Consolidated Case Nos. 18-15068, 18-15069, 18-15070,
18-15071, 18-15072, 18-15128, 18-15133, 18-15134

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Plaintiffs/Appellants,

v.

DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants/Appellees.

On Appeal from the United States District Court
for the Northern District Of California,
Honorable William H. Alsup, Presiding

BRIEF OF IMMIGRATION LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, JANET NAPOLITANO, AND THE CITY OF SAN JOSE

Harry Lee
Johanna S. Dennehy
Claire M. Blakey
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Christopher W. Smith
Counsel of Record
STEPTOE & JOHNSON LLP
633 West 5th Street
Suite 700
Los Angeles, CA 90071
(213) 439-9400

Attorneys for the Immigration Law Scholars

March 20, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Rules and Regulations

Legislative Materials

Agency Publications and Guidance

Scholarly Works

Other Sources

INTEREST OF AMICI CURIAE[1]

Amici curiae are immigration law professors with deep knowledge regarding the executive branch's authority to issue policies such as Deferred Action for Childhood Arrivals ("DACA"), the 2012 policy at issue in this appeal. *Amici* have testified, lectured, researched, written, and advocated at length on immigration issues, including the principal subject of this appeal: the President's legal power to craft immigration-related deferred-action policies. *Amici* do not seek to substitute their views for those of this Court, but they do have unique insight into why DACA is legal and hope their views will assist the Court in its consideration of this important issue.

Amici are the following scholars, in alphabetical order:[2]

Jennifer M. Chacón, Chancellor's Professor of Law, the University of California, Irvine, School of Law;

Kevin R. Johnson, Dean, the University of California, Davis, School of Law;

Dr. Stephen H. Legomsky, John S. Lehmann University Professor Emeritus at the Washington University School of Law in St. Louis;

---

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), no parties' counsel authored any part of this brief; no party or its counsel contributed money intended to fund its preparation or submission; and no other person contributed such money. Pursuant to Fed. R. App. P. 29(a)(2), all parties of record in Cases No. 18-15068 and 18-15070—the U.S. Department of Homeland Security, the Regents of the University of California, Janet Napolitano, and the City of San Jose—have consented to the filing of this brief.

[2] *Amici* join this brief as individuals. Their institutional affiliations are listed for informational purposes and do not signify any institutional endorsement.

Hiroshi Motomura, Susan Westerberg Prager Professor of Law at the UCLA School of Law;

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

Shoba Sivaprasad Wadhia, Samuel Weiss Faculty Scholar, Clinical Professor of Law, the Pennsylvania State Law School.

INTRODUCTION AND SUMMARY OF ARGUMENT

The main rationale for the district court's decision below is that DACA's rescission by the U.S. Department of Homeland Security ("DHS") was based on the false premise that the policy was illegal. DACA's legality is therefore a central issue here. *Amici* offer a detailed analysis of why they believe the DACA policy was well within the executive's lawful prosecutorial discretion. Because DHS's stated premise for revoking DACA—illegality—is erroneous, appellees are highly likely to prevail on the merits of their claims. Accordingly, this Court should affirm the district court's preliminary injunction and its partial denial of the government's motion to dismiss.

Amici's brief outlines the history of immigration-related prosecutorial discretion, and deferred action in particular, and analyzes why DACA is both constitutional and otherwise consistent with the statutory and regulatory framework. In particular, this brief demonstrates that any constitutional attack on

DACA, including arguments based on the Constitution's "take Care" clause, would certainly fail. It explains that the relevant immigration statutes and regulations were written broadly so as to vest the executive with the legal authority to devise prosecutorial discretion policies like DACA, and responds briefly to arguments raised by critics regarding the legality of large-scale deferred action.

While these issues are partially addressed in the main briefs, the additional appellate issues spawned by the government's *post hoc* explanations for revoking DACA have precluded appellees from offering a comprehensive analysis of DACA's historical and legal underpinnings. *Amici* respectfully seek to ensure that the Court receives a full explanation of *why* DACA constitutes a legal exercise of the executive's discretion.[3]

ARGUMENT

I. THE HISTORY OF DEFERRED-ACTION POLICIES BOLSTERS THE INHERENT LEGALITY OF THE 2012 DACA POLICY

Deferred action (previously known as "non-priority status") and similar policies have been integral parts of immigration enforcement for more than fifty

