] The United States had its first recorded case of COVID-19 on January 22, 2020, and as of April 28, 2020 there have been 957,875 recorded cases and over 53,922 confirmed deaths.[2] While these numbers are the highest recorded worldwide, health experts estimate that cases are vastly underreported due to an inadequate federal response and a severe shortage of testing materials.[3] Testing protocol in the United States also stipulates that only those with clear symptoms of COVID-19 may be tested for the virus, even though healthy adults may carry the virus without exhibiting symptoms.[4] Significantly, the Trump administration made the controversial decision not to open a special enrollment period for health insurance under the ACA in light of COVID-19, though people who lose their insurance due to loss of employment can still enroll or try for off market options.[5] By April 20, 2020, the pandemic led to stay-at-home orders for over 316 million people in at least 42 states, Washington, D.C., and Puerto Rico.[6]

Immigrant workers are both indispensable and disproportionately vulnerable to health and employment risks during the pandemic. Immigrants make up 17 percent of the civilian workforce and 19 percent of the workforce in industries vital to COVID-19 response, like health care, agriculture, and scientific research and development.[7] However, immigrants are also more vulnerable to the economic consequences of the pandemic and the country's efforts to stop the spread. While local, state, and federal governments have made efforts to soften the blow, immigrants have less access to these and existing safety-net programs. Immigrants make up more than half of the workforce in the hardest hit industries, but most are unable to access relief through unemployment benefits or the stimulus funds of the most recent CARES Act.[8] Even when employed, 28 percent of immigrant workers lack health insurance, which is twice the amount of U.S.-born workers.[9] Though states were given the option to expand Medicaid to cover the costs of coronavirus testing and treatment, most immigrants still do not have access to the expansion.[10]

DACA recipients face these same structural barriers to accessing health care and health insurance, and many work in industries that put them at risk during this crisis. There are over 200,000 DACA recipients who are essential critical infrastructure workers as classified by DHS,[11] and there are an estimated 62,600 DACA and DACA-eligible individuals in the healthcare industry.[12]

B. Deferred Action for Childhood Arrivals

In June 2012, DHS issued a policy memorandum stating that it would not deport[13] certain undocumented immigrants who entered the United States as children through a form of prosecutorial discretion known as "deferred action," an initiative later known as Deferred Action for Childhood Arrivals or DACA.[14] DACA is a form of case-by-case relief that provides temporary relief from deportation and allows recipients to live and work legally in the United States.[15] DACA does not provide a path to legal status or citizenship and must be renewed every two years.

In September 2017, the Trump administration announced the rescission of DACA.[16] Multiple district courts quickly issued preliminary injunctions temporarily delaying the rescission.[17] The combined cases were considered by the Supreme Court in November 2019, and the Court will likely issue a decision in the summer of 2020 concerning the legality of the administration's rescission of DACA.[18] Consequently, the future of DACA remains unstable and uncertain. As the Supreme Court did not "stay" any of the lower court decisions, current DACA recipients may continue to renew their status, but the government is not accepting any new initial applications.[19] Even if DACA is terminated, DACA would be phased out over several years as grants expire, and by that time a different president could potentially reinstate DACA.[20]

Altogether, the federal government has approved 850,000 undocumented people for DACA since DACA's inception in 2012, with roughly 650,000 active DACA recipients as of September 2019.[21] According to census data, DACA recipients are parents to nearly 256,000 U.S. citizen children.[22] The Migration Policy Institute estimates that an additional 1.3 million people would be immediately eligible for DACA if a future administration reinstated DACA.[23]

C. The Affordable Care Act

The Affordable Care Act or ACA is a comprehensive healthcare reform law enacted in March 2010.[24] The ACA's goal is to increase access to healthcare, primarily by expanding access to affordable health insurance and Medicaid to insure those previously uninsured.[25] The expansion takes place through federal and state health insurance exchanges, essentially online marketplaces where individuals and small businesses can shop for health insurance.[26] The exchanges also determine if people are eligible for tax-funded federal subsidies to help cover health costs, or if they are eligible for Medicaid. Each state interacts with the ACA differently, especially in regards to the Medicaid expansion, but the federal and state marketplace is available to residents of all 50 states.[27]

