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# Protecting the Rights of DACA Recipients as Persons Residing Under Color of Law in New York

Janet M. Calvo  
*CUNY School of Law*

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# Protecting the Rights of DACA Recipients as Persons Residing Under Color of Law in New York

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## PROTECTING THE RIGHTS OF DACA RECIPIENTS AS PERSONS RESIDING UNDER COLOR OF LAW IN NEW YORK

*Janet M. Calvo*<sup>d1</sup>

### INTRODUCTION

While the future immigration status of those who enrolled in DACA, Deferred Action for Childhood Arrivals, is uncertain, they should remain eligible for both professional licensing and Medicaid in New York as they continue to be PRUCOL, permanently residing under color of law, whether or not DACA is ultimately rescinded. Almost 800,000 non-citizens who came to the United States as children have been afforded DACA.<sup>1</sup> As of 2017, there were over 40,000 approved DACA recipients (DACAs) in New York.<sup>2</sup> The USCIS reported that as of September 4, 2017 there were 32,900 active DACAs in New York.<sup>3</sup> A future immigration status for those with

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<sup>d1</sup> Professor of Law, CUNY School of Law. This was written with the research assistance of Bianca Granados and Cheryl Walker, CUNY School of Law 2019, and the comments of Professors Ruthann Robson, Nermeen Arastu, and Natalie Gomez-Velez.

<sup>1</sup> JENS MANUEL KROGSTAD, *DACA HAS SHIELDED NEARLY 790,000 YOUNG UNAUTHORIZED IMMIGRANTS FROM DEPORTATION*, PEW RES. CTR.: FACT TANK (SEPT. 1, 2017), [HTTP://WWW.PEWRESEARCH.ORG/FACT-TANK/2017/09/01/UNAUTHORIZED-IMMIGRANTS-COVERED-BY-DACA-FACE-UNCERTAIN-FUTURE/?SL&UTM\\_CAMPAIGN=2017-09-06+PNN&UTM\\_MEDIUM=EMAIL&UTM\\_SOURCE=PEW](http://www.pewresearch.org/fact-tank/2017/09/01/unauthorized-immigrants-covered-by-daca-face-uncertain-future/?sl&utm_campaign=2017-09-06+pnn&utm_medium=email&utm_source=pew) [[HTTPS://PERMA.CC/ZK86-S53S](https://perma.cc/ZK86-S53S)].

<sup>2</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., NO. OF I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS BY FISCAL YEAR, QUARTER, INTAKE, BIOMETRICS AND CASE STATUS FY 2012-2017 (2017), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca\\_performancedata\\_fy2017\\_qtr1.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2017_qtr1.pdf) [<https://perma.cc/T7W6-RP8X>]. There were almost 800,000 DACA recipients approved in the country, with the largest number in California, over 200,000. *Id.*

<sup>3</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., APPROXIMATE ACTIVE DACA RECIPIENTS: STATE OF RESIDENCE 6 (2017),

current DACA eligibility is uncertain, however, their continuing presence in the country “under color of law” remains.<sup>4</sup>

In September 2017, the Trump administration announced that it is phasing out DACA within six months.<sup>5</sup> The Acting Secretary of Homeland Security rescinded the 2012 DACA memorandum.<sup>6</sup> However, legislation has been proposed to address the plight of those known as “Dreamers.” The proposed Dream Act and American Hope Act provide a pathway to permanent residence and citizenship for certain young people who entered the country as children after a period of conditional residence and meeting additional criteria.<sup>7</sup> But, other proposals impose more difficult criteria and future restrictions on potential for family unity under the immigration law.<sup>8</sup> At the beginning of 2018, some legislators are working toward bipartisan legislation to provide a pathway to citizenship for Dreamers.<sup>9</sup>

Further, there are lawsuits filed by State Attorney Generals including the New York Attorney General,<sup>10</sup> individuals,<sup>11</sup> the Regents of the

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[https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca\\_population\\_data.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_population_data.pdf) [<https://perma.cc/T86D-GA8Y>].

<sup>4</sup> See Dan Goldberg, *Trump's DACA Decision Could Strip Thousands in New York of Medicaid Coverage*, POLITICO (Sept. 5, 2017, 3:45 PM),

<https://www.politico.com/states/new-york/albany/story/2017/09/05/daca-decision-could-strip-thousands-of-medicaid-114281> [<https://perma.cc/87QT-54RP>].

<sup>5</sup> DEP'T OF HOMELAND SEC., MEMORANDUM ON RESCISSION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/A2H9-3QLR>].

<sup>6</sup> *Id.* (“This memorandum rescinds the June 15, 2012 memorandum entitled ‘Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,’ which established the program known as Deferred Action for Childhood Arrivals (‘DACA’).”).

<sup>7</sup> Dream Act of 2017, S. 1615, 115th Cong. (2017); Dream Act of 2017, H.R. 3440, 115th Cong. (2017); American Hope Act of 2017, H.R. 3591, 115th Cong. (2017).

<sup>8</sup> See, e.g., SUCCEED Act, S.1852, 115th Cong. (2017).

<sup>9</sup> Leigh Ann Caldwell, *Trump, Congress Reach Deal to Negotiate DACA, Border Security*, NBC NEWS (Jan. 9, 2018, 8:20 PM),

[https://www.nbcnews.com/politics/congress/trump-congress-agree-two-step-immigration-process-n836136?cid=eml\\_onsite](https://www.nbcnews.com/politics/congress/trump-congress-agree-two-step-immigration-process-n836136?cid=eml_onsite) [<https://perma.cc/E5XL-TSSF>].

<sup>10</sup> Complaint for Declaratory and Injunctive Relief, *New York v. Donald Trump*, No. 17-cv-5228 (E.D.N.Y. Sept. 6, 2017), ECF No. 1; Complaint for Declaratory and Injunctive Relief, *California v. U.S. Dep’t of Homeland Security*, No. 17-cv-05235 (N.D. Cal. Sept. 11, 2017). For other documents in this case, see University of Michigan Law School, Civil Rights Litigation Clearinghouse, <https://www.clearinghouse.net/detail.php?id=16130&search=source%7Cgeneral%3BspecialCollection%7C46%3Borderby%7CfilingYear%3B> [<https://perma.cc/EEF7-77UQ>].

<sup>11</sup> Letter from Michael J. Wishnie to Judge Nicholas G. Garaufis, *Batalla Vidal et al. v. Baran et al.*, No. 1:16-cv-04756 (E.D.N.Y. Sept. 5, 2017); Complaint for Declaratory and Injunctive Relief, *Dulce Garcia et al. v. U.S.*, No. 3:17-cv-05380 (N.D. Cal. Sept. 18, 2017).

University of California,<sup>12</sup> and the City of San Jose<sup>13</sup> that challenge the legality of the administration's rescission of DACA.<sup>14</sup> In January 2018, a federal District Judge in California issued a nationwide preliminary injunction requiring the Department of Homeland Security and its Secretary to maintain the DACA program and allow DACA enrollees to renew their enrollments.<sup>15</sup>

Moreover, the President has tweeted that if Congress does not address the issue in six months, he will revisit it,<sup>16</sup> and that he cannot believe that anyone would want to deport "good, educated and accomplished young people who have jobs . . . ."<sup>17</sup> However, his comments and actions about this issue have been inconsistent.<sup>18</sup>

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<sup>12</sup> Complaint for Declaratory and Injunctive Relief, *Regents of the University of California v. U.S. Dep't of Homeland Sec.*, No. 3:17-cv-05211 (N.D. Cal. Sept. 8, 2017).