[3] DACA's legality can all too easily be lost in the litigation haze. In *Casa De Maryland v. U.S. Department of Homeland Security*, Civil No. RWT-17-2942, 2018 WL 1156769 (D. Md., Mar. 5, 2018), the only district court that has refused to enjoin DACA's revocation did so "regardless of the lawfulness of DACA," reasoning that the government's conclusion that DACA is unlawful was "reasonable," even if it was "wrong." *Id*. at *5. By ignoring Congress' mandate that the judiciary review and correct administrative decisions premised on clear mistakes of law, 5 U.S.C. § 706(2)(A), the district court mooted the central issue—DACA's legality.

years.[4] Since 1960, the Immigration and Naturalization Service ("INS") and its successor, DHS, have adopted at least twenty policies reflecting the use of prosecutorial discretion with respect to large, defined categories of undocumented immigrants.[5] INS published its first deferred-action guidance in an "Operations Instruction" more than 40 years ago, and such policies have thereafter been memorialized in numerous agency guidance documents.[6]

---

[4] *Amici* have tracked and catalogued these historical policies. *See*, *e.g.*, *Hearing Before H. Comm. on the Judiciary*, 114th Cong. 69 (2015) (written testimony of Stephen H. Legomsky, The John S. Lehmann University Professor, Washington University School of Law) (hereinafter "Legomsky Written Testimony"); Shoba Sivaprasad Wadhia, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION ch. 4 (2015); Wadhia, *In Defense of Deferred Action and the DREAM Act*, 91 TEXAS L. REV. 59 (2013); Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INTEREST L.J. 243 (2010); *see also* Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42 (1976).

[5] *See* Brief for the United States at 48, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674) (Mar. 1, 2016).

[6] *See* Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii); Sam Bernsen, Gen. Counsel of INS, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976), https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf; Doris Meissner, Comm'r of INS, *Exercising Prosecutorial Discretion* (Nov. 17, 2000); John Morton, Dir., U.S. Immigration & Customs Enforcement, Policy No. 10075.1, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

Deferred-action policies have been issued by administrations led by both major parties. Ronald Reagan and George H.W. Bush, for instance, sought to defer deportations of approximately 1.5 million non-citizen spouses and children of immigrants (expected at the time to affect 40% of the undocumented immigrant population) under the Immigration Reform and Control Act (IRCA) of 1986.[7] Under Bill Clinton, the INS established a deferred-action program for survivors of abuse by U.S.-citizen spouses.[8] George W. Bush's administration instituted a deferred-action policy for foreign students affected by Hurricane Katrina.[9] In 2009, the Obama administration implemented deferred action for widows and widowers whose visa applications had not been adjudicated when their U.S.-citizen spouses died.[10]

The use of deferred action as an enforcement tool is not only long-standing; it is now firmly entrenched in the constitutional, statutory, and regulatory

---

[7] *See* Gene McNary, Comm'r of INS, *Family Fairness: Guidelines for Voluntary Departure Under 8 CFR 242.5* at 1–2 (Feb. 2, 1990); *see also* Legomsky Written Testimony at 83–85.

[8] *See* Paul W. Virtue, Acting Exec. Assoc. Comm'r of INS, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* (May 6, 1997).

[9] *See* Press Release, USCIS, *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* (Nov. 25, 2005), https://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf.

[10] *See* Donald Neufeld, Acting Assoc. Dir. of USCIS, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* (Sept. 4, 2009).

framework governing immigration. Congress has effectively delegated to DHS (and INS before that) the power and authority to make prosecutorial discretion decisions.[11] Notably, Congress has used the term "deferred action" in immigration legislation for the past several decades, including in Section 237(d)(2) of the Immigration and Nationality Act (INA) (codified at 8 U.S.C. § 1227(d)(2)), which provides that the denial of a request for an administrative stay of an order of removal "shall not preclude the alien from applying for . . . deferred action," and in Section 1503(d)(3) of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1522 (codified at 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV)), which makes certain covered immigrants "eligible for deferred action and work authorization." Reflecting the degree to which Congress acknowledges the executive's long-standing power to employ deferred-action policies, Congress has on several occasions openly faulted the executive for not using the discretion Congress gave it under the immigration laws.[12]

---

[11] *See* 8 U.S.C. § 1103(a)(1) (charging the Secretary "with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens").

