IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12668-K

ELLY MARISOL ESTRADA; DIANA UMANA; SALVADOR ALVARADO; SAVANNAH UNDOCUMENTED YOUTH ALLIANCE,

Plaintiffs-Appellants,

v.

MARK BECKER ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia
No. 1:16-CV-3310-TWT

AMENDED AMICUS CURIAE BRIEF OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLEES

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CERTIFICATE OF INTERESTED PARTIES

In addition to those persons listed in Plaintiffs-Appellants' Statement of Interested Persons, the following persons have an interest in this *amicus curiae* brief:

1) The Immigration Reform Law Institute, *amicus curiae*; and

2) Attorneys for *amicus curiae*: Michael M. Hethmon and Christopher J. Hajec (Immigration Reform Law Institute).

Dated: November 13, 2017

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF *AMICUS CURIAE*

The Immigration Reform Law Institute is a 501(c)(3) nonprofit corporation. It does not have a parent corporation and does not issue stock.

All parties have consented to the filing of this *amicus curiae* brief. No party or party's counsel authored any part of this brief. No person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and assisting courts in understanding federal immigration law. For more than twenty years the Board of Immigration Appeals ("BIA") has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization. *See*, *e.g.*, *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010); and *In re Q- T- -- M- T-*, 21 I. & N. Dec. 639 (B.I.A. 1996).

IRLI submits this *amicus curiae* brief to help this Court understand how the Deferred Action for Childhood Arrivals program ("DACA") lacks the force of law, and, indeed, is *ultra vires* agency action, and also to show that the phrase "lawful presence," as used in appellees' challenged policy, comports with the use of that phrase throughout the Immigration and Nationality Act ("INA"), and thus mirrors federal law.

ARGUMENT

Appellants claim that appellees' policy of barring DACA beneficiaries from oversubscribed state universities in Georgia, on the ground that such beneficiaries are not "lawfully present" in the United States, is preempted by federal law,

including the DACA program. Appellants cannot prevail on this claim if: 1) DACA is a mere exercise in inherent prosecutorial discretion, and lacks the force of law; and 2) DACA beneficiaries lack lawful presence under federal law. Because both are the case, this Court should affirm the dismissal of appellants' claims.

I. DACA LACKS THE FORCE OF LAW.

DACA, considered either as an exercise in prosecutorial discretion or as a rule or program, does not derive the force of law from any statute, because no statute authorizes it. And, as an exercise in inherent prosecutorial discretion, not authorized by Congress, it lacks the force of law by definition. In addition, DACA lacks the force of law because it is *ultra vires.*

A. The INA does not authorize the prosecutorial discretion exercised in DACA.

The phrase "deferred action" only appears in three INA subsections. First, 8 U.S.C. § 1154(a)(1)(D)(i)(IV) provides that certain victims of domestic violence and their children are "eligible for deferred action and work authorization." Second, an alien whose request for an administrative stay of removal has been denied is not precluded from applying for deferred action or certain other immigration benefits. 8 U.S.C. § 1227(d)(2). Third, 8 U.S.C. § 1151 note, National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, §1703, 117 Stat. 1392 (2003) addresses the extension of posthumous benefits, including

deferred action, to certain surviving spouses, children, and parents of servicemen killed in combat.

None of these very specific provisions applies to the bulk of DACA beneficiaries. Since these are the only provisions of the INA authorizing deferred action, the INA does not authorize DACA as deferred action. *See Nken v. Holder*, 556 U.S. 418, 430 (2009) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987)) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Indeed, for nearly a century, Congress has consistently legislated to restrain or roll back executive deferrals of removal, evincing a persistent intent that enforcement be increased, not delayed.