<sup>13</sup> Complaint for: 1. Violation of Fifth Amendment Equal Protection 2. Violation of 5 U.S.C. §§ 553 & 706(2)(D), *San Jose v. Trump*, No. 3:17-cv-05329 (N.D. Cal. Sept. 14, 2017).

<sup>14</sup> Ruthann Robson, *States Challenge DACA Rescission in New York v. Trump*, CONST. LAW PROF. BLOG (Sept. 6, 2017), <http://lawprofessors.typepad.com/conlaw/2017/09/states-challenge-daca-rescission-.html> [<https://perma.cc/7MN2-EJX8>]; Ruthann Robson, *More Challenges to DACA Rescission*, CONST. LAW PROF. BLOG (Sept. 11, 2017), <http://lawprofessors.typepad.com/conlaw/2017/09/more-challenges-to-daca-rescission.html> [<https://perma.cc/PV3C-7EJD>].

<sup>15</sup> Order Denying FRCP 12(b)(1) Dismissal and Granting Provisional Relief, *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, No. 3:17-cv-05211 (N.D. Cal. Jan. 9, 2018) (ECF 234); Steven D. Schwinn, *District Court Halts DACA Repeal*, CONST. LAW PROF. BLOG (Jan. 10, 2018), <http://lawprofessors.typepad.com/conlaw/2018/01/district-court-halts-daca-repeal.html> [<https://perma.cc/GV6A-7QDZ>]; see also *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Jan. 13, 2018), <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction> [<https://perma.cc/S5PW-3E98>]; Matt Stevens, *DACA Participants Can Again Apply for Renewal, Immigration Agency Says*, N.Y. Times (Jan. 14, 2018), [https://www.nytimes.com/2018/01/14/us/politics/daca-renewals-requests.html?emc=edit\\_na\\_20180114&nl=breaking-news&nid=54649503&ref=cta](https://www.nytimes.com/2018/01/14/us/politics/daca-renewals-requests.html?emc=edit_na_20180114&nl=breaking-news&nid=54649503&ref=cta) [<https://perma.cc/TJ5B-U6CZ>].

<sup>16</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2017, 5:38 PM), <https://twitter.com/realDonaldTrump/status/905228667336499200> [<https://perma.cc/2NMT-995A>].

<sup>17</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 14, 2017, 3:28 AM), <https://twitter.com/realDonaldTrump/status/908276308265795585> [<https://perma.cc/73P4-GLJA>].

<sup>18</sup> Glenn Thrush & Maggie Haberman, *To Allies' Chagrin, Trump Swerves Left*, N.Y. TIMES: POLITICS (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/us/politics/in-nighttime-tweet-trump-offers-mixed-message-on-immigration.html?action=click&contentCollection=Opinion&module=Trending&version=Full&region=Marginalia&pgtype=article> [<https://perma.cc/NU6C-TKQR>]. Candidate Trump stated he would cancel "unconstitutional" executive actions, memoranda and orders

The immigration status of current DACA recipients is fraught with uncertainty and they fear the consequences of DACA's expiration.<sup>19</sup> One consequence is how the rescission of DACA, if it endures, will affect the continuing access of DACA recipients to rights controlled by state and local governments. State governments have control over many aspects that affect the health, welfare, and safety of their residents, whatever their immigration status.<sup>20</sup> The following article addresses one aspect of this in New York

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issued by President Obama. Donald Trump, *Donald Trump's Contract with the American Voter*, [https://assets.donaldjtrump.com/\\_landings/contract/O-TRU-102316-Contractv02.pdf](https://assets.donaldjtrump.com/_landings/contract/O-TRU-102316-Contractv02.pdf) [<https://perma.cc/H64Y-VBKA>]; see also Andrew Rudalevige, *Trump Says He'll Cancel Obama's 'Unconstitutional' Executive Actions. It's Not That Easy*, WASH. POST (Dec. 3, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/03/trump-says-hell-cancel-obamas-unconstitutional-executive-actions-its-not-that-easy/?utm\\_term=.463f349b7221](https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/03/trump-says-hell-cancel-obamas-unconstitutional-executive-actions-its-not-that-easy/?utm_term=.463f349b7221) [<https://perma.cc/W2PT-4WLX>]. However, in an April 2017 interview with an Associated Press reporter, President Trump said that Dreamers should “rest easy.” Associated Press, *'Dreamers' Should 'Rest Easy,' Trump Says*, L.A. TIMES (Apr. 21, 2017, 11:24 AM), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-dreamers-should-rest-easy-trump-says-1492799046-htmlstory.html> [<https://perma.cc/Y4RJ-ENLZ>]. In his confirmation hearing before the U.S. Senate, “Trump’s nominee for Secretary of the Department of Homeland Security, retired Marine Gen[eral] John Kelly [was] ambiguous about the” Administration’s actual plans regarding DACA. Maya Rhodan, *Dreamers Face Uncertain Future After Confirmation Hearings*, TIME (Jan. 12, 2017), <http://time.com/4632293/donald-trump-cabinet-dreamers-confirmation-hearings/> [<https://perma.cc/WH7M-9EWF>]. But, General Kelly did state in the hearing that “young migrants likely” would not be a priority for removal. *Id.* The Speaker of the House, Paul Ryan, also stated that President Trump has asked lawmakers to focus on two priorities with respect to illegal immigration: securing the border and deporting immigrants “who are violent, repeat criminals,” and that there would not be a deportation force for the unauthorized. *Ryan Tells Undocumented Family Deportation Force 'Not Happening'*, FOX NEWS: POLITICS (Jan. 13, 2017), <http://www.foxnews.com/politics/2017/01/13/ryan-says-gop-lawmakers-trump-transition-team-working-on-solution-for-immigrant-kids.html> [<https://perma.cc/2PLB-543E>].

<sup>19</sup> Rose Cuison Villazor, *What Do Dreamers Do Now?*, N.Y. TIMES: OPINION (Sept. 4, 2017), <https://www.nytimes.com/2017/09/04/opinion/trump-daca-repeal-security.html> [<https://perma.cc/92NJ-6LDB>]; Karla Cornejo Villavicencio, *The Psychic Toll of Trump's DACA Decision*, N.Y. TIMES: OPINION (Sept. 8, 2017), <https://nytimes.com/2017/09/08/opinion/sunday/mental-health-daca.html> [<https://perma.cc/HHC2-HHUX>]; Jose Antonio Vargas, *'Dreamers' Put Their Trust in DACA. What Now?*, N.Y. TIMES: OPINION (Sept. 9, 2017), [https://nytimes.com/2017/09/09/opinion/sunday/can-dreamers-trust-anyone.html?emc=edit\\_th\\_20170910&nl=todaysheadlines&nid=42015597&referer=](https://nytimes.com/2017/09/09/opinion/sunday/can-dreamers-trust-anyone.html?emc=edit_th_20170910&nl=todaysheadlines&nid=42015597&referer=) [<https://perma.cc/NG5Y-BUAR>]. For updates on DACA see CUNY Law Library Guide, Deferred Action for Childhood Arrivals (DACA), <http://libguides.law.cuny.edu/DACA/Home> [<https://perma.cc/UG7B-HL32>].