[12] *See, e.g.*, Letter from Members of Congress to Janet Reno, Attorney General, Department of Justice, on Guidelines for Use of Prosecutorial Discretion in Removal Proceedings (Nov. 4, 1999), http://www.ice.gov/doclib/foia/prosecutorial-discretion/991104congress-letter.pdf; Statements by Congressman Barney Frank, Symposium, *Transcript of Panel Presentation on Immigration & Criminal Law Hosted by the Association of the Bar of the City of New York*, 4 N.Y. CITY L. REV. 9, 29–36 (2001) (criticizing the INS for not exercising prosecutorial discretion in its removal decisions in the wake of

The long-accepted use of deferred action as an enforcement tool is also embedded in INA's implementing regulations. For example, regulations in place since 1981 have recognized deferred action as "an act of administrative convenience to the government which gives some cases lower priority" and direct undocumented immigrants "who ha[ve] been granted deferred action" to apply for employment authorization upon a showing of "economic necessity." 8 C.F.R. § 274a.12(c)(14). Thousands of deferred-action recipients have applied for and received employment authorization pursuant to this regulation.[13] Thus, as the Office of Legal Counsel recognized in 2014, "Congress has long been aware of the practice of granting deferred action, including in its categorical variety" and "has enacted several pieces of legislation that have either assumed that deferred action would be available in certain circumstances, or expressly directed that deferred action be extended to certain categories of aliens."[14] DACA, therefore, is not a deviation, let alone a radical departure from immigration-related statutes, regulations, or discretionary immigration practices of previous administrations.

Congress' passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

[13] *See, e.g.*, Legomsky Written Testimony at 76–78; Shoba Sivaprasad Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. RACE & LAW 1 (2016).

[14] Office of Legal Counsel, U.S. Dept. of Justice, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* at 18 (Nov. 19, 2014).

To the contrary, and as the government admits, DACA has "deep historical roots."[15]

Prior to DACA's issuance, no case had ever been brought challenging the executive's consistent use of deferred action for many decades. Over this same lengthy period, the courts repeatedly confirmed the executive's lawful right and need to employ prosecutorial discretion policies in various contexts, including immigration. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion"); *cf. United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (describing immigration as a "field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program"). The Supreme Court recently re-affirmed that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona v. United States*, 567 U.S. 387, 396 (2012). Moreover, at least one Circuit has recognized that *DACA itself* constitutes an authorized exercise of such discretion. *See Arpaio v. Obama*, 797 F. 3d 11, 16 (D.C. Cir. 2015) ("With enforcement responsibility comes the latitude that all executive branch agencies enjoy to exercise enforcement discretion . . . .

[15] Brief for the United States at 16, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674) (Mar. 1, 2016).

Whether to initiate removal proceedings and whether to grant relief from deportation are among the discretionary decisions the immigration laws assign to the executive.").

II. IMPLEMENTATION OF THE 2012 DACA POLICY IS WELL WITHIN THE EXECUTIVE'S POWER

Executive action is subject to review and reversal if it is "not in accordance with law." 5 U.S.C. § 706(2)(A). Actions based on clearly incorrect views of the law are considered "arbitrary and capricious," and thus an improper exercise of agency authority. *See Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007). The district court's preliminary injunction is based, in part, on its finding that DHS's decision to revoke DACA was "not in accordance with law," and therefore arbitrary and capricious when made, because it was premised on the Acting Secretary's finding that DACA is both unconstitutional and otherwise unlawful. This conclusion is inconsistent not only with the historical acceptance of the executive's power to use deferred-action policies on a categorical basis, but also with the statutory framework and legal precedent approving the executive's right to issue such policies.

A. DACA Is Clearly Constitutional

DHS made a clear mistake of law when it premised its revocation decision on the view that DACA is unconstitutional. The main constitutional challenge to date is that because the President must "take Care that the Laws be faithfully

executed," U.S. CONST. art. II, § 3, his willingness to temporarily defer pursuit and deportation of successful DACA applicants constitutes a failure to "execute" the immigration laws. The Supreme Court has never struck down a deferred-action policy based on the "take Care" clause.[16] It would be irrational to do so given the wide historical and current latitude afforded the exercise of discretion in immigration enforcement, *see Arizona*, 567 U.S. at 396, especially since constitutional challenges are highly disfavored in the immigration arena.[17]

In addition, a constitutional challenge to a deferred-action policy such as DACA cannot succeed given that the law *requires* the President, as "prosecutor-in-chief" for the immigration enforcement system, to make the hard choices necessary to properly "administer systematic enforcement in the huge gap between the unauthorized population of over eleven million and the annual enforcement

---

[16] *See* Kate Manuel & Tom Garvey, Cong. Research Serv., *Prosecutorial Discretion in Immigration Enforcement* at 17 (Dec. 27, 2013), https://fas.org/sgp/crs/misc/R42924.pdf.