The Immigration Act of 1924 repealed the statute of limitations on deportation for nearly all forms of unlawful entry for any alien entering the United States after July 1, 1924, without a valid visa or inspection.[1] In 1952, enactment of INA ended various bureaucratic attempts under the rubric of pre-examination to

[1] Immigration Act of 1924, Pub. L. 68-139. 43 Stat. 153, sec. 14 (1942) (repealed 1952).

overcome the intent of Congress to restrict relief.[2] The new INA displaced these informal discretionary practices with more limited statutory procedures, *e.g.*, 8 U.S.C.§ 1182(c) (waiver of deportability), 8 U.S.C. § 1254(a) (suspension of deportation), 8 U.S.C. § 1254(b) (voluntary departure), and 8 U.S.C. § 1255 (adjustment of status).[3]

Enactment of Temporary Protected Status (TPS) in 1990 created statutory authority for the executive to formalize temporary deferrals of foreign nationals who had not been persecuted, but whose repatriation could not be accomplished safely due to war or natural disasters. 8 U.S.C. §1254a(b)(1).[4] Congress mandated that TPS was to be an "exclusive remedy," displacing extra-statutory categorical temporary relief on the basis of nationality for both illegal aliens and parolees. 8 U.S.C. § 1254a(g). For example, TPS displaced use of Extended Voluntary Departure (EVD), an *ad hoc* categorical variant of deferred action, which had been granted administratively to at least fifteen nationalities over a period of more than twenty years.[5]

Prior to 1996, the INA had no limitations on the time period in which an alien subject to a final deportation order could be permitted to remain in the United

[2] *Matter of B,* 5 I. & N. Dec. 542 (1953). The Senate had criticized the scope of pre-examination practices as providing excessive extra-statutory relief. *See* Sen. Rep. No. 81-1515, at 384 (1950).
[3] Immigration and Nationality Act, Pub. L. 414, 66 Stat 214 (1952).
[4] Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990), redesignated as INA § 244 by IIRIRA, Pub. L. 104-208, § 308, 110 Stat. 3009-546 (1996).
[5] Gordon & Rosenfeld, Immigration Law & Practice (IL&P), Vol 1A, § 5.3e(6a) (1981).

States. *See former* 8 U.S.C. § 1254(b); 8 U.S.C. § 1252(b) (1995). The Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996) ("IIRIRA"), enacted severe restrictions on the Attorney General's formerly unfettered discretion to extend voluntary departure orders. IIRIRA § 304(a)(3) (enacting 8 U.S.C. § 1229c). IIRIRA stripped federal agencies of discretion to grant, for a period of ten years, "any further relief" for any alien who failed to depart within the statutory time restrictions. These rollbacks included bars to discretionary relief including cancellation of removal (8 U.S.C. § 1229b), adjustment of status to permanent resident alien (8 U.S.C. § 1255), change to another nonimmigrant classification (8 U.S.C. § 1258), and admission for permanent residence under the registry statute (8 U.S.C. § 1259). Arriving aliens were categorically excluded from voluntary departure discretion. 8 U.S.C. § 1229c(a)(4). The INA no longer provides any discretion to any executive official, including the President or the BIA, to extend eligibility for voluntary departure.

IIRIRA also repealed the suspension of deportation statute, former 8 U.S.C. § 1182(c), which had no numerical limits on discretionary grants of relief from deportation, and replaced it with cancellation of removal ("COR"). IIRIRA § 304; *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2015 (2012) (discussing 8 U.S.C. § 1229b(e)(1)). The exercise of agency discretion in COR cases is far more circumscribed than under the pre-1996 statutes. Removable nonimmigrant aliens

are ineligible for COR until they have been continuously present in the United States for not less than ten years, far longer than the conflicting extra-statutory criteria in the DACA program. 8 U.S.C. § 1229b(b)(1)(A).

One justification for the DACA program was that, because its beneficiaries are long-time residents of the United States, they merit special favorable treatment. *See* Memorandum from Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012) ("DACA memo") at 1 (stating that beneficiaries have "continuously resided in the United States for a least five years"). But when Congress considered this length-of-stay issue in 1986 and 1996, it enacted the "registry" statute, which *limits* categorical grants of discretionary lawful permanent residence status on the basis of extended physical presence to aliens who have continuously resided in the United States since January 1, 1972—a category that excludes DACA beneficiaries entirely. 8 U.S.C. § 1259.

IIRIRA also expanded the prohibition on categorical parole from refugees to *all* aliens, by authorizing 8 U.S.C. § 1182(d)(5)(A) parole "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." IIRIRA § 602. Legislative history indicates that Congress mandated this prohibition on categorical agency discretion out of "concern that parole under § 1182(d)(5)(A) was being used by the executive to circumvent congressionally established immigration

policy." *Cruz-Miguel v. Holder*, 650 F.3d 189, 198-200 (2nd Cir. 2011) (citing H.R. Rep. No. 104-169, pt.1, at 140-41 (1996)).