<sup>20</sup> For example, see the Executive Order issued by Governor Andrew M. Cuomo of New York generally precluding state employees from inquiring about or disclosing immigration status unless required by law. ANDREW M. CUOMO, STATE OF N.Y., EXECUTIVE ORDER NO. 170 STATE POLICY CONCERNING IMMIGRANT ACCESS TO STATE

State. In New York, those with DACA are considered permanently residing under color of law (PRUCOL), and thereby eligible for professional licensing<sup>21</sup> and Medicaid.<sup>22</sup> As the following demonstrates, whether or not DACA is ultimately terminated, current New York DACA recipients continue as PRUCOL in New York. Moreover, not recognizing those who have been DACA recipients as PRUCOL would violate the equal protection clause of the New York State Constitution.

### PROFESSIONAL LICENSING IN NEW YORK

In June 2016, the New York Board of Regents and Department of Education issued a regulation regarding the eligibility of non-citizens for professional licensing.<sup>23</sup> A memorandum explains that non-citizens who are DACA or PRUCOL are eligible for professional licensing.<sup>24</sup> The regulation applies to over fifty professions. Many are health-related including physicians, physician assistants, nurses, dentists, midwives, pharmacists, occupational and physical therapists, acupuncturists, audiologists, chiropractors, laboratory massage therapists, mental health practitioners, optometrists, podiatrists, psychologists, athletic trainers, respiratory, speech and language therapists, and veterinarians. Other

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SERVICES (2017),

[https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_%23\\_170.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_%23_170.pdf) [<https://perma.cc/FT65-6KFW>]; see also Janet M. Calvo, *Professional Licensing and Teacher Certification for Non-Citizens: Federalism, Equal Protection and a State's Socio-Economic Interests*, 8 COLUM. J. RACE. L. (forthcoming 2018).

<sup>21</sup> Memorandum from Douglas E. Lentivech, Deputy Comm'r, N.Y. State Office of the Professions & John L. D'Agati, Deputy Comm'r, N.Y. State Office of Higher Educ. to Prof'l Practice Comm., N.Y. State Educ. Dep't & Higher Educ. Comm., N.Y. State Educ. Dep't (May 9, 2016), <http://www.regents.nysed.gov/common/regents/files/516heppca1.pdf> [<https://perma.cc/DCW6-UHG7>]; see Calvo, *supra* note 20. For an overview of licensing for non-citizens, see Michael A. Olivas, *Within You Without You: Undocumented Lawyers, DACA, and Occupational Licensing*, 52 VAL. L. REV. (forthcoming 2017).

<sup>22</sup> PRUCOL is a criterion for New York Medicaid eligibility. N.Y. COMP. CODES R. & REGS. tit. 18, § 360-3.2(j)(1)(ii) (2007).

<sup>23</sup> Press Release, N.Y. State Educ. Dep't, Board of Regents Permanently Adopts Regulations to Allow DACA Recipients to Apply for Teacher Certification and Professional Licenses (May 17, 2016), <http://www.nysed.gov/news/2016/board-regents-permanently-adopts-regulations-allow-daca-recipients-apply-teacher> [<https://perma.cc/Q9YV-XRRJ>].

<sup>24</sup> Memorandum from Douglas E. Lentivech, *supra* note 21 (stating that those who are PRUCOL meet the criteria of not unlawfully present for professional licensing and teacher certification); see generally N.Y. COMP. CODES R. & REGS. tit. 8, § 80-1.3 (2017) (“[N]o otherwise qualified alien shall be precluded from obtaining a professional license under this Title if an individual is not unlawfully present in the United States, including but not limited to applicants granted Deferred Action for Childhood Arrivals relief or similar relief from deportation.”).

professions include social work, public accounting, architecture, and engineering.<sup>25</sup>

Continuing eligibility for professional licensing is important for current DACA recipients and for New York State.<sup>26</sup> Assuring that New York's non-citizen population can contribute to New York's economy and be integrated into New York communities are important objectives for the State.<sup>27</sup> New York State has a significant foreign-born population with a diverse population from all regions of the world.<sup>28</sup> Non-citizen residents who can practice the occupations for which they are qualified contribute to the economy of the state. Non-citizens with the higher education that professional licensing requires enhance the fiscal and economic integrity of New York.<sup>29</sup> 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.<sup>30</sup>

Many non-citizen students are enrolled in programs that require professional licenses. A sampling of some CUNY non-citizen students profiled in the Chronicle of Higher Education reveals that a number are studying to enter into professions.<sup>31</sup> A number of the students are studying

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<sup>25</sup> *New York State Licensed Professions*, N.Y. STATE OFFICE OF THE PROFESSIONS (Apr. 11, 2017), <http://www.op.nysed.gov/prof/> [https://perma.cc/3YDY-5MSG]. New York State regulates 130 occupations through various administrative agencies. *Occupations Licensed or Certified by New York State*, N.Y. STATE DEP'T OF LABOR, <https://www.labor.ny.gov/stats/lstrain.shtm> [https://perma.cc/X7M9-MSPN]. Many of the occupations do not have any immigration category restrictions. *See, e.g., Barber*, N.Y. STATE DEP'T OF LABOR (Nov. 9, 2016), <https://www.labor.ny.gov/stats/olcny/barbers.shtm>; N.Y. STATE DIV. OF LICENSING SERVS., STATE LICENSED/CERTIFIED REAL ESTATE APPRAISER APPLICATION (2017), <http://www.dos.ny.gov/forms/licensing/en/1432-f-a.pdf> [https://perma.cc/Z7SE-8H5Z].

<sup>26</sup> *See Calvo, supra* note 20.

<sup>27</sup> *About the New York State Office for New Americans*, N.Y. STATE OFFICE FOR NEW AMERICANS, <http://www.newamericans.ny.gov/about/about.html> [https://perma.cc/KD4A-7825].

<sup>28</sup> Migration Policy Inst., *State Immigration Data Profiles: New York*, MIGRATIONPOLICY.ORG, <http://www.migrationpolicy.org/data/state-profiles/state/demographics/NY> [https://perma.cc/7TRN-6JJB]; *Governor's Message*, N.Y. STATE OFFICE FOR NEW AMERICANS, <http://www.newamericans.ny.gov/about/governor.html> [https://perma.cc/2XS9-MSNX].

<sup>29</sup> *See* FISCAL POLICY INST., *THE NEW YORK STATE DREAM ACT: A PRELIMINARY ESTIMATE OF COSTS AND BENEFITS* (Mar. 9, 2012), <http://www.fiscalpolicy.org/FPI-CostBenefitAnalysis-NYS-DREAM-Act-20120309.pdf> [https://perma.cc/2KBJ-NBLK].