[17] *See* Stephen Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUPREME COURT REV. 255, 285 ("[T]he Court perceives the judicial role as especially narrow when, as the Court assumes to be the case with immigration, foreign affairs are affected."); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (2000) ("Courts should only rarely, if ever, and in limited fashion, entertain constitutional challenges to decisions about which aliens should be admitted or expelled.").

capacity of [a small percentage] of that figure."[18] The President's "faithful execution of the immigration laws" therefore "includes prioritizing the deportable population in a cost-effective and conscientious manner and providing benefits to the deportable citizens when they qualify" under other laws.[19] Critically, as "[p]art of taking care faithfully to execute the immigration laws," the executive is not only obligated to adopt "an enforcement system that maximizes predictability and uniformity," *but also* fashion one that "minimizes discrimination."[20]

Maximizing predictability and uniformity and minimizing discrimination are precisely what DACA accomplishes. It publicizes application criteria that reduce the likelihood of discrimination or enforcement without accountability, including by DHS personnel. The need to formalize and centrally supervise the process of exercising prosecutorial discretion was especially pressing in light of significant resistance within Immigration and Customs Enforcement (ICE) to the prosecutorial discretion guidelines issued by then-Director John Morton in June 2011. DACA makes only those persons whose applications are actually granted eligible for

---

[18] Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 28 (2015) (hereinafter "*President's Dilemma*").

[19] Shoba Sivaprasad Wadhia, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 107 (NYU Press 2015); *see also* Wadhia, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L.R. 59, 62–63 (2013).

[20] Motomura, *President's Dilemma*, at 28.

benefits allowed by other statutes; and it maintains individualized discretion in all cases so that no particular deferral jeopardizes any legitimate removal priorities, thereby efficiently satisfying the executive's obligation to enforce *all* laws. This is exactly what the Constitution requires.

In light of the Acting Secretary's official legal reasons for revoking DACA, it is surprising that the government's brief makes absolutely no effort to demonstrate that DACA is unconstitutional. The government's abandoned argument is consistent with the administrative record, which lacks any legal support for DHS's determination. This is not surprising. Like the district court here, no court has approved a constitutional challenge to DACA or suggested that such a challenge would succeed. *See Arpaio v. Obama*, 27 F. Supp. 3d 185, 209–10 (D.D.C. 2014), *aff'd on other grounds*, 797 F.3d 11 (D.C. Cir. 2015) (rejecting constitutional attack on DACA); *Crane v. Johnson*, 783 F.3d 244, 251–55 (5th Cir. 2015) (dismissing on standing grounds plaintiff's claim that DACA is unconstitutional). In fact, the lone case on which the Acting Secretary relied to find DACA unconstitutional *never reached the issue*. *Texas v. United States*, 809 F.3d 134, 178–86 (5th Cir. 2015), *aff'd per curiam by an equally divided panel*, *United States v. Texas*, 136 S. Ct. 2271 (2016) (hereinafter "*Texas II*").[21]

[21] The *Arpaio* and *Texas II* plaintiffs also asserted challenges based on versions of the "non-delegation" doctrine. The *Arpaio* district court rejected this argument. *See* 27 F. Supp. 3d at 209–10 (explaining that DACA's "meaningful case-by-case

B. DACA's Issuance Was Otherwise Lawful

1. The Executive Branch Is Vested with the Legal Authority to Devise Prosecutorial Discretion Policies like DACA

As discussed above, "[p]rosecutorial discretion is a long-established, and unavoidable, practice in every area of law enforcement today, both civil and criminal."[22] When an enforcement agency has the resources to pursue only a small fraction of those who may be violating the law, it must make choices. In the immigration context, Congress gives the executive only enough funding to pursue a tiny portion of the undocumented population.[23] There are approximately 11 million undocumented immigrants living in the United States, yet Congress appropriates funds that allow executive agencies to remove only 400,000 per

---

review" prevented the "large class-based program" from being "push[ed] . . . over the line from the faithful execution of the law to the unconstitutional rewriting of the law). And the *Texas II* district court did not reach the issue. *See Texas v. United States*, 86 F. Supp. 3d 591, 645–46, 677 (S.D. Tex. 2015). It would be entirely unreasonable for anyone reviewing DACA to believe that the non-delegation doctrine could apply here, given the Supreme Court's most recent pronouncement on the doctrine in modern society: "Congress simply cannot do its job absent an ability to delegate power under broad general directives. Accordingly, this Court has deemed it constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (internal citations and quotation marks omitted). DACA easily meets this test.

[22] Legomsky Written Testimony at 63.

