18-485(L), 18-488(CON)

In the United States Court of Appeals for the Second Circuit

MARTIN JONATHAN BATALLA VIDAL, MAKE THE ROAD NEW YORK, on behalf of itself, its members, its clients, and all similarly situated individuals, ANTONIO ALARCON, ELIANA FERNANDEZ, CARLOS VARGAS, MARIANO MONDRAGON, CAROLINA FUNG FENG, on behalf of themselves and all other similarly situated individuals, STATE OF NEW YORK, STATE OF MASSACHUSETTS, STATE OF WASHINGTON, STATE OF CONNECTICUT, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF HAWAII, STATE OF ILLINOIS, STATE OF IOWA, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF OREGON, STATE OF PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF VIRGINIA, STATE OF COLORADO,

Plaintiffs-Appellees,

—vs.—

DONALD J. TRUMP, President of the United States, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, United States of America, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, KIRSTJEN M. NIELSEN, Secretary of Homeland Security, JEFFERSON B. SESSIONS III, U.S. Attorney General,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR AMICUS CURIAE
IMMIGRATION REFORM LAW INSTITUTE
IN SUPPORT OF DEFENDANTS-APPELLANTS

List of Counsel on Following Page

Lawrence J. Joseph
D.C. Bar No. 464777
1250 Connecticut Ave., NW
Suite 700-1A
Washington, DC 20036
Telephone: (202) 355-9452
Telecopier: (202) 318-2254
Email: ljoseph@larryjoseph.com

Christopher J. Hajec
DC Bar No. 492551
Michael M. Hethmon
DC Bar No. 1019386
Immigration Reform Law Institute
25 Massachusetts Ave. N.W.
Suite 335
Washington, DC 20001
Telephone: (202) 232-5590

Attorneys for Amicus Curiae

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CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF COMPLIANCE

On behalf of *amicus curiae* Immigration Reform Law Institute (IRLI), undersigned counsel:

(1) Certifies pursuant to Fed R. App. P. 26.1 that it does not issue stock or have a parent corporation that issues stock;

(2) Certifies pursuant to Fed R. App. P. 32(a)(7)(B) and 29(a)(5) that this brief complies with the applicable type-volume limitation because it has 2,902 words, , including footnotes, but excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii);

(3) Certifies pursuant to the typeface requirements of Fed R. App. P. 32(a)(5) and the typestyle requirements of Fed R. App. P. 32(a)(6) that this brief has been prepared in a proportionally spaced typed face using a Microsoft Word 14-point Times New Roman font.

Dated: August 22, 2018

/s/ Lawrence J. Joseph

Lawrence J. Joseph
Counsel for Amicus Curiae

I. STATEMENT OF INTEREST

Amicus curiae Immigration Reform Law Institute ("IRLI") files this brief with the consent of all parties.[1] IRLI is a nonprofit 501(c)(3) public interest law firm dedicated to legal advocacy in the national interest and in the interests of United States citizens. To assist courts in understanding federal immigration law, IRLI has filed *amicus curiae* briefs in many immigration-related cases, including *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Ariz. Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); and *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016).

II. INTRODUCTION

The District Court below denied motions by defendants President Trump, Secretary of Homeland Security Nielsen ("Secretary"), and certain subordinate agency officials to dismiss this consolidated civil action for failure to state an equal protection claim under the Fifth Amendment. The Court declined to dismiss "Plaintiffs' claims that the decision to end the DACA program violated the U.S. Constitution because it was substantially motivated by racial animus against Latinos and, in particular Mexicans." Mem. & Order 12, ECF No. 260 (Mar. 29, 2018)

[1] Pursuant to FED. R. APP. P. 29(a)(4)(E), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

("Order") (citing No. 16-cv-4756, Third Amended Complaint ("BV TAC") ¶¶ 195-98, ECF No. 113; No. 17-cv-5228, First Amended Complaint, ("State FAC") ¶¶ 233-39, ECF No. 71). The Court concluded both that this decision had a discriminatory effect, *id.* at 14, and "that Plaintiffs have alleged sufficient facts to raise a plausible inference that the DACA rescission was substantially motivated by unlawful discriminatory purpose," *id.* at 12-13.