<sup>30</sup> Tom K. Wong et al., *DACA Recipients' Economic and Educational Gains Continue to Grow*, CTR. FOR AM. PROGRESS: IMMIGRATION, (Aug. 28, 2017, 9:01 AM), <https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/> [https://perma.cc/8747-EFX2].

<sup>31</sup> Julia Schmalz & Vincent DeFrancesco, *On Being Undocumented*, CHRONICLE OF



for needed health-related occupations.<sup>32</sup> New York State provides in-state tuition to its non-citizen New York high school graduates without regard to immigration status.<sup>33</sup> It is especially beneficial to New York that those young people who have grown up in New York and benefited from New York's public education system have the opportunity to engage in the professions for which they have been educated so that they can contribute the benefits of their educations back to New York.<sup>34</sup> Further, inclusive measures have brought hope to non-citizen youth and encouraged them to stay in school and pursue higher education and professions. The inability to obtain licenses for professions is a significant barrier to continuing education. The barrier discourages students from staying in school and pursuing the professions for which they have capacity and ambition.<sup>35</sup>

### MEDICAID ELIGIBILITY IN NEW YORK

Non-citizen residents in New York who are PRUCOL are eligible for Medicaid.<sup>36</sup> New York Medicaid is important for the well-being of New York residents and the state as a whole. Medicaid covers uninsured people with limited means for needed health care. Medicaid is important for individual health care access especially since a number of employers do not

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HIGHER EDUC. (May 27, 2015), <http://www.chronicle.com/article/on-being-undocumented/230243?cid=at&utmmedium=en&utmsource=at> [<https://perma.cc/FL45-VWK9>].

<sup>32</sup> *SEE KEEPING NYC HEALTHY*, CUNY (SEPT. 18, 2015),

[HTTP://WWW1.CUNY.EDU/MU/FORUM/2015/09/18/KEEPING-NYC-HEALTHY/](http://www1.cuny.edu/mu/forum/2015/09/18/keeping-nyc-healthy/) [[HTTPS://PERMA.CC/F39H-4QAD](https://perma.cc/F39H-4QAD)] (REGARDING CUNY EDUCATION IN HEALTH-RELATED PROFESSIONS); NOAM SCHEIBER & RACHEL ABRAMS, *WHAT OLDER AMERICANS STAND TO LOSE IF 'DREAMERS' ARE DEPORTED*, N.Y. TIMES: ECONOMY (SEPT. 6, 2017), [HTTPS://WWW.NYTIMES.COM/2017/09/06/BUSINESS/ECONOMY/DACA-DREAMERS-HOME-HEALTH-CARE.HTML?EMC=EDIT\\_TNT\\_20170906&NLIID=42015597&TNTMAIL0=Y&R=0](https://www.nytimes.com/2017/09/06/business/economy/daca-dreamers-home-health-care.html?emc=edit_tnt_20170906&nliid=42015597&tnemail0=y&r=0) [[HTTPS://PERMA.CC/5M45-J8GY](https://perma.cc/5M45-J8GY)].

<sup>33</sup> N.Y. EDUC. LAW §355(2)(h)(8) (2017); N.Y. EDUC. LAW § 6206(7)(a),(a-1) (2017); N.Y. EDUC. LAW §6301(5) (2017).

<sup>34</sup> *See* Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMMIGR. L.J. 243, 267-68 (2017) (showing that even though expired DACA recipients may not have the authorization to work for employers, they can pursue their professions through volunteer work or self-employment). Immigration law prohibits employers from hiring non-citizens without work authorization. *Id.* at 244. Employees are not penalized under the employer sanctions law. *See id.* at 265. Further working for oneself or volunteering is not employment. *Id.* at 270. *See also* Calvo, *supra* note 20.

<sup>35</sup> ROBERTO G. GONZALES ET AL., *DACA AT YEAR THREE: CHALLENGES AND OPPORTUNITIES IN ACCESSING HIGHER EDUCATION AND EMPLOYMENT*, NEW EVIDENCE FROM THE NATIONAL UNDACAMENTED RESEARCH PROJECT 1-6 (2016).

<sup>36</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 360-3.2(j)(ii).

provide health insurance to part-time and lower wage workers.<sup>37</sup> Seventy eight percent of adult and child Medicaid recipients in New York are in families with a worker.<sup>38</sup> “Medicaid and the Children’s Health Insurance Program (CHIP) provide health and long-term care coverage to more than 6.4 million low-income children, pregnant women, adults, seniors, and people with disabilities in New York.”<sup>39</sup> “Medicaid coverage contributes to . . . [l]ong-term health and educational gains” and “[i]mprovements in health and financial security.”<sup>40</sup>

Medicaid also promotes the public health of all New Yorkers. Coverage for non-citizens continuously residing in a state promotes public health goals including contagious disease control, prevention of ill health through early detection and diagnosis and immunization, and coordination of chronic disease care.<sup>41</sup> DACA recipients are predominately young adults attending school or working.<sup>42</sup> As such their health care needs are for lower cost preventive and primary care. Allowing those who need Medicaid as they work to get through school or to move out of lower wage employment would be beneficial to them, but also to the public health of New York.

#### THE HISTORY AND CURRENT STATUS OF DACA

A 2012 memorandum from the Secretary of Homeland Security entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children” set criteria for deferred action for certain non-citizens who had entered the United States as children.<sup>43</sup> The memorandum stated that DACA applies to “certain young people who were brought to this country as children and know only this country as home” and that the immigration laws were not “designed to remove productive

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<sup>37</sup> Rachel Garfield et al., *Understanding the Intersection of Medicaid and Work*, HENRY J. KAISER FAMILY FOUND., (Dec. 7, 2017), <http://www.kff.org/medicaid/issue-brief/understanding-the-intersection-of-medicaid-and-work/> [<https://perma.cc/R2GB-VVS7>].

<sup>38</sup> *Medicaid In New York*, HENRY J. KAISER FAMILY FOUND. (June 2017), <http://files.kff.org/attachment/fact-sheet-medicaid-state-NY> [<https://perma.cc/5YRE-QEWM>].

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See Janet M. Calvo, *The Consequences of Restricted Health Care Access for Immigrants:*

*Lessons from Medicaid and Schip*, 17 ANNALS HEALTH L. 175 (2008).

<sup>42</sup> Wong et al., *supra* note 30.

<sup>43</sup> Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r of U.S. Customs and Border Protection et al. (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/Z867-2MFK>].

young people to countries where they may not have lived or even speak the language.”<sup>44</sup> DACA applied to those non-citizens who came to the United States when under the age of sixteen, continuously resided in the U.S since June 15, 2007, were under 31 as of June 15, 2012, and who met additional educational and public safety criteria.<sup>45</sup> DACA is a form of deferred action, a long-standing practice of prosecutorial discretion by federal immigration authorities.<sup>46</sup>

Applications for DACA were submitted to an agency of Homeland Security, United States Citizenship and Immigration Services (USCIS). USCIS is the agency that reviews numerous types of immigration-related applications.<sup>47</sup> Applications for DACA required the submission of extensive personal information about the applicant’s background and life. Additionally, all applicants had to provide biometrics and undergo background checks.<sup>48</sup> The Department of Homeland Security, through USCIS, assured applicants that the information they submitted would not be used for immigration enforcement purposes against them or their family members.<sup>49</sup>

On September 5, 2017, the acting Secretary of the Department of Homeland Security rescinded the 2012 DACA memorandum and detailed the phase-out of DACA.<sup>50</sup> An individual’s DACA will expire at the time

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<sup>44</sup> *Id.* at 1, 2.