Non-citizens have limited access to ACA-related benefits and must be "lawfully present" in the United States. As regulatorily defined by a variety of agencies, "lawfully present" originally covered a wide range of noncitizens, including those with deferred action status.[28] Though DACA recipients are considered to have legal permission to reside in the United States for most other purposes, they are not considered "lawfully present" for the purposes of the ACA because of the regulation in question.[29] Though legally identical to "deferred action," DACA is not a qualifying status for benefits under the ACA, leaving

650,000 people potentially uninsured under legislation meant to increase access to insurance.[30]

D. ACA DACA Exclusions

While lawmakers specified that "lawfully present" non-citizens are considered eligible for ACA, they left the exact definition of "lawfully present" ambiguous. In the initial implementation of the ACA in 2010, HHS codified a list of immigration categories considered "lawfully present" and thus potentially eligible for the Pre-Existing Condition Insurance Plan (PCIP).[31] HHS used this same definition of "lawfully present" to determine eligibility to access the online health insurance exchange, and the U.S. Department of Treasury also adopted the definition determining eligibility for the tax credit subsidies to make private insurance more affordable.[32]

This 2010 definition of "lawfully present" included all those granted deferred action as well as other temporary immigration initiatives, such as Temporary Protected Status (TPS) and Deferred Enforced Departure (DED).[33] When DHS announced DACA as its newest deferred action category in June 2012, DACA recipients would have been classified as "lawfully present" under the existing HHS definition and qualified for ACA-related benefits. However, HHS issued an Interim Final Rule in August 2012 that specifically excluded DACA recipients from the definition of "lawfully present."[34] HHS stated that "[b]ecause the reasons that DHS offered for adopting the DACA process do not pertain to eligibility for Medicaid or the Children's Health Insurance Program (CHIP), HHS has determined that these benefits should not be extended as a result of DHS deferring action under DACA," despite maintaining ACA eligibility for regular deferred action, which continues to be a qualifying status to this day.[35] As a result of these exclusions, DACA recipients are unable to access virtually all of the ACA's primary benefits and are functionally treated as noncitizens without any form of legal protection.

As outlined by the National Immigrant Law Center, DACA recipients:[36]

- Cannot get comprehensive health insurance under Medicaid or CHIP in their state, unless the state has a separate, state-funded program or has elected the federal option to provide prenatal care regardless of the woman's immigration status;
- Cannot buy health insurance in the ACA's health insurance marketplace, even at full cost using their own funds;
- Are not eligible for federal tax credits to make private health insurance affordable (even though DACA recipients are still required to file and paying federal taxes) in the marketplace; and
- Will likely not be eligible for the Basic Health Program, a state option through the ACA to provide coverage to low-income residents who could otherwise purchase coverage through the marketplace, if their state has this program.[37]

DACA recipients, however, are still able to obtain full-price health insurance in health insurance exchanges outside the marketplaces (if they exist in their state).[38] DACA recipients can also obtain health insurance through their employer, if available.[39]

E. Impact of ACA DACA Exclusions

Young adults across the board have the highest rate of uninsurance of any age group at 30 percent.[40] Undocumented adults have reported even higher rates of uninsurance, with estimates ranging from 45 - 68 percent.[41] DACA recipients sit at the intersection of these two highly uninsured groups. Without access to the healthcare exchange and associated ACA benefits, 79 percent of DACA recipients indicated they would be unable to obtain health insurance.[42] Moreover, while the ACA enables young adults under 26 utilize their parents' insurance, DACA recipients are often unable to take advantage of this benefit due to the low health insurance rates of their undocumented parents.[43] During the current pandemic, the practical impact is that less individuals have access to health care for testing and treatment of COVID-19.