III. STANDARD OF REVIEW

This Court reviews a motion to dismiss under Fed. R. Civ. P. 12(b)(6) *de novo*, accepting as true all factual allegations contained in the complaint and drawing all reasonable inferences in the plaintiff's favor. *Littlejohn v. City of New York*, 795 F.3d 297, 306 (2d Cir. 2015). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. Pleadings that are merely consistent with a theory of liability, however, stop "short of the line between possibility and plausibility of entitlement to relief." *Id.* at 662.

IV. ARGUMENT

A. Plaintiffs' Allegations Are Insufficient To State A Claim Arising Solely Under The Fifth Amendment's Equal Protection Guarantee.

The equal protection guarantees in the Constitution safeguard the "'right to be free from invidious discrimination in statutory classifications and other governmental activity.'" *Bernheim v. Litt*, 79 F.3d 318, 323 (2d Cir. 1996) (quoting *Harris v. McRae*, 448 U.S. 297, 322 (1980)). Thus, this right "'requires the government to treat all similarly situated individuals alike.'" *Vassallo v. Lando*, 591 F. Supp. 2d 172, 183 (E.D.N.Y. 2008) (quoting *Harlen Assocs. V. Inc. of Vill. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001)).

To state a constitutional violation, plaintiffs must allege facts that reasonably imply that: "'(1) the [plaintiff], compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" *Diesel v. Town of Lewisboro*, 232 F.3d 92, 103 (2d Cir. 2000) (quoting *LeClair v. Saunders*, 627 F.2d 606, 608 (2d. Cir. 1980)); *see also Miner v. Clinton Cty.*, 541 F.3d 464, 474 (2d Cir. 2008) (also requiring a plausible inference of "adverse treatment of individuals compared with other similarly situated individuals . . . .") (citation omitted).

1. Plaintiffs failed to plead selective treatment compared to others similarly situated.

The equal protection claims should have been dismissed. Plaintiffs never made the threshold pleading that the President treated any plaintiff "differently than *others similarly situated*." *Phillips v. Girdich*, 408 F.3d 124, 129 (2d Cir. 2005) (emphasis added); *see also Lopez v. Bay Shore Union Free Sch. Dist.*, 668 F. Supp. 2d 406, 413-15 (E.D.N.Y. 2009) ("[W]ith no allegations concerning the defendant's treatment of other similarly situated students, the complaints also did not create an inference of discriminatory intent.").

Neither the complaints nor any pleadings in opposition to the government's motion to dismiss ever identified a similarly situated "racial group" that was or would be "treated differently" than Mexicans or Latinos by the DACA rescission. There are, for example, no facts pled about the rescission's effect on illegal aliens who are neither Mexican nor Latino. Indeed, the District Court found that the amended complaints did not plead "that [plaintiffs] in particular are being targeted for removal because of their race—in which case judicial review . . . would presumably be limited by 8 U.S.C. § 1252(g) . . . ." Order at 14-15. Plaintiffs alleged only that this action "was motivated by discriminatory animus and its application results in a discriminatory effect . . . [because] the DACA Rescission Memo both disadvantages and was intended to disadvantage certain racial groups." *Id.* (quoting BV TAC ¶ 197); *see also* State FAC ¶¶ 235-36. This vague claim of "disadvantage"

is not enough. *Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 193 (2d Cir. 1994) ("To establish . . . intentional or purposeful discrimination, it is axiomatic that a plaintiff must allege that similarly situated persons have been treated differently.").

The District Court did not repair matters by holding that plaintiffs' allegation of "disparate impact," paired with an allegation of discriminatory animus, sufficed. Order at 15, 17. Disparate impact also requires that similarly situated groups experience different outcomes. *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 576-577 (2d Cir. 2003) ("Whether using statistics or some other analytical method, plaintiffs must also utilize the appropriate comparison groups. They must first identify members of a protected group that are affected by the neutral policy and then identify similarly situated persons who are unaffected by the policy. . . . Such a comparison . . . allows for a causal analysis between the claim of discrimination . . . and the facially neutral policy."). Here, no group situated similarly to Mexican or Latino DACA recipients was even identified.