<sup>45</sup> *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> [<https://perma.cc/8K8A-YXGK>].

<sup>46</sup> *See* 7 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 72.03(2)(h) (Rev. ed. 2016); *see also* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015).

<sup>47</sup> *About Us*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/aboutus> [<https://perma.cc/22W5-ELQJ>]; *What We Do*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/about-us/what-we-do> [<https://perma.cc/F2RS-CDZU>]; *Our History*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/history-and-genealogy/our-history/our-history> [<https://perma.cc/GE4J-PSWA>].

<sup>48</sup> DEP’T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS., INSTRUCTIONS FOR CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, USCIS FORM I-821D (on file with author).

<sup>49</sup> *DACA Frequently Asked Questions: DHS DACA FAQs*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/archive/frequently-asked-questions> [<https://perma.cc/FV4P-5CAT>].

<sup>50</sup> Press Release, Dep’t of Homeland Sec., Rescission of Deferred Action for Childhood Arrivals (DACA) (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/rescission-deferred-action-childhood-arrivals-daca> [<https://perma.cc/4SFC-7EP4>]; *see also* Memorandum from Elaine C. Duke, Acting Sec’y of the Dep’t of Homeland Sec. to Thomas D. Homan, Acting Director of U.S. Immigration and Customs Enforcement et al. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/FB4V-TGL4>]; *see also* Press Release, Dep’t of Homeland Sec.,

her current two-year authorized DACA approval expires.<sup>51</sup> This will be at different dates for different DACA recipients since the approvals were granted at different times.<sup>52</sup>

While DACA was rescinded, it did not appear that the Secretary or the President contemplated enforcing the removal of those who had been granted DACA. The official statement from the President about the rescission of DACA assured:

Our enforcement priorities remain unchanged. We are focused on criminals, security threats, recent border-crossers, visa overstays, and repeat violators. I have advised the Department of Homeland Security that DACA recipients are not enforcement priorities unless they are criminals, are involved in criminal activity, or are members of a gang.<sup>53</sup>

Further, in coordination with the Secretary of Homeland Security's rescission memorandum, USCIS assured DACA applicants that the information that was submitted to USCIS in the DACA application or renewal process would not be provided to immigration enforcement agencies except in some limited circumstances to address national security,

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Frequently Asked Questions: Rescission for Deferred Action of Childhood Arrivals (DACA) (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca> [<https://perma.cc/BBW6-P5B4>].

<sup>51</sup> See Press Release, Dep't of Homeland Sec., Frequently Asked Questions: Rescission for Deferred Action of Childhood Arrivals (DACA) (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca> [<https://perma.cc/BBW6-P5B4>].

<sup>52</sup> See *id.* If the DACA approval was scheduled to expire before March of 2018, i.e., in less than six months, the person with DACA could apply for a DACA renewal if the renewal application is filed by October 5, 2017. *Deferred Action for Childhood Arrivals 2017 Announcement*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Nov. 15, 2017), <https://www.uscis.gov/daca2017> [<https://perma.cc/MHV3-UK89>].

<sup>53</sup> Press Release, White House, Statement from President Donald J. Trump (Sept. 5, 2017), <https://www.whitehouse.gov/the-press-office/2017/09/05/statement-president-donald-j-trump> [<https://perma.cc/A884-ELFN>]; see also Louis Nelson, *DHS Chief: Deporting Dreamers Won't Be a Priority for ICE if Talks Fail*, POLITICO (Jan. 16, 2018, 8:30 AM), <https://www.politico.com/story/2018/01/16/dhs-dreamers-deportation-not-priority-340681> [<https://perma.cc/VA32-TTJ6>] (noting that the Secretary of Homeland Security confirmed that DACA recipients would not be enforcement priorities for removal).

public safety, serious criminal activity, or fraud.<sup>54</sup> The enforcement agencies of the Department of Homeland Security are ICE, Immigration and Customs Enforcement, and CBP, U.S. Customs and Border Protection. USCIS referred to its Notice to Appear policy document for the details.<sup>55</sup> A Notice to Appear is the document that initiates removal proceedings.<sup>56</sup> It is generally issued by the enforcement agencies. The policy document refers to some limited circumstances under which USCIS would issue these notices, none of them applicable to DACA. The document controls the situations when USCIS would refer information it acquires on individuals to enforcement agencies, stating that referral of the information would be allowed.<sup>57</sup> Those who have met the DACA criteria would generally not meet those criteria, especially since a grant of DACA required the results of biometrics and background checks. Even in situations under the guidance document that allow USCIS referral to enforcement agencies, the initiation of removal proceedings is not guaranteed as it is still up to the enforcement agency to decide to issue the Notice to Appear and initiate a removal proceeding.

Moreover, the New York State Attorney General and fifteen other state Attorney Generals brought a lawsuit challenging the termination of DACA.<sup>58</sup> One of the causes of action in the complaint asserts that the

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<sup>54</sup> Press Release, Dep't of Homeland Sec., Frequently Asked Questions: Rescission for Deferred Action of Childhood Arrivals (DACA) (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca> [<https://perma.cc/BBW6-P5B4>] (“Q7: Once an individual’s DACA expires, will their case be referred to ICE for enforcement purposes? A7: Information provided to USCIS in DACA requests will not be proactively provided to ICE and CBP for the purpose of immigration enforcement proceedings, unless the requestor meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria set forth in USCIS’ Notice to Appear guidance.”).

<sup>55</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVS., POLICY MEMORANDUM ON REVISED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAS) IN CASES INVOLVING INADMISSIBLE AND REMOVABLE ALIENS (2011), [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf) [<https://perma.cc/SXX3-N8L4>].

<sup>56</sup> See § 1239.1 *Notice to Appear*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (last visited Jan. 22, 2018), <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-36698/0-0-0-36713.html> [<https://perma.cc/K5MS-2VBE>].

<sup>57</sup> See *id.*

<sup>58</sup> Press Release, New York State Office of the Attorney General, A.G. Schneiderman Files Lawsuit To Protect Dreamers And Preserve DACA (Sept. 6, 2017), <https://ag.ny.gov/press-release/ag-schneiderman-files-lawsuit-protect-dreamers-and-preserve-daca> [<https://perma.cc/T8YF-6DG6>]. Sixteen State Attorney Generals joined together in a lawsuit filed in the U.S. District Court for the Eastern District of New York. See *Complaint for Declaratory and Injunctive Relief, States of New York, et al. v. Trump*, No. 17-cv-5228 (E.D.N.Y. Sept. 6, 2017), ECF No. 1,

federal government's refusal to prohibit the use of information contained in DACA applications and renewal requests for purposes of immigration enforcement, including identifying, apprehending, detaining, or deporting non-citizens, is fundamentally unfair and thereby violates the Due Process Clause of the Fifth Amendment to the United States Constitution.<sup>59</sup>

Even just the inadequate USCIS policy and President's statement described above confirm the conclusion that those with expired DACA are PRUCOL. They are PRUCOL as the federal immigration authorities have knowledge of their presence in the country and have acquiesced to that presence by their stated general policy of not referring information regarding expired DACA recipients to enforcement agencies and the presidential direction that they are not enforcement priorities. Moreover, under the long-term understanding of PRUCOL by courts and administrative agencies in New York, even when there is not a policy restricting removal, non-citizens whose federal authorization has expired continue as PRUCOL under the facts and circumstances of their situations unless federal immigration authorities have pursued their removal and ameliorative relief is not available.