Additionally, low income DACA recipients are unable to afford off-market exchanges for health insurance, and so without assistance from the ACA they are likely to remain uninsured. The average cost of insurance without a federal subsidy for an average DACA recipient aged 25 is about $312 a month, or $3,744 a year with an average deductible of $4,578 per year.[44] DACA recipients who are employed similarly have difficulties accessing health care, particularly if they are underemployed and ineligible for employment-based insurance, or if they work for an employer that fails to offer health insurance. Even DACA recipients that have access to employment-based health insurance are impacted by the ACA exclusions, as they are locked in their current workplace or risk losing one of their only avenues to insurance. Relief from "job lock" was in fact one of the predicted benefits of the ACA. In 2014, the Congressional Budget Office (CBO) estimated that the ACA would lead to a reduction of labor hours equivalent to about two million people "almost entirely because workers will choose to supply less labor" when not forced to choose between a job and health insurance.[45]

For many DACA recipients, a lack of healthcare insurance is more than just living with uncertainty. Single and undocumented parents such as Maria Lopez struggle to finance care for a child with disabilities, a child with DACA but shut out from the ACA.[46] Parents like Maria must care for their children full time, simultaneously blocking potential avenues to employment-based health insurance. Other adults with DACA struggle to reconcile the promise of the American dream with the reality that the only country they know excluded them from affordable healthcare. Cesar Calderon became disabled after a car accident in 2006 and was forced to leave the United States and receive care in Mexico through the controversial medical repatriation program.[47] After finally returning to the United States and facing mounting medical bills, Cesar graduated from high school, obtained his college degree, and applied for DACA. It was only after obtaining DACA that Cesar learned about the ACA exclusion. "Even though I'm doing everything right," he said, "I'm still being held back."[48]

E. Unintended Consequences

1. Risk of higher health insurance premiums for everyone

DACA recipients are by definition young and of school- and working-age, a key demographic for a solvent insurance pool with manageable premiums.[49] All insurance

programs need healthy, young people to pay into the system to subsidize older or less healthy participants who are likely to need more frequent payouts, a key assumption underlying the very foundation of the ACA. During the Obama administration, the majority of ACA enrollment ads specifically targeted younger, healthier people.[50] By increasing the number of young and healthy individuals entering the insurance pool, the government maintains premiums low for everyone. However, the ACA DACA exclusions block upwards of 650,000 young individuals from participating, even blocking them from purchasing health insurance through the exchanges at full cost and without subsidies.

2. Increased stress to safety net providers and state/local governments

Excluding DACA recipients from ACA benefits does not eliminate their need for healthcare and merely passes potentially preventable health care costs to collateral actors, often at higher cost. Those without health insurance tend to rely more heavily on safety net providers like community health centers and hospital emergency rooms, shifting the cost of care to these healthcare providers.[51] These "uncompensated costs" have actually fallen as other previously uninsured patients gain access to the ACA.[52] While some states and local jurisdictions have programs to serve their residents regardless of immigration status, it is a heavy lift without federal support and no substitute for comprehensive health insurance.[53]

3. Mixed message to lawfully present immigrants

One of the stated motivating factors for DACA was to integrate individuals who "are Americans in their heart, in their minds, in every single way but one: on paper."[54] DACA allows eligible individuals to live without fear of deportation and gives them the ability to work and provide for themselves and their families with the goal of being healthy and productive members of society. The ACA exclusion undermines this message by preventing DACA recipients from buying affordable health insurance, a benefit all Americans and documented immigrants can access. Despite encouraging these young people to come out from the shadows and integrate as "Americans in every sense but paper," DACA recipients are singled out and excluded from a basic and vital benefit.

III. The ACA Exclusion is Unconstitutional and Unlawful

A. Equal Protection Clause Violation

The Fourteenth Amendment states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[55] The Equal Protection Clause "is essentially a constitutional requirement that all persons similarly situated should be treated alike," and if not, that the government must have a sufficient rationale for that disparate treatment.[56] While the Equal Protection Clause "does not forbid classifications," it does serve to keep government actors "from treating differently persons who are in all relevant aspects alike."[57]

1. The regulation treats DACA differently than other deferred action recipients

DACA recipients are "similarly situated" to other deferred action recipients. There is no statutory or legal difference between them, with the Obama administration strongly

arguing that DACA was part of an existing and long-standing statutory authority to enforce immigration laws in this manner.[58] DHS considers DACA recipients in an "identical" situation as other deferred action categories and considers them "lawfully present" for purposes of admissibility.[59] All other agencies aside from HHS utilize a "lawfully present" definition treat DACA recipients the same as all others with deferred action.[60] Federal district courts also confirmed in a recent case on drivers' licenses that DACA recipients are "similarly situated" as other deferred action categories under equal protection and cannot be singled out.[61] When HHS excludes DACA recipients from ACA benefits that are available to all other deferred action categories, the regulation violates the equal protection clause.