2. The District Court erred in finding that discriminatory intent on the part of President Trump could reasonably be inferred.

Even if Plaintiffs properly alleged that similarly situated persons were treated differently, the facts as pled did not give rise to a reasonable inference of discriminatory intent on the part of President Trump.[2]

[2] The District Court found no statements by any other defendant that "would give rise to an inference of discriminatory motive." Order at 20.

The District Court found that the DACA rescission was "facially neutral official action." Order at 13. "Plaintiffs allege [only] that the categorical decision to end the DACA program, which provided them with some limited assurance that they would not be deported, was motivated by unlawful animus." Order at 15.

While facially neutral conduct may constitute discrimination in violation of the Equal Protection Clause, such a claim requires that a plaintiff show an intent to discriminate against a suspect class. *Vills. of Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 265-70 (1977). A claim of discriminatory purpose "implies more than intent as volition or intent as awareness of consequences." *Pers. Adm'r of Mass. V. Feeney*, 442 U.S. 256, 279 (1979). A plaintiff must show that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group." *Id.*

Asserting that it could "consider the background of facially neutral decisions to smoke out" covert "discriminatory purposes," Order at 18-19 (citing *Vills. of Arlington Heights*, 429 U.S. at 267), the District Court deemed four selected "campaign-trail statements" by then-Presidential nominee Trump to be "overt expressions of prejudice." *Id.* at 19.[3]

[3] The District Court relied on these campaign statements. *See* Order Certifying Appeal 2, ECF No. 269 ("If, . . . the court were required to disregard these pre-Inauguration statements, it would likely (although not certainly) dismiss Plaintiffs'

In doing so, the District Court both grossly misinterpreted these statements and ran afoul of heightened pleading requirements. In this circuit, in order for a court to "smoke out" invidious intent to discriminate against a racial group, the "sensitive inquiry" prescribed by *Vills. of Arlington Heights* obliges a plaintiff to allege *with particularity* specific acts giving rise to an inference of racial animus. *Rivera-Powell v. N.Y.C. Bd. of Elections*, 470 F.3d 458, 470 (2d Cir. 2006) ("[The complaint] proffers only a conclusory allegation of discrimination, which, without evidentiary support or allegations of particularized incidents, does not state a valid claim and so cannot withstand a motion to dismiss."); *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714 (2d Cir. 1994) (holding that a "naked allegation of racial discrimination" was insufficient to withstand a motion to dismiss); *Manbeck v. Micka*, 640 F. Supp. 2d 351 (S.D.N.Y. 2009) (holding that, under *Iqbal*, Fed. R. Civ. P. 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"); *Johnson ex rel. Johnson v. Columbia Univ.*, No. 99 Civ. 3415, 2003 U.S. Dist. LEXIS 20932, at *6 (S.D.N.Y. Nov. 19, 2003) (requiring "specific allegations of discriminatory purpose and intent"); *D.C. v. Copiague Union Free Sch. Dist.*, No. 16-cv-4546, 2017 U.S. Dist. LEXIS 113253, *21 (E.D.N.Y. July 11, 2017) (agreeing

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equal-protection claims, as Plaintiffs have not alleged that the President made comparably inflammatory and offensive statements about Latinos and especially Mexicans and Mexican-Americans after taking office.")

that racial remarks "do not, without more, amount to a violation of Constitutional rights").

While the District Court gratuitously opined that "a disheartening number of statements by President Donald Trump . . . allegedly suggest that he is prejudiced against Latinos and, in particular, Mexicans," it actually "conclud[ed]" that only four specific allegations "are sufficiently racially charged, recurring, and troubling as to raise a plausible inference that the decision to end the DACA program was substantially motivated by discriminatory animus." Order at 17 (citing BV TAC ¶¶ 91-93, 96, 97, 99, State FAC ¶¶ 58-59, 61, 62, 65-66, 70).