#### THE MEANING AND APPLICATION OF PRUCOL IN NEW YORK

PRUCOL, permanently residing in the United States under color of law, is a term that has been applied to various contexts.<sup>60</sup> PRUCOL has been interpreted by court decisions,<sup>61</sup> regulation,<sup>62</sup> and administrative

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[https://ag.ny.gov/sites/default/files/new\\_york\\_et\\_al.\\_v.\\_trump\\_et\\_al\\_-\\_17cv5228.pdf](https://ag.ny.gov/sites/default/files/new_york_et_al._v._trump_et_al_-_17cv5228.pdf) [<https://perma.cc/N84B-RP7J>]; Ruthann Robson, *States Challenge DACA Rescission in New York v. Trump*, CONST. L. PROF. BLOG (Sept. 6, 2017), <http://lawprofessors.typepad.com/conlaw/2017/09/states-challenge-daca-rescission-.html> [<https://perma.cc/8Y3Z-BAZP>].

<sup>59</sup> Complaint for Declaratory and Injunctive Relief, *States of New York, et al. v. Trump*, No. 17-cv-5228 (E.D.N.Y. Sept. 6, 2017), ECF No. 1,

[https://ag.ny.gov/sites/default/files/new\\_york\\_et\\_al.\\_v.\\_trump\\_et\\_al\\_-\\_17cv5228.pdf](https://ag.ny.gov/sites/default/files/new_york_et_al._v._trump_et_al_-_17cv5228.pdf) [<https://perma.cc/N84B-RP7J>].

<sup>60</sup> PRUCOL currently applies to Medicaid eligibility and professional licensing in New York. PRUCOL was a term in federal regulations until statutory changes in 1996. *See* Soc. Security Admin., Prog. Operations Manual System (POMS), SI 00501.420, Permanent Residence Under Color of Law (PRUCOL) Pre-1996 Legislation (May 25, 2012), <https://secure.ssa.gov/poms.nsf/lnx/0500501420> [<https://perma.cc/TE5L-YUUE>]; *see also* Janet M. Calvo, *Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs*, 16 N.Y.U. REV. L. & SOC. CHANGE 395 (1988).

<sup>61</sup> *See, e.g.*, *Holley v. Lavine*, 553 F.2d 845 (2d Cir. 1977) *cert. denied sub nom.*, *Shang v. Holley*, 435 U.S. 947 (1978); *Matter of Aliessa v. Novello*, 96 N.Y.2d 418 (2001); *Papadopoulos v. Shang*, 67 A.D.2d 84 (1st Dep't 1979); *Matter of Brunswick Hosp. Ctr., Inc. v. Daines*, 26 Misc. 3d 1225(A) (Sup. Ct. Nassau Cty. Feb. 22, 2010); *Tonashka v. Weinberg*, 178 Misc. 2d 280 (Sup. Ct. Rockland Cty. Sept. 23, 1998).

memoranda.<sup>63</sup> On January 23, 2018, New York State Governor Cuomo announced that New York's DACA recipients are and will remain PRUCOL even if the federal government finally terminates DACA.<sup>64</sup>

State and federal courts in New York have broadly interpreted “permanently residing under color of law” and have focused on the factual realities of federal immigration authorities’ policies, practices, and their behavior toward individual non-citizens. In the 1977 case, *Holley v. Lavine*,<sup>65</sup> the United States Court of Appeals for the Second Circuit discussed the meaning of “under color of law” and then turned to “permanently residing.”<sup>66</sup> The court explained that “under color of law” included administrative action to not enforce the letter of a statute or regulation.<sup>67</sup> The court noted that “under color of law” “encircles the law, its shadows, and its penumbra.”<sup>68</sup> The court stated that “permanently residing,” includes aliens whose presence in the United States is “continuing or lasting,” even though their residence is susceptible to termination.<sup>69</sup> New York state courts have followed this interpretation.<sup>70</sup>

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<sup>62</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 360-3.2(j)(1)(ii) (2007) (“The term PRUCOL alien means an alien who is residing in the United States with the knowledge and permission or acquiescence of the Federal Immigration Agency and whose departure from the U.S. such agency does not contemplate enforcing.”).

<sup>63</sup> See Memorandum from Judith Arnold, Director Division of Coverage and Enrollment to Local District Commissioners, Medicaid Directors, Revised Desk Guide: “Documentation Guide to Citizenship and Immigrant Eligibility for Health Coverage in New York State” (Mar. 26, 2008), [https://www.health.ny.gov/health\\_care/medicaid/publications/docs/gis/08ma009.pdf](https://www.health.ny.gov/health_care/medicaid/publications/docs/gis/08ma009.pdf) [<https://perma.cc/K5AN-A5L4>]; see also N.Y. State Dep’t of Health, Documentation Guide: Citizenship and Immigrant Eligibility for Health Coverage in New York State (Mar. 3, 2008), [https://www.health.ny.gov/health\\_care/medicaid/publications/docs/gis/08ma009att.pdf](https://www.health.ny.gov/health_care/medicaid/publications/docs/gis/08ma009att.pdf) [<https://perma.cc/MYS3-8NM9>].

<sup>64</sup> See *Governor Cuomo Ensures Medicaid Coverage for DACA Recipients Regardless of Federal Action*, N.Y. STATE OFFICE OF THE GOVERNOR (Jan. 23, 2018), <https://www.governor.ny.gov/news/governor-cuomo-ensures-medicaid-coverage-daca-recipients-regardless-federal-action> [<https://perma.cc/T4GQ-L782>]; *What You Should Know About Applying for or Renewing Your Medicaid Coverage Through NY State of Health if Deferred Action for Childhood Arrivals (DACA) is Rescinded*, N.Y. STATE OF HEALTH (Jan. 23, 2018), <https://info.nystateofhealth.ny.gov/DACAFactSheet> [<https://perma.cc/N67Y-ZWZN>].

<sup>65</sup> *Holley v. Lavine*, 553 F.2d 845 (2d Cir. 1977) *cert. denied sub nom.*, *Shang v. Holley*, 435 U.S. 947 (1978).

<sup>66</sup> *Id.* at 848-50.

<sup>67</sup> *Id.* at 849-50.

<sup>68</sup> *Id.* at 849.

<sup>69</sup> *Id.* at 850.