[23] *See, e.g.*, Consolidated Appropriations Act 2017, Pub. L. 115-31, Div. F, title II, 131 Stat. 135, 406 (2017); Consolidated Appropriations Act 2016, Pub. L. 114-113, Div. F, title II, 129 Stat. 2242, 2495 (2015).

year—less than 4% of that population.[24] DHS spends all of the money appropriated to it every year in order to remove this small percentage, and thus it *must* decide within its broad discretion which people are the highest removal priorities—*and which people are not*.[25]

Given that this underfunding situation is one of Congress' own making, it cannot possibly be argued that the executive is invading Congress' province when it exercises the prosecutorial discretion embodied by DACA. Because 6 U.S.C. § 202(5) expressly makes DHS "responsible" for "establishing national immigration enforcement policies and priorities," Congress has for all intents and purposes decided that the executive must decide who to defer removing and how to accomplish that deferral. *See also* 8 U.S.C. § 1103(a)(1) (charging the Secretary "with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens"). Congress' intent is further

---

[24] *See* John Morton, Dir., U.S. Immigration & Customs Enforcement, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* at 1 (Mar. 2, 2011), http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf, *superseded by* Jeh Charles Johnson, Sec'y of Homeland Security, *Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants* (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

[25] *See* Legomsky Written Testimony at 63; Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 268 (2010) (explaining that a just response to limited federal resources for immigration enforcement is to prioritize the removal of bad actors and, conversely, make the removal of noncitizens with desirable qualities a lower priority).

confirmed by 8 U.S.C. § 1103(a)(3), which requires the Secretary to, among other things, "issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act."[26] Indeed, despite numerous amendments to the INA and annual appropriations acts for the agencies responsible for administering and enforcing federal immigration laws, Congress has never curtailed the executive's use of deferred action over the almost 50 years it has been employed.

There is no legal authority that suggests it is unlawful for an agency to provide general criteria to guide the evaluation of individual immigration cases. In fact, the courts have consistently recognized the executive's broad discretion to implement deferred action by announcing general categorical criteria.[27] A series of decisions, including at least one Supreme Court opinion, explicitly recognize deferred action and note Congress' endorsement of its use and administration by

---

[26] *See also* 8 U.S.C. § 1227(d)(2) and 8 U.S.C. § 154(a)(1)(D)(i)(II,IV)). Some have argued that Congress' explicit recognition of deferred action in these provisions indicates that it meant to prohibit deferred action in all other circumstances. It is inconceivable that Congress would abolish virtually an entire administrative practice by vague inference, particularly given that deferred action has been so explicitly and frequently recognized in statutes, regulations, and court decisions. Had Congress intended to take such a radical action, there would surely have been some mention of the issue in the legislative history, if not a record of the ensuing heated debate. This is not the case. *See* Legomsky Written Testimony at 69.

[27] *See, e.g.*, *Pasquini v. Morris*, 700 F.2d 658, 661 (11th Cir. 1983); *Nicholas v. INS*, 590 F.2d 802, 806–807 (9th Cir. 1979); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999).

the executive.[28] Justice Scalia, writing on behalf of eight Supreme Court Justices, described with approval the broad scope of the President's discretion to grant deferred action: "at the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999).[29]

In short, "[t]he legal authority to exercise prosecutorial discretion comes with the authority—indeed, the obligation—to adopt a system that justifies confidence that decisions will be consistent, predictable, and nondiscriminatory. Designing and implementing such a system may need to rely heavily on categories, even if no applicant who fits into them will receive a DACA approval

[28] *See* Legomsky Written Testimony at 68 (citing, as further examples, *Reno*, 525 U.S. at 483–84; *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1024 (9th Cir. 1985); *Pasquini*, 700 F.2d at 661; *Nicholas*, 590 F.2d at 802; *David v. INS*, 548 F.2d 219, 223 (8th Cir. 1977); *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976); *Vergel v. INS*, 536 F.2d 755 (8th Cir. 1976)).

[29] *See* Legomsky Written Testimony at 68. Professor Legomsky describes at length the decisions of other courts expressing this same view of broad executive branch discretion to grant deferred action, including: *Pasquini*, 700 F.2d at 662 (granting or withholding deferred action "is firmly within the discretion of the INS" and therefore can be granted or withheld "as [the relevant official] sees fit, in accord with the abuse of discretion rule when any of the [then] five determining conditions is present"), and *Soon Bok Yoon*, 538 F.2d at 1213 ("The decision to grant or withhold nonpriority status [the former name for deferred action] therefore lies within the particular discretion of the INS").

automatically. Without such categories, high-level federal officials cannot exercise meaningful supervision."[30]