2. The regulations are not rationally related to a legitimate government interest

Under rational basis review, the government must demonstrate that categorizing DACA recipients as their own class under the HHS regulation is (a) rationally related to (b) a government interest.[62] As DACA recipients are legally identical to all other deferred action categories, the government is unlikely to legitimately argue that the classification is "rationally related." While the government could make several arguments regarding the exclusion of all deferred action categories as a class, the fact that DACA recipients are uniquely excluded from the ACA renders this argument irrational. Moreover, as stated previously, the ACA's goal was to expand coverage to all lawfully present individuals and promote the inclusion of young adults in the marketplaces, goals explicitly undermined by the regulation. As Justice Roberts stated in the 2015 opinion of the court affirming the ACA, "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."[63]

B. The Regulation Violates the Administrative Procedure Act

Under the APA, courts may hold unlawful and set aside lawful presence regulations that are "in excess of statutory jurisdiction authority." If lawful presence regulations are not in excess of statutory jurisdiction authority, the HHS lawful presence regulations may still be unlawful if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[64]

1. The regulation is in excess of statutory authority

Congress neglected to provide a definition for "lawfully present" in the ACA, leaving the term ambiguous. However, the ACA does not grant explicit statutory authority for HHS to define the term itself. The government cannot argue that HHS has unspoken authority to define undefined terms in the ACA, especially considering the myriad of instances where the text provides the HHS Secretary with explicit authority to define a term in other portions of the ACA. There are approximately 30 different instances where the ACA instructs the HHS Secretary to create regulations applying to those "lawfully present" with the phrase "the Secretary shall promulgate," but the ACA does not authorize lawful presence regulations that define "lawful presence" or "lawfully present" in any of these instances.

2. The regulation is contrary to congressional intention

Considering the ambiguous definition of "lawfully present," courts may employ statutory construction to discern congressional intent when using the term.[65] Three separate agencies utilized and defined the term "lawfully present" to include all deferred action recipients.[66] There are various portions of the ACA that require the HHS Secretary to consult the Social Security Administration (SSA) and DHS to confirm lawful presence, both of which consider DACA recipients lawfully present.[67] Considering its previous usage and the instructions to consult agencies using existing definitions of "lawfully present," the term has an arguably settled meaning. Congress used the phrase "lawfully present" as a term of art to refer to the commonly understood definition of "lawful presence" and intended for "lawfully present" in the ACA to have this same definition.

3. The regulation is arbitrary and capricious

HHS argues that because DHS did not explicitly mention eligibility for Medicaid or CHIP when it announced the DACA program, HHS could exclude DACA recipients from those programs as well as the rest of the ACA. There is no rational reason to single out DACA from the ACA definition of "lawfully present," as DACA recipients are legally and functionally identical to all other deferred action categories considered "lawfully present." All other agencies consider DACA recipients "lawfully present," including the agencies HHS is statutorily obligated to consult in determining lawful presence. The exclusion itself also runs counter to the overall goal of the ACA to provide health insurance to the previously uninsured, as previously mentioned.

4. The regulation is not barred by the APA's statute of limitations

Though any "aggrieved party" may challenge a federal agency under the APA, the law dictates that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."[68] Though the initial regulation excluding DACA recipients from the ACA was promulgated over six years ago in 2012, existing case law states that the date of the "right of action" accrues for the "first time" when new class members (in this case, new DACA recipients) come into existence and are first affected. Specifically, "a substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency's application of that decision to the specific challenger."[69]

The last DACA applicants to obtain their initial designations were granted DACA before, on, or shortly after (e.g. for those initial applications received on the date of the rescission) the Trump administration's attempted recission in September of 2017. Thus challenges to the exclusionary regulations under the APA on behalf of these most recent DACA recipients are within the statute of limitations if they are brought before September 2023.