<sup>70</sup> See, e.g., *Papadopoulos v. Shang*, 67 A.D.2d 84 (1st Dep’t 1979); *Matter of Brunswick Hosp. Ctr., Inc. v. Daines*, 26 Misc. 3d 1225(A) (Sup. Ct. Nassau Cty. Feb. 22,

New York state courts have looked to the existence of immigration policy or factual practice and found PRUCOL through either the knowledge and permission, or the knowledge and acquiescence, of the federal immigration authorities.<sup>71</sup> The courts found knowledge and permission met by non-citizens whose presence in the country was known to the federal immigration authority and whose continued residence was permitted either by treatment of the individual or by policy that applied to non-citizens in particular circumstances.<sup>72</sup>

The courts found that knowledge and acquiescence was met when individual facts and circumstances showed that the federal immigration authority had knowledge of the non-citizens' presence and had acquiesced to that presence by some policy, practice, or inaction.<sup>73</sup> The courts found a non-citizen to be permanently residing in the United States under color of law when the non-citizen could have been removed under immigration law, but the federal authority had a general policy or practice not to enforce the removal of non-citizens during a certain continuing, albeit limited, time period.<sup>74</sup> They also found PRUCOL when the immigration authorities knew of the non-citizen's continuous residence, but did not, in fact, pursue the individual non-citizen's removal.<sup>75</sup>

For example, in *Papadopoulos v. Shang*, a non-citizen filed an application with immigration authorities that was eventually denied.<sup>76</sup> She was determined to be "permanently residing [in the United States] under color of law" during the period in which the denied application was pending because there was a general policy not to remove that type of applicant.<sup>77</sup> But further, after that denial she continued to be PRUCOL under the facts of her situation. The immigration authorities knew of her continuing presence despite the denial through another request, but took no steps to remove her.<sup>78</sup> In *St. Francis Hospital v. D'Elia*, a non-citizen's visa expired and she was therefore removable.<sup>79</sup> She was living in New York while processing a new visa application, but the federal authorities did not in fact

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2010); *Tonashka v. Weinberg*, 178 Misc. 2d 280 (Sup. Ct. Rockland Cty. Sept. 23, 1998).

<sup>71</sup> *Papadopoulos v. Shang*, 67 A.D.2d 84, 87 (1st Dep't 1979); *Matter of Brunswick Hosp. Ctr., Inc. v. Daines*, 26 Misc. 3d 1225(A), 5 (Sup. Ct. Nassau Cty. Feb. 22, 2010); *Tonashka v. Weinberg*, 178 Misc. 2d 280, 283-84 (Sup. Ct. Rockland Cty. Sept. 23, 1998).

<sup>72</sup> *Papadopoulos v. Shang*, 67 A.D.2d 84, 87 (1st Dep't 1979); *Matter of Brunswick Hosp. Ctr., Inc. v. Daines*, 26 Misc. 3d 1225(A), 5 (Sup. Ct. Nassau Cty. Feb. 22, 2010); *Tonashka v. Weinberg*, 178 Misc. 2d 280, 283-84 (Sup. Ct. Rockland Cty. Sept. 23, 1998).

<sup>73</sup> See *Tonashka*, 178 Misc. 2d at 283-84.

<sup>74</sup> *Papadopoulos v. Shang*, 67 A.D.2d 84, 87-88 (1st Dep't 1979).

<sup>75</sup> *Matter of St. Francis Hospital v. D'Elia*, 71 A.D.2d 110 (2d Dep't 1979).

<sup>76</sup> *Papadopoulos v. Shang*, 67 A.D.2d 84, 86 (1st Dep't 1979).

<sup>77</sup> *Id.* at 86-87.

<sup>78</sup> See *id.* at 88.

<sup>79</sup> *Matter of St. Francis Hospital v. D'Elia*, 71 A.D.2d 110 (2d Dep't 1979).



pursue her removal.<sup>80</sup> She was found to be “permanently residing in the United States under color of law.”<sup>81</sup> In *Brunswick Hospital Center v. Daines*, the non-citizen was PRUCOL even though her visa had expired and she was removable.<sup>82</sup> She requested “voluntary departure” by letter.<sup>83</sup> She did not receive a response, but the immigration authorities did not actually pursue her removal.<sup>84</sup> In these cases, the knowledge and acquiescence required for PRUCOL was met when the facts and circumstance of the individual’s situation showed that federal immigration authorities knew about the non-citizens’ continuous residence in the United States and yet did not in fact pursue their removal. Acquiescence was found even when the non-citizen’s permission to be in the country had expired if the immigration authorities did not over time attempt to remove the non-citizen.

New York regulations and state directives have similarly articulated that PRUCOL includes those who are residing in the United States with the knowledge and acquiescence or permission of federal immigration authorities.<sup>85</sup> A New York State Department of Health regulation states that PRUCOLs “are any persons who are permanently residing in the United States with the knowledge and permission or acquiescence of the . . . [USCIS] and whose departure from the United States the USCIS does not contemplate enforcing.”<sup>86</sup> A person is considered as one whose departure the USCIS does not contemplate enforcing if, based on all the facts and circumstances of the particular case, it appears that the USCIS is otherwise permitting the immigrant to reside in the United States indefinitely, or it is the policy or practice of the USCIS not to enforce the departure of immigrants in a particular category.<sup>87</sup>

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<sup>80</sup> *Id.* at 120.

<sup>81</sup> *Id.*

<sup>82</sup> *Matter of Brunswick Hosp. Ctr., Inc. v. Daines*, 26 Misc. 3d 1225(A) (Sup. Ct. Nassau Cty. Feb. 22, 2010).

<sup>83</sup> *Id.* at 3.

<sup>84</sup> *Id.*

<sup>85</sup> *See, e.g.*, N.Y. State Dep’t of Health, Administrative Directive 04 OMM/ADM-7, Citizenship & Alien Status Requirements for the Medicaid Program (Oct. 26, 2004), [https://www.health.ny.gov/health\\_care/medicaid/publications/docs/adm/04adm-7.pdf](https://www.health.ny.gov/health_care/medicaid/publications/docs/adm/04adm-7.pdf) [<https://perma.cc/K98F-H4YK>].

<sup>86</sup> *Id.*

<sup>87</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 360-3.2(j)(1)(ii) (2007) (“Permanently Residing Under Color of Law (PRUCOL). The term PRUCOL alien means an alien who is residing in the United States with the knowledge and permission or acquiescence of the Federal Immigration Agency and whose departure from the U.S. such agency does not contemplate enforcing. An alien will be considered as one whose departure the Federal Immigration Agency does not contemplate enforcing if, based on all the facts and circumstances in a particular case, it appears that the Federal Immigration Agency is otherwise permitting the alien to reside in the United States indefinitely or it is the policy or practice of such agency not to enforce the departure of aliens in a particular category.”).

A number of specific categories of non-citizens have been designated as PRUCOL<sup>88</sup> including those who have applied to remain in the United States even on a temporary basis, as well as those who have been given a particular designation by federal immigration authorities. For example, those who have applied for, as well as those who have been afforded Deferred Action are PRUCOL.<sup>89</sup> Further, while an individual in removal proceedings is generally not considered PRUCOL, non-citizens in proceedings are PRUCOL when they have pending ameliorative applications such as cancellation of removal or asylum that are made in the context of these proceedings.<sup>90</sup> Knowledge and acquiescence has been found in several other circumstances. Even when a person has a final order of removal, but the person is in a supervision program, that individual is considered PRUCOL.<sup>91</sup> Further, as the cases discussed above show, even when an individual's explicit permission to be in the country expires, that non-citizen is PRUCOL when immigration authorities know of the expiration and the individual's continuing residence and, through policy or practice, do not respond by initiating removal against that person.