2. The DACA Policy Does Not Run Afoul of Any Aspect of Immigration-Related Statutes, Regulations, Court Decisions, or Other Policies

a. DHS May Continue to Effectively Exercise Its Discretion as to each DACA Applicant or Recipient

As Professor Stephen Legomsky has observed, "[p]erhaps the critics' most frequent [anti-DACA] argument . . . is that deferred action is legal when granted on an individual, case-by-case basis but illegal when granted to an entire class."[31] This theory appears to arise from the notion that large-scale deferred-action policies involve an "abdication" of the executive's responsibility to enforce the law as written. Even if these critics could point to a statute or regulation that prohibited a group-based discretion policy—and they cannot—the simple fact is that the 2012 DACA Memorandum expressly calls for the individualized, case-by-case, discretionary evaluations on which these critics insist.[32]

DACA's inclusion of case-by-case discretion is not an accident. Then-Secretary Napolitano drafted the DACA policy to explicitly require DHS adjudicators to exercise individualized discretion consistent with the

---

[30] Motomura, *President's Dilemma*, at 26.

[31] Legomsky Written Testimony at 69.

[32] *See id.*

administration's stated view that there were not "whole categories that we will, by Executive Fiat, exempt from the current immigration system, as sympathetic as we feel towards them."[33] Under DACA, if young people meet certain criteria relating to their residence in the United States, age at arrival, education, and good behavior, they are eligible for an individualized assessment, but the discretionary grant of temporary relief is only a *possible* outcome—it is not guaranteed.[34]

DACA's initial eligibility criteria also explicitly preclude approval of applicants who pose a threat to national security or public safety, which itself requires an exercise of individualized discretion. Whether an applicant endangers the public safety is not simply a matter of looking to see if a box is "checked." Assessing the likelihood that an individual may cause harm, and the severity of that harm, necessitates the use of subjective judgment. The same is true when deciding whether an applicant is a threat to national security.[35] Courts have found that similar determinations of "exceptional and extremely unusual hardship," a statutory prerequisite for cancellation of removal, are discretionary and therefore

---

[33] Elise Foley, *Officials Refuse to Budge on Deportation of Students, Families*, The Huffington Post (June 1, 2011), http://www.huffingtonpost.com\2011\04\01\obama–administration–refu_1_in_843729.html.

[34] Indeed, Professor Chacón has documented thoroughly the extensive social and legal costs to DACA recipients from living in a state of "liminal legality." *See* Jennifer M. Chacón, Producing Liminal Legality, 92 DENVER L. R. 709, 727 (2015).

[35] *See* Legomsky Written Testimony at 73.

lawful. *See, e.g., Gonzalez-Oropeza v. U.S. Att'y Gen.*, 321 F.3d 1331, 1332–33 (11th Cir. 2003); *Romero-Torrez v. Ashcroft*, 327 F.3d 887, 889–92 (9th Cir. 2003).[36]

The record developed in *Texas II*—the case DHS emphasized in its revocation decision—reflects that the agency in fact exercises its discretion when reviewing DACA applications. As of December 5, 2014, 36,860 requests for deferred action under the DACA Policy had been denied on the merits (in addition to those that were rejected for such reasons as failure to enclose the required fee, sign the application, etc).[37] The government also provided a number of examples of applications denied on discretionary grounds, even though the applicants met all of the threshold criteria—not even counting those denials that were based on the discretion inherent in some of the threshold criteria themselves, such as not posing a threat to public safety.[38]

The federal district court for the District of Columbia has specifically rejected the claim that DHS personnel are not evaluating the facts of each individual case when applying DACA. *See Arpaio*, 27 F. Supp. 3d 185. The court found not only that the DACA policy "retain[s] provisions for meaningful case-by-

[36] *See* Legomsky Written Testimony at 73.

[37] *See* Decl. of Donald W. Neufeld ¶ 23, *Texas*, 86 F. Supp. 3d at 591 (No. B-14-254), ECF No. 130 att. 11.

[38] *See id.* ¶ 18.

case review," but also that "[s]tatistics provided by the defendants reflect that such case-by-case review is in operation." *Id.* at 209. The court specifically noted the unrebutted statistics referenced above—that through 2014, more than 38,000 DACA applications were denied on the merits. *See id.* at 209 n.13.