The District Court's synopsis of the four statements in the Order was inaccurate and highly prejudicial to the President. In one of the statements, then-candidate Trump blamed the Mexican government and its immigration policy for the illegal entry of "criminals," "drug dealers" and "rapists." *See, e.g.*, BV TAC ¶ 91 ("When Mexico sends . . ."), BV TAC ¶ 92 ("The Mexican government is forcing . . . ,"), BV TAC ¶ 93 ("[Y]ou have really bad people coming [illegally] through the border . . . ."). State FAC ¶ 59 ("The Mexican government is much smarter, much sharper, much more cunning. And they send the bad ones over because they don't want to pay for them."). The only animus conveyed by these statements is against the Mexican government and categories of criminal aliens from Mexico; it does not follow from such hostility that the speaker harbored animus against Mexicans

generally. That the District Court nevertheless drew this inference violated the requirement for particularized pleading of discriminatory animus.

The District Court baldly misstated the second alleged statement as "Trump's characterization of individuals who protested outside a campaign rally as 'thugs who were flying the Mexican flag.'" Order at 17. In fact, the State Plaintiffs only alleged that Trump vilified "anti-Trump protestors" in New Mexico and "thugs that attacked peaceful Trump supporters in San Jose . . . ." State FAC ¶ 61. The District Court did not state any source for the quote "thugs who were flying the Mexican flag" other than to cite to the pleadings. But the complaints did not contain this quote, or even identify the protesters as Mexican or Latino.

Trump's third supposedly "smoked-out" statement of animus, that the federal judge presiding over a case where a Trump-controlled company was a party had an apparent conflict of interest arising from his alleged membership in a local "La Raza" bar association, was a garden-variety tactic in commercial litigation, to seek a possibly more favorable judge than the one assigned. *See* State FAC ¶ 62. Nor do the pleadings provide any source or particularized context for the fourth set of supposedly invidious statements, that the President characterized some unidentified "undocumented immigrants" as "animals," BV TAC ¶ 97, and "the undocumented Latino community," as "criminals and gang members," BV TAC ¶ 99. For all the pleadings indicate with particularity, these statements might have been made about

vicious criminals, or categories of criminals, and thus do not reasonably imply animus against Latinos or Mexicans generally.

As for the other allegations in BV TAC ¶¶ 95, 98 and State FAC ¶¶ 67-69, the District Court had to concede that they "offer only weak support at best" that "the President's alleged decision . . . was motivated by desire to harm Latinos and especially Mexicans." Order 17, 18 n.8. In fact, as just shown, none of the President's alleged statements indicates that he had any such desire.

B. The District Court Erred In Applying Strict Scrutiny To Plaintiffs' Equal Protection Claims.

Where a suspect class or a fundamental right is not implicated, a challenged action need only be rationally related to a legitimate governmental purpose. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976). Recently, even in a case involving claims of religious discrimination, the Supreme Court assumed, without deciding, that it could "look behind the face" of a presidential order categorically excluding aliens "to the extent of applying rational basis review . . . ," under which a policy is upheld "so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018).

Hispanics as an ethnic group may constitute a suspect class under equal protection analysis. *See Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 197 (1973). But the Supreme Court has made clear that the federal judiciary may not simply assume

that Hispanics or Latinos are a suspect class nationwide: "[C]ommunity prejudices are not static . . . . Whether [] a group [subject to such prejudice] exists within a community is a question of fact." *Hernandez v. Texas*, 347 U.S. 475, 477-79 (1954) (holding that pleading specific facts that persons of Mexican origin or ancestry suffered prejudice in a Texas county constituted a viable allegation of membership in a suspect class).

Here, no specific facts whatsoever were alleged showing that Hispanics or Latinos are a suspect class in the United States. Plaintiffs did not allege that any laws in this country discriminate against Hispanics or Latinos, or allege any specific facts showing societal prejudice or discrimination against them. Unstated background assumptions cannot substitute for these lacks. Because of this pleading deficiency under *Hernandez*, the DACA rescission is not subject to strict scrutiny on the basis that it affects Hispanics or