IV. Recommendations

A. For the U.S. Department of Health and Human Services

HHS should issue an emergency regulation rescinding the restrictions specified in subsection 8 of 45 CFR § 152.2, effective immediately. Specifically, HHS should strike the following language:

> ~~(8) Exception. An individual with deferred action under the Department of Homeland Security's deferred action for childhood arrivals process, as described in the Secretary of Homeland Security's June 15, 2012 memorandum, shall not be considered to be lawfully present with respect to any of the above categories in paragraphs (1) through (7) of this definition.~~

The NPRM should also insert the following language into 8 of 45 CFR § 152.2 to ensure there are no ambiguities regarding DACA eligibility for the ACA:

> (8) An individual with deferred action under the Department of Homeland Security's deferred action for childhood arrival process, as described in the Secretary of Homeland Security's June 15, 2012 memorandum.

Issuing an interim final regulation on the APA's "good cause" basis is particularly important because of the exigent health care needs of DACA recipients and the need to continue to stabilize the ACA's health care exchanges through an infusion of mostly healthy young adults. Use of the "good cause" basis is further strengthened by the ongoing COVID-19 emergency.

B. For Legal Advocates

Advocates should file a legal challenge against HHS's regulation on APA and constitutional grounds, as discussed above. Such legal challenge should incorporate a request for a preliminary injunction in light of the administration's ongoing attempts to rescind DACA along with a potential negative decision from the Supreme Court that would allow the rescission of DACA with grants expiring gradually over two years. Litigation should be filed immediately, particularly in light of the statute of limitations for APA-related claims, flagged earlier in this brief. Finally, a preliminary injunction is particularly important in light of DACA recipients who have pressing medical needs and urgently need access to the ACA, especially in response to the COVID-19 pandemic.

C. For Congress

Congress should pass legislation restoring ACA access to DACA recipients. The intent of Congress for the ACA was to expand access to affordable health insurance for those who would otherwise be uninsured, and this regulation runs counter to that goal. Congress has the ability to clarify its intentions through new legislation specifying that DACA recipients are indeed considered "lawfully present" for the purposes of the ACA. This legislation can be a standalone provision that rescinds the HHS regulation or as part of a broader legislative package, such as the HEAL Act.[70]

D. For the Next President

While most Democratic presidential candidates for 2020 pledged to protect and restore DACA, these candidates must also similarly commit to directing HHS to rescind this regulation and restore access to the ACA for DACA recipients. The next president should prioritize the restoration of DACA to the ACA within the first 100 days in office and bring the HHS definition of "lawfully present" in line with all other relevant departments of the federal government. To accomplish this goal, the next president must direct the Secretary of HHS to promulgate a regulation, potentially on an emergency basis, to rescind the existing regulation.