Before IIRIRA, the Attorney General could authorize the immigration courts or BIA to make determinations other than deportation orders, which arguably included discretionary deferrals of removal. *See* former 8 U.S.C. § 1252(b). That provision was repealed by IIRIRA, and thus any such authority under it (which was never exercised) could not have been transferred to the Department of Homeland Security ("DHS").

Thus, far from authorizing the deferred action in DACA, Congress has again and again evinced an intent that executive deferrals of removal be curtailed.

B. The INA does not authorize DACA as a program.

The Immigration and Nationality Act ("INA") does not provide a statutory foundation for the DACA program. On the contrary, DACA is a categorical refusal by DHS to enforce Congress's clear statutory mandate. Under the INA, any alien who entered the country illegally is an applicant for admission. 8 U.S.C. § 1225(a)(1). And 8 U.S.C. § 1225(b)(2)(A) mandates that if an applicant for admission "is not clearly and beyond a doubt entitled to be admitted, the alien *shall* be detained" for removal proceedings under 8 U.S.C. § 1229a (emphasis added). "Congress did not place the decision as to which applicants for admission are placed in removal proceedings into the discretion of the Attorney General, but

created mandatory criteria." *Succar v. Ashcroft*, 394 F.3d 8, 10 (1st Cir. 2005). "[W]hile the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws." *Massachusetts v. EPA*, 549 U.S 497, 534 (2007).

True, two provisions of the INA provide broad, general grants of authority to DHS. 8 U.S.C. § 1103(a)(3) ("[The Secretary] . . . shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter."); 6 U.S.C. § 202(5) ("The Secretary . . . shall be responsible for . . . [e]stablishing national immigration enforcement policies and priorities."). The first of these, 8 U.S.C. § 1103(a)(3), clearly fails to authorize DACA, which is not "necessary to carry out" any part of the INA. In any event, only if the authority of DHS to "deem[]" that an action is so "necessary" were unlimited and unreviewable could this provision grant authority for DACA, but in that case, it would grant DHS a limitless authority over how it carries out its duties, making the innumerable other provisions of the INA that detail how DHS is to carry out its duties meaningless. *See, e.g.*, 8 U.S.C. §§ 1158(d)(5) (providing requirements for asylum procedure), 1228(a)(3) (providing that expedited proceedings "shall be" initiated for aliens incarcerated for

aggravated felonies), 1229a (providing procedural requirements for removal proceedings).

Title 6 U.S.C. § 202(5)'s grant of authority to "[e]stablish[] national immigration enforcement policies and priorities" also fails to authorize DACA. This provision could only authorize DACA based on its apparently open-ended authorization to DHS to establish enforcement "policies." (Its authorization to DHS to set "priorities" does not authorize DACA, which goes far beyond making removable aliens that meet its criteria low priorities for removal.) But if this language were as open-ended as that, it would allow DHS to establish a policy, for example, of removing only removable aliens who were violent felons, or only those who had been in the country less than two months, or only those who lacked a high-school education—and it would be patently unreasonable to suppose that Congress intended DHS to have such sweeping authority under the INA.

C. As inherent prosecutorial discretion, DACA lacks the force of law, and, indeed, is ultra vires.

Prosecutorial discretion, considered as an inherent power of the executive, not authorized in a given case by Congress, by definition lacks the force of law; it is, rather, a decision to delay enforcement of the law against certain individuals. In any event, DACA lacks the force of law because it is not a valid form of "deferred action" at all, but is *ultra vires.*

True, faced with limited resources, an agency has discretion to implement the mandate of Congress as best as it can, by setting priorities for action. *See City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977) (holding that when a statutory mandate is not fully funded, "the agency administering the statute is required to effectuate the original statutory scheme as much as possible, within the limits of the added constraint.").

With DACA, however, DHS did not "effectuate the original statutory scheme as much as possible" within the limits set by underfunding. DACA was not created because of lack of resources; the aliens protected by it were already rarely removed. Memorandum from Jeh Charles Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who are Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014) at 3 (explaining that DACA applies to individuals who "are extremely unlikely to be deported given [the] Department's limited enforcement resources").[6] Rather, the program reflects a policy judgment that these aliens should be free to live in the United States without fear of deportation. Far from "effectuat[ing] the original statutory scheme as much as possible," this policy judgment is at odds with the INA and congressional intent.