The suggestion that no discretion is being exercised because DACA applicants are accepted at a relatively high rate (95%)[39] is unfounded. A high acceptance rate is the natural result of self-selected candidates—young people who were willing to spend the time to complete the detailed application, gather the necessary documentation, and pay the relatively high application fee because, based on the *published* eligibility criteria and discretionary factors, they could judge beforehand whether they were likely to be approved. The other side of the coin is that there were good reasons for undocumented persons with less-than-perfect backgrounds, including those who *might* be perceived, fairly or unfairly, as posing a risk to society, to avoid undertaking the application process at all. Primary among those reasons was at least the risk—despite contrary representations by DHS—that if their applications were rejected, they would be immediately detained and removed because they had disclosed all of their personal

[39] *See* USCIS, *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012-2014*, http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_fy2014_qtr4.pdf.

information during the application process. By absenting themselves from the application process altogether (even though they might have been successful), they increased the acceptance rate.[40] As Professor Legomsky succinctly concludes: "A denial rate of 5%, therefore, provides no legitimate basis for the belief that DACA requests are being rubber-stamped; to the contrary, it shows that thousands of denials occur even among this highly self-selected group."[41]

In any event, the initially high approval rates cited and relied on by the Fifth Circuit in *Texas II* no longer exist. Approval rates have dropped markedly.[42] This trend demonstrates that discretion is being applied to a pool of applicants with somewhat less-than-perfect attributes, and there may now be more legitimate reasons to exercise negative discretion. In other words, DACA's deferred-action plan is working. Without running afoul of statutory requirements, DHS is using limited resources to prioritize undocumented persons who should be detained and removed now with the funds available, while deferring the removal of those for which such action is not a high priority.

---

[40] *See* Legomsky Written Testimony at 72 n.10.

[41] *Id.*

[42] *See* USCIS, *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012-2016* (June 30), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2016_qtr3.pdf.

The Fifth Circuit's decision in *Crane v. Johnson* confirms that DACA's individualized discretion fully comports with the existing procedural and substantive statutory framework. In *Crane*, the district court considered ICE agents' claims that applying the DACA policy put their jobs at risk because, in part, they would be prevented from "detaining eligible aliens for the purpose of commencing removal proceedings" and thereby be subjected to adverse employment actions. 783 F.3d at 249. After conducting an evidentiary hearing, the district court dismissed their claims for lack of subject matter jurisdiction because the agents had not demonstrated concrete, particularized, and actual or imminent injury. *See id.* at 251 (citing *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014)). The Fifth Circuit affirmed the district court's decision, explaining that the individualized discretion embedded in DACA exposes the "fundamental flaw" in the argument that DACA is an illegal, top-down directive that forced the agents to "rubber stamp" applications:

> The Agents' reading of the [DACA] Directive—that they are always required to grant deferred action and cannot detain an alien who may meet the Directive's criteria—*is erroneous*. The [DACA] Directive makes clear that the Agents shall exercise discretion in deciding to grant deferred action, and this judgment should be exercised on a case-by-case basis . . . .

Id. at 254–55 (emphasis added). Given DACA's plain and unequivocal direction that agency personnel *must* exercise individualized discretion, coupled with the lack of any employment sanctions (real or threatened), the Fifth Circuit held that

the agents had failed to establish any injury as a matter of law. *See id*. at 255. *Crane*, in other words, confirms that individualized discretion is an unmistakable part of the DACA policy.

b. DACA Does Not Displace an Existing Immigration Pathway for any Eligible Applicant

The Attorney General and the Acting Secretary both suggested that the Fifth Circuit's decision in *Texas II* establishes DACA's illegality. But DACA lacks the key feature that motivated the Fifth Circuit to find that Congress did not give DHS the authority to enact DAPA—the fact that the INA had already addressed the same, specific class of immigrants that DAPA sought to benefit. The Fifth Circuit viewed DAPA as treading on an existing, congressionally-mandated pathway for undocumented parents of citizens to achieve a status that would allow them to live in the United States without fear of imminent deportation. The court explained this "intricate process" for obtaining "lawful immigration classification" from a child's immigration status:

> In general, an applicant must (i) have a U.S. citizen child who is at least twenty-one years old, (ii) leave the United States, (iii) wait ten years, and then (iv) obtain one of the limited number of family-preference visas from a United States consulate.