---

[1] *Coronavirus Disease 2019 (COVID-19): Situation Summary*, Centers for Diseases Control and Prevention (last accessed April 28, 2020) https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html.
[2] *Id.*
[3] Christopher Weaver and Rebecca Ballhaus, *Coronavirus Testing Hampered by Disarray, Shortages, Backlogs,* Wall Street Journal, April 19, 2020, https://www.wsj.com/articles/coronavirus-testing-hampered-by-disarray-shortages-backlogs-11587328441.
[4] *Id.*
[5] Susannah Luthi, *Trump rejects Obamacare special enrollment period amid pandemic*, Politico, March 31, 2020, https://www.politico.com/news/2020/03/31/trump-obamacare-coronavirus-157788.
[6] Sarah Mervosh, Denise Lu and Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, New York Times, last updated Apr. 20, 2020, https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html (last visited April 22, 2020).
[7] Julia Gelatt, *Immigrant Workers: Vital to the U.S. COVID-19 Response, Disproportionately Vulnerable*, Migration Policy Institute, March 2020, https://www.migrationpolicy.org/research/immigrant-workers-us-covid-19-response.
[8] Coronavirus Aid, Relief, and Economic Security (CARES) Act, S. 3548, 116th Cong. (2020), *available at* https://www.govtrack.us/congress/bills/116/s3548/text.
[9] Gelatt, *Immigrant Workers*, Migration Policy Institute, March 2020.
[10] Holly Straut-Eppsteiner, *To Ensure Collective Health and Safety, Federal Packages for COVID-19 Relief Must Include Immigrant Communities,* National Immigration Law Center, April 21, 2020, https://www.nilc.org/2020/04/21/federal-packages-for-covid19-relief-must-include-immigrant-communities-the-torch/.
[11] Nicole Prchal Svajlenka, *A Demographic Profile of DACA Recipients on the Frontlines of the Coronavirus Response,* Center for American Progress, https://www.americanprogress.org/issues/immigration/news/2020/04/06/482708/demographic-profile-daca-recipients-frontlines-coronavirus-response/.
[12] *Undocumented Immigrants and the Covid-19 Crisis*, New American Economy, April 4, 2020, https://research.newamericaneconomy.org/report/undocumented-immigrants-covid-19-crisis/.
[13] "Deportation" is the formal removal of a noncitizen for a violation of immigration laws. The legal term of art "removal" generally refers to expulsion from the country based on inadmissibility (applicable to those who have not been officially inspected and approved for entry) and deportability (applicable to those who entered with permission but have since broken immigration law). We will be using "deportation" for the purposes of this brief to cover all expulsions from the country. For more information on these two definitions. *See* https://www.dhs.gov/immigration-statistics/data-standards-and-definitions/definition-terms#18.
[14] Memorandum from Janet Napolitano, Secretary, U.S. Department of Homeland Security to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, et al. on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-whocame-to-us-as-children.pdf.

[15] DACA requestors must meet a variety of criteria related to date of entry, residency, criminal background, and more to request DACA. *See id.*
[16] Michael D. Shear and Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act,* New York Times, Sept. 5, 2017, https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html.
[17] *DACA Litigation Timeline,* National Immigration Law Center, last updated Sept. 28, 2019, https://www.nilc.org/issues/daca/daca-litigation-timeline/.
[18] *Id.*
[19] *Deferred Action for Childhood Arrivals: Response to Jan. 2018 Preliminary Injunction*, Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), last updated July 17, 2019, https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-Jan.-2018-preliminary-injunction.
[20] David Bier, *How DACA Will End – When DACA Permits Will Expire,* CATO Institute, Sept. 5, 2017, https://www.cato.org/blog/how-daca-will-end-when-daca-permits-will-expire.
[21] U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, Approximate active DACA Recipients: As of December 31, 2019 (April 20, 2020), *available at* https://www.uscis.gov/tools/reports-studies/immigration-forms-data (search for "Deferred Action for Childhood Arrivals (DACA)").
[22] Nicole Prchal Svajlenka, *What We Know About DACA Recipients in the United States*, Center for American Progress, Sept. 5, 2019, https://www.americanprogress.org/issues/immigration/news/2019/09/05/474177/know-daca-recipients-united-states/.
[23] *Deferred Action for Childhood Arrivals (DACA) Data Tools,* Migration Policy Institute, accessed Dec. 16, 2019, https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles.
[24] *Read the Affordable Care Act*, Healthcare.gov, U.S. Centers for Medicare & Medicaid Services (CMS), accessed Dec. 16, 2019, https://www.healthcare.gov/where-can-i-read-the-affordable-care-act/. The ACA is also colloquially referred to as "Obamacare."
[25] *Affordable Care Act (ACA)*, Healthcare.gov, CMS, accessed Dec. 16, 2019, https://www.healthcare.gov/glossary/affordable-care-act/.
[26] *Exchange*, Healthcare.gov, CMS, accessed Jan. 14, 2020, https://www.healthcare.gov/glossary/exchange/.
[27] *The Marketplace in Your State*, Healthcare.gov, CMS, accessed Jan. 14, 2020, https://www.healthcare.gov/marketplace-in-your-state/.
[28] 45 C.F.R. § 152.14 (2010), *available at* https://www.govinfo.gov/content/pkg/FR-2010-07-30/pdf/2010-18691.pdf.
[29] 45 C.F.R. § 152.2 (2012), *available at* https://www.govinfo.gov/content/pkg/FR-2012-08-30/pdf/2012-21519.pdf.
[30] U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, Approximate active DACA Recipients: As of December 31, 2019 (April 20, 2020), *available at* https://www.uscis.gov/tools/reports-studies/immigration-forms-data (search for "Deferred Action for Childhood Arrivals (DACA)").
[31] 45 C.F.R. § 152.2 (2012).
[32] 26 C.F.R. § 1.36B-1(g); 77 Fed. Reg. 30377, May 23, 2012.
[33] 45 C.F.R. § 152.2 (2012).
[34] 77 Fed. Reg. 52614, Aug. 30, 2012.
[35] Memorandum from Cindy Mann, Director, Center for Medicaid and CHIP Services, U.S. Department of Health and Human Services to State Health Officials and Medicaid Director on Individuals with Deferred Action for Childhood Arrivals (Aug. 28, 2012), *available at* https://www.medicaid.gov/Federal-Policy-Guidance/Downloads/SHO-12-002.pdf; *Immigration status and the Marketplace*, Healthcare.gov, CMS, accessed Jan. 14, 2020, https://www.healthcare.gov/immigrants/immigration-status/.