[6] This statement is scarcely consistent with Secretary Napolitano's bald assertion that "additional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities." DACA memo at 1.

Not only has Congress rejected a legislative version of DACA repeatedly, it has found that "immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and illegal aliens do not have the right to remain in the United States undetected and unapprehended." H.R. Rep. No. 104-725, at 383 (1996) (Conf. Rep.). Indeed, Congress, in making it illegal for illegal aliens to work, wished to discourage illegal entry and to encourage removable aliens to remove themselves, even if enforcement by removal is underfunded and slow to reach low-priority cases. *Texas v. United States*, 86 F. Supp. 3d 591, 634-35 (S.D. Tex. 2015), *aff'd Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (arguing that DAPA would disincentivize illegal aliens from self-deporting); Michael X. Marinelli, *INS Enforcement of the Immigration Reform and Control Act of 1986: Employer Sanctions During the Citation Period*, 37 Cath. U. L.R. 829, 833-34 (1988) ("Congress postulated that unauthorized aliens currently in the United States would be encouraged to depart") (citing H.R. Rep. No. 99-682, at 46 (1986)).

II. APPELLEES' POLICY, IN ITS USE OF "LAWFULLY PRESENT," MIRRORS FEDERAL LAW.

Appellants argue that

> the district court's definition of "lawful presence" as only congressional "categories and classifications" is incorrect as a matter of law [because] the definition collapses lawful presence into lawful status…[,] subverts the INA's intent to assign discretion to the executive, [and fails] to

> recognize the INA's statutory delegation of executive discretion as preemptive . . . .

Appellant's Amended Brief ("Appellants' Brief") at 37-38. Appellants claim that

> [t]he district court did not point to any contrary definition of lawful presence in the INA because none exists: the INA *only* defines "lawful presence" as the lack of "unlawful presence." 8 U.S.C. 1182(a)(9)(B)(ii).

Id. at 30 (emphasis in original). Appellants accurately note the omission by the district court, but are wildly mistaken that no "contrary definition" exists. Indeed, in federal immigration law, "lawful presence" overwhelmingly refers to a statutory lawful immigration status, sometimes is equated with such status, and never refers to a "period of stay authorized by the Attorney General" under 8 U.S.C. § 1182(a)(9)(B).

In at least four provisions, lawful presence clearly refers to statutory lawful immigration status. First, the INA provides that "[u]pon request of the governor of any State, the Service [now ICE] shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution." 8 U.S.C. § 1226(d)(3). It would be absurd for "identification of aliens unlawfully present" to refer only to the inadmissible aliens seeking admission described in § 1182(a)(9)(B), as opposed to the far larger population of aliens in the United States who do not possess any lawful immigration status.

Second, the INA provides:

> Notwithstanding any other provision of law, an alien who is not *lawfully present* in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit . . . without regard to whether the citizen or national is such a resident.

8 U.S.C. § 1623. Here, "alien[s] who [are] not lawfully present in the United States" clearly includes aliens who lacks a statutory lawful immigration status.

Third, Congress mandated that certain federal agencies notify United States Citizenship and Immigration Services ("USCIS") quarterly if they "know" a noncitizen is unlawfully present in the United States. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, § 404(b) (creating Social Security Act § 411A, 42 U.S.C. § 611a).

Fourth, Congress subsequently required the Attorney General to identify prisoners incarcerated by local governments who are unlawfully present:

> Not later than 6 months after the date of the enactment of this Act, . . . the Attorney General shall establish and implement a program to identify, from among the individuals who are incarcerated in local governmental incarceration facilities prior to arraignment on criminal charges, those individuals who are within 1 or more of the following classes of deportable aliens: (1) Aliens unlawfully present in the United States . . . .

Immigration Law and Procedure § 63.10 (2015), citing P.L. No. 105-141, § 1, 111 Stat. 2647 (1997) (note to 8 U.S.C. § 1226).[7]

[7] PRWORA was enacted "to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(6).