Similarly, those with DACA are currently PRUCOL and will continue to be PRUCOL as New Yorkers within the "knowledge" and "acquiescence" of immigration officials unless they are in removal proceedings without pending relief applications.<sup>92</sup> Moreover, not treating those who have been DACA similar to non-citizens in other PRUCOL categories would violate equal protection.

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<sup>88</sup> N.Y. State Dep't of Health, Informational Letter 08 OHIP/INF-4, Clarification of PRUCOL Status for the Purposes of Medicaid Eligibility (Aug. 4, 2008), [https://www.health.ny.gov/health\\_care/medicaid/publications/docs/inf/08inf-4.pdf](https://www.health.ny.gov/health_care/medicaid/publications/docs/inf/08inf-4.pdf) [<https://perma.cc/Q9ED-AUFS>].

<sup>89</sup> N.Y. State Dep't of Health, Administrative Directive 04 OMM/ADM-7, Citizenship & Alien Status Requirements for the Medicaid Program (Oct. 26, 2004), [https://www.health.ny.gov/health\\_care/medicaid/publications/docs/adm/04adm-7.pdf](https://www.health.ny.gov/health_care/medicaid/publications/docs/adm/04adm-7.pdf) [<https://perma.cc/D9G4-WGU4>]; *see also* N.Y. State Dep't of Health, Informational Letter 08 OHIP/INF-4, Clarification of PRUCOL Status for the Purposes of Medicaid Eligibility (Aug. 4, 2008), [https://www.health.ny.gov/health\\_care/medicaid/publications/docs/inf/08inf-4.pdf](https://www.health.ny.gov/health_care/medicaid/publications/docs/inf/08inf-4.pdf) [<https://perma.cc/Q9ED-AUFS>]; *see also* NYC Mayor's Office of Immigrant Affairs, Insurance, <http://www.nyc.gov/site/immigrants/help/city-services/insurance.page> [<https://perma.cc/AE5P-LKVU>].

<sup>90</sup> *See* N.Y. State Dep't of Health, Informational Letter 08 OHIP/INF-4, Clarification of PRUCOL Status for the Purposes of Medicaid Eligibility (Aug. 4, 2008), [https://www.health.ny.gov/health\\_care/medicaid/publications/docs/inf/08inf-4.pdf](https://www.health.ny.gov/health_care/medicaid/publications/docs/inf/08inf-4.pdf) [<https://perma.cc/Q9ED-AUFS>] (explaining that immigration relief includes, but is not limited to, adjustment of status, cancellation of removal, asylum, deferred action, and temporary protected status).

<sup>91</sup> *Id.* at 3.

<sup>92</sup> *Id.*

New Yorkers who currently have DACA are PRUCOL as persons residing in the state with the knowledge and permission of federal immigration authorities. They will continue to be PRUCOL even if the DACA rescission persists despite litigation and legislative efforts since they will continue to reside in the country with the knowledge and acquiescence of immigration authorities. This is the consequence of both the President's and USCIS's statements that those with expired DACA are not enforcement priorities and that the information acquired through the DACA process will not be used for immigration enforcement except in limited individual circumstances. Current DACA recipients continue as PRUCOL unless an individual determination has been made to initiate removal proceedings against a person and that person has not applied for any ameliorative relief. Moreover, even the individual initiation of a removal proceeding against a current DACA recipient may be unconstitutional according to the New York State Attorney General.<sup>93</sup>

Further, those who have been afforded DACA must be treated equally with others in similar categories to prevent violations of the equal protection clause of the New York State Constitution.<sup>94</sup> In *Matter of Aliessa v. Novello*, the New York Court of Appeals concluded that a New York statute that afforded Medicaid to certain categories of PRUCOL non-citizens, but not to others, violated the equal protection clauses of the United States and New York State Constitutions.<sup>95</sup> The court applied strict scrutiny<sup>96</sup> to a state law affecting differing categories of "unauthorized" aliens of whom the federal immigration authorities were aware, but had no plans to deport.<sup>97</sup> The court therefore required that any such discrimination had to further a compelling state interest by the least restrictive means.<sup>98</sup> The court rejected the argument that the distinctions were constitutional because they only did what a federal statute authorized. The New York Court of Appeals found that, under our system of separation of powers, a federal statute cannot constitutionally authorize New York to unconstitutionally discriminate

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<sup>93</sup> Press Release, New York State Office of the Attorney General, A.G. Schneiderman Files Lawsuit To Protect Dreamers And Preserve DACA (Sept. 6, 2017) <https://ag.ny.gov/press-release/ag-schneiderman-files-lawsuit-protect-dreamers-and-preserve-daca> [<https://perma.cc/T8YF-6DG6>].

<sup>94</sup> Calvo, *supra* note 20.

<sup>95</sup> *Matter of Aliessa v. Novello*, 96 N.Y.2d 418 (2001).

<sup>96</sup> *See Dandamudi v. Tisch*, 686 F.3d 66, 72 (2d Cir. 2012). Applying strict scrutiny, the Second Circuit held a section of the New York Education Law that restricted professional licenses to only citizens or legal permanent residents. *Id.* The Second Circuit, like the New York Court of Appeals, determined the constitutionality of distinctions among categories of non-citizens with a strict scrutiny analysis and found the discrimination in those situations to be unconstitutional. *See id.*

<sup>97</sup> *Matter of Aliessa v. Novello*, 96 N.Y.2d 418, 419 (2001).

<sup>98</sup> *Id.* at 431.

against non-citizens.<sup>99</sup> Expired DACA recipients are similarly situated to non-citizens recognized as PRUCOL whose federal permission for presence has expired or who have requested relief or applied to federal authorities but did not receive a response. They continue to be PRUCOL as those whose presence is with the knowledge and acquiescence of immigration authorities.

### CONCLUSION

The federal government controls the immigration categorization of those young people who came to the United States as children and were subsequently afforded DACA. It is possible for DACA to endure as a result of decisions on cases now pending in federal courts or through subsequent federal administrative action. It is possible that legislation will provide for permanent residence and future citizenship for these Dreamers. But, whatever happens in that regard, they will continue through federal policy and practice to be New York residents “under color of law.” Even the President and the USCIS do not anticipate their removal from the country except in very unusual circumstances when an individual proceeding might be initiated. And the New York State Attorney General asserts that it is unconstitutional for the federal government to initiate a proceeding based on information submitted by a DACA applicant. Therefore, the presence of current or expired DACA recipients in the state is continuing with the “knowledge and acquiescence” of federal authorities. These Dreamers meet the PRUCOL criteria under court decisions, regulations, and administrative interpretations and thereby remain eligible for both professional licensing and New York Medicaid. Otherwise, state entities would violate the Dreamers’ right to equal protection since non-citizens in similar situations are considered PRUCOL in New York.

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<sup>99</sup> *Id.* at 435.