[36] *Frequently Asked Questions: Exclusion of Youth Granted "Deferred Action for Childhood Arrivals" from Affordable Health Care*, National Immigration Law Center, Sept. 25, 2013, https://www.nilc.org/issues/health-care/acadacafaq/.
[37] *Basic Health Program*, Medicaid.gov, CMS (last accessed Jan. 29, 2020), https://www.medicaid.gov/basic-health-program/index.html.
[38] *Frequently Asked Questions*, National Immigration Law Center, Sept. 25, 2013, https://www.nilc.org/issues/health-care/acadacafaq/.
[39] *Id.*
[40] *How to get or stay on a parent's plan*, Healthcare.gov, CMS (last accessed Jan. 14, 2020), https://www.healthcare.gov/young-adults/children-under-26/.
[41] Dana P. Goldman et al., *Legal Status And Health Insurance Among Immigrants*, Health Affairs, 1635 (2005), https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.24.6.1640; Samantha Artiga and Maria Diaz, *Health Coverage and Care of Undocumented Immigrants,* Kaiser Family Foundation, 3 (2019), https://www.kff.org/disparities-policy/issue-brief/health-coverage-and-care-of-undocumented-immigrants/.
[42] Roberto G. Gonzales and Angie M. Bautista-Chavez, *Two Years and Counting: Assessing the Growing Power of DACA* 4, American Immigration Council (June 2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/two_years_and_counting_assessing_the_growing_power_of_daca_final.pdf.
[43] An average 45 percent of non-elderly undocumented immigrants are uninsured, compared to about 23 percent of lawfully present immigrants and 8 percent of citizens. *See* Artiga and Diaz, *Health Coverage and Care of Undocumented Immigrants,* Kaiser Family Foundation, 3 (2019), https://www.kff.org/disparities-policy/issue-brief/health-coverage-and-care-of-undocumented-immigrants/.
[44] U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, Approximate active DACA Recipients: As of December 31, 2019 (April 20, 2020), *available at* https://www.uscis.gov/tools/reports-studies/immigration-forms-data (search for "Deferred Action for Childhood Arrivals (DACA)"); *Affordable Care Act: How Much Does Health Insurance Cost Without A Subsidy?*, eHealth, Nov. 6, 2019, https://www.ehealthinsurance.com/resources/affordable-care-act/much-health-insurance-cost-without-subsidy.
[45] *Appendix C: Labor Market Effects of the Affordable Care Act: Updated Estimates*, *Budget and Economic Outlook: 2014 to 2024,* 117 (2014), Congressional Budget Office, http://www.cbo.gov/sites/default/files/cbofiles/attachments/45010-breakout-AppendixC.pdf.
[46] Rachel Glickhouse, *Without federal help, young immigrants in the US fight for health care*, *Aljazeera America,* Oct. 5, 2015, http://america.aljazeera.com/articles/2015/10/5/young-immigrants-fight-for-health-care.html.
[47] *Id.;* Mark Kuczewski, "Can Medical Repatriation Be Ethical? Establishing Best Practices," *American Journal of Bioethics*, 12(9):1-5, Sept. 2012, *available at* https://www.researchgate.net/publication/230653790_Can_Medical_Repatriation_Be_Ethical_Establishing_Best_Practices.
[48] Glickhouse, "Without federal help," Aljazeera America, Oct. 5, 2015, http://america.aljazeera.com/articles/2015/10/5/young-immigrants-fight-for-health-care.html.
[49] Gustavo López and Jens Manuel Krogstad, *Key facts about unauthorized immigrants enrolled in DACA*, *Fact Tank: News in the Numbers*, Pew Research Center, Sept. 25, 2017, https://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/.
[50] Colleen L. Barry, et al., *Assessing the Content of Television Health Insurance Advertising during Three Open Enrollment Periods of the ACA*, Journal of Health Politics Policy and Law*,* 43(6):961-989, Aug. 2018, *available at* https://www.researchgate.net/publication/327438635_Assessing_the_Content_of_Television_Health_Insurance_Advertising_during_Three_Open_Enrollment_Periods_of_the_ACA.
[51] *American Hospital Association: Uncompensated Hospital Care Cost Fact Sheet*, American Hospital Association, Dec. 2017, https://www.aha.org/system/files/2018-01/2017-uncompensated-care-