These provisions in no way imply that "lawful presence" also refers to some categories of aliens who lack a statutory lawful immigration status, though on their face they do not foreclose this interpretation. But that interpretation is foreclosed in the following four provisions, in which "lawful presence" means *only* statutory lawful immigration status:

Of these, the first is the INA provision that no written "287(g)" agreement is required

> in order for any … employee of a State or political subdivision of a state (A) to communicate with the [Secretary of Homeland Security] regarding the *immigration status* of any individual, including reporting knowledge that a particular alien *is not lawfully present* in the United States; or (B) otherwise to cooperate with the [Secretary] in the identification … of *aliens not lawfully present* in the United States.

8 U.S.C. § 1357(g)(10) (emphases added). Here, the equation of lawful presence with immigration status is explicit.

Second, the INA provides that "[i]n the [removal proceeding] the alien has the burden of establishing … (B) by clear and convincing evidence, that the alien is *lawfully present* in the United States *pursuant to a prior admission."* 8 U.S.C. § 1229a(c)(2)(B) (emphasis added). Here, lawful presence clearly means *only* statutory lawful immigration status, which is what an alien acquires when admitted.

Third, IIRIRA required the Attorney General to "conduct 3 pilot programs of employment eligibility confirmation…." IIRIRA § 401(a). The "basic pilot

program"—the precursor to the E-Verify System now operated by DHS—was to be implemented in "5 of the 7 States with the highest estimated population of aliens who are not lawfully present in the United States…." § 401(a)(1). There is no evidence that the former INS or today's DHS ever used appellants' construction in designating the five states where the nascent E-Verify program was developed.

Fourth, IIRIRA provides for repayment from appropriated federal funds to "each State … that provides medical assistance for care and treatment of an emergency medical condition . . . through a . . . public facility . . . to an individual who is an alien *not lawfully present* in the United States . . . of its costs of providing such services . . . ." IIRIRA § 562(a) (emphasis added). "No payment shall be made … unless the *immigration status* of the individual has been verified." *Id.* (emphasis added). Here, again, Congress explicitly equates lawful presence with immigration status.

Finally, lawful presence does *not* mean a "period of stay authorized by the Attorney General" even in the provision appellants rely on so heavily, 8 U.S.C. § 1182(a)(9)(B)(ii). That provision reads:

> For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

This provision is written in the disjunctive; an alien is unlawfully present if in the United States either after the period of stay authorized by the Attorney General or without being admitted or paroled. Thus, an alien who is not in the United States after the period of stay authorized by the Attorney General, because that period of stay has not expired, but who also is neither admitted nor paroled is unlawfully present. If being authorized to stay constituted lawful presence, such an alien would be both lawfully present and unlawfully present under this provision, and the provision would be self-contradictory. Clearly, then, the different terms—being "authorized" to "stay" by the Attorney General *versus* being "[]lawfully present"—refer to different things.

This point is fatal to appellants' argument that, because they are "allowed" to stay under DACA, they have any sort of lawful presence under statutory federal immigration law at all. Appellants' Brief at 18. True, as this Court has noted, deferred action recipients have been permitted to remain in the United States, *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1258-59 (11th Cir. 2012) (implying that an alien "currently classified under deferred action status … remains permissibly in the United States"). Indeed, this could hardly be gainsaid; the very agency charged with the removal of such aliens decided not to remove them for a stated period of time, and so informed them. But such "permission," even if not *ultra vires*, and even if having the force of law, is

distinct from lawful presence under federal immigration law, and thus does not preempt appellees' policy.

CONCLUSION

For the foregoing reasons, this Court should affirm the dismissal by the court below.

DATE: November 13, 2017

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

I certify that per Circuit Rule 25.2.13 that the electronic submission was scanned using commercial virus-scanning software and no viruses were detected.

Pursuant to Federal Rules of Appellate Procedure 29, 32(a)(5) and 32(a)(7), the foregoing *amicus curiae* brief is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 3,824 words, excluding those sections identified in Fed. R. App. P. 32(f).

November 14, 2017
Date

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2017, I electronically filed a copy of the foregoing Brief *Amici Curiae* using the CM/ECF System for the United States Court of Appeals for the Eleventh Circuit, which will send notification of that filing to all counsel of record in this litigation.

Dated: November 13, 2017

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