809 F.3d at 179–80. Although the Fifth Circuit recognized that "DAPA does not confer the full panoply of benefits that a visa gives," it would allow undocumented immigrants to "receive the benefits of lawful presence solely on account of their

children's immigration status without complying with any of the requirements . . . that Congress has deliberately imposed." *Id.*

By contrast, no law presently creates a specific process for the class of persons eligible to apply for DACA to derive a lawful immigration classification. Thus, even accepting the Fifth Circuit's erroneous[43] premise that Congress had already spoken to the issue of how to handle immigration issues relating to the class of DAPA applicants, the same cannot be said for DACA. For this reason, *Texas II* cannot be seen as controlling the legality of DACA.[44]

c. DACA Is Not So Broad as to Effectively Replace or Nullify the Statutory Scheme for Undocumented Persons

Finally, to the extent the *Texas II* court was unwilling to infer that Congress had delegated to DHS the power to adopt DAPA—"a policy decision of such economic and political magnitude," 809 F.3d at 181—the same concern is not present here. Unlike the unchallenged deferred-action policies of Ronald Reagan and George H.W. Bush, which were intended to affect 1.5 million non-citizen spouses and children of immigrants—approximately 40% of the estimated

[43] That Congress had already specified the criteria for lawful permanent resident status does not mean Congress had prescribed equally stringent criteria for the far-more-minimal protection of deferred action.

[44] In addition, *Texas II* was not decided on the merits and is not binding on this court due to the decision's *per curiam* affirmance by an equally divided Supreme Court.

undocumented population at that time—the number of applicants approved under the DACA policy is less than 10% percent of the current undocumented population.[45] Moreover, as the record in this case reflects, the impact of DACA on the immigration system as a whole has not been significant (and certainly not negative), and is unlikely to be significant in the future.

The Fifth Circuit's own *Crane* decision reveals the illogic of any argument that DACA has had or will have a broad, negative economic or political impact. In *Crane*, the district court considered the State of Mississippi's claim that it was injured, and thus had standing to sue, because DACA was "costing the state money." 783 F.3d at 252. The district court rejected this argument based on the evidence submitted, because it failed to prove that DACA, as distinct from illegal immigration generally, cost the state anything. The Fifth Circuit affirmed, observing that DACA likely *lessens* any financial impact on a state:

> It could be that the reallocation of DHS's assets [due to DACA] is resulting in the removal of immigrants that impose a greater financial burden on the state. If this is true, the net effect would be a *reduction* in the fiscal burden on the state.

Id. (emphasis added). The D.C. Circuit went further in *Arpaio*, finding that the likelihood DACA would *reduce* crime and lower costs was "so convincing" that the contrary assertions made by the plaintiff, an Arizona sheriff, were literally "*im* plausible." 797 F.3d at 25 (internal quotation marks omitted). Consistent with

[45] *See*, *e.g.*, Legomsky Written Testimony at 84–85.

Crane and *Arpaio*, the district court here found that there is no evidence to support a finding that DACA will have a pervasive, negative impact. Absent contrary evidence in the administrative record, these findings preclude any ability to use DACA's effects—which appear to be quite positive—as a basis to declare it "unlawful."

CONCLUSION

> Would the world's beacon of freedom—a nation founded by immigrants—cast out an immigrant population that was likely brought here without choice and who likely knows no other home? While 'no' would seem to be the obvious answer, ordinary logic has eluded our Congress.[46]

Congress' inability to legislate a comprehensive answer to this question for more than a decade does not mean that in 2012, the President was precluded from implementing a large-scale deferred-action policy, particularly where that policy is subject to express, individualized discretion to detain and remove *any* undocumented persons immigration agents so choose. Issuance of the DACA policy was not only authorized; it made good sense given limited resources, the consequent need to prioritize removals, and the benefits of temporary work authorization for those who are highly unlikely to be removed in the near future. Any decision to revoke DACA now because it is unconstitutional or otherwise

[46] *Casa de Md.*, 2018 WL 1156769, at *2.

"unlawful" is erroneous as a matter of law. This Court should therefore affirm the district court's preliminary injunction, as well as the district court's denial of the government's motion to dismiss.

Respectfully submitted,

/s/ Christopher W. Smith

Harry Lee
Johanna S. Dennehy
Claire M. Blakey
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Christopher W. Smith
Counsel of Record
STEPTOE & JOHNSON LLP
633 West 5th Street
Suite 700
Los Angeles, CA 90071
(213) 439-9400

Attorneys for the Immigration Law Scholars

March 20, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(3)(G), the undersigned hereby certifies that this brief complies with the required type-volume limitations, in that it has been filed by separately represented parties, is prepared with proportionately spaced serif type (Times New Roman), has type face of 14 points, and, according to the word-processing system used to prepare the brief, contains 6,440 words, exclusive of the items set forth in Fed. R. App. P. 32(f).

Dated: March 20, 2018

/s/ Christopher W. Smith

CERTIFICATE OF SERVICE

I certify that on March 20, 2018, I electronically filed of the foregoing document with the clerk of the court of the United States Court of Appeals for the ninth circuit by using the appellate CM/ECF system. I certify that all participants in this case or registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 20, 2018

/s/ Christopher W. Smith