factsheet.pdf; Teresa A. Coughlin et al., *Uncompensated Care for the Uninsured in 2013: A Detailed Examination*, Kaiser Family Foundation, May 30, 2014, https://www.kff.org/uninsured/report/uncompensated-care-for-the-uninsured-in-2013-a-detailed-examination/.

[52] Jessica Schubel and Matt Broaddus, *Uncompensated Care Costs Fell in Nearly Every State as ACA's Major Coverage Provisions Took Effect*, Center on Budget and Policy Priorities, May 23, 2018,

[53] *Medical Assistance Programs for Immigrants in Various States*, National Immigration Law Center, (last updated April 2020) https://www.nilc.org/issues/health-care/medical-assistance-various-states/.

[54] R*emarks by the President on Immigration*, President Barack Obama, June 15, 2012, *available at* http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration.

[55] U.S. CONST. AMEND. 14, § 1. Equal protection applies to the federal government through the Fifth Amendment Due Process Clause.

[56] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)).

[57] Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

[58] Memorandum from Secretary of Homeland Security Janet Napolitano Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf; Letter from Hiroshi Motomura, et. al., to Barack H. Obama, President of the United States, (May 28, 2012) (on file with author).

[59] U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, "Frequently Asked Questions," (Oct. 23, 2014), *available at* http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.

[60] Aside from the original definition from the U.S. Department of Health and Human Services (HHS), the U.S. Social Security Administration (SSA), the U.S. Department of Agriculture (USDA), and the U.S. Department of Homeland Security (DHS) all have definitions of "lawfully present" that include DACA recipients.

[61] Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053, 1058 (9th Cir. 2014).

[62] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

[63] King et al. v. Burwell, Secretary of Health and Human Services, et al., Opinion of the Court, 576 U. S. 21 (2015), https://www.supremecourt.gov/opinions/14pdf/14-114_qol1.pdf.

[64] 5 U.S. Code § 706.2(a), *available at* https://www.law.cornell.edu/uscode/text/5/706.

[65] *Statutory Construction*, Legal Information Institute, Cornell Law School (last accessed Jan. 15, 2019), https://www.law.cornell.edu/wex/statutory_construction.

[66] As specified above, the U.S. Social Security Administration (SSA), the U.S. Department of Agriculture (USDA), and the U.S. Department of Homeland Security (DHS) all have definitions of "lawfully present" that include DACA recipients.

[67] 75 Fed. Reg. 45015, 45030 (codified at 45 C.F.R. pt. 152).

[68] 28 U.S.C. § 2401(a) (2012).

[69] Wind River Min. Corp. v. United States, 946 F.2d 710, 714-16 (9th Cir. 1991).

[70] Health Equity and Access under the Law (HEAL) for Immigrant Women and Families Act of 2019, *available at* https://www.congress.gov/bill/116th-congress/house-bill/4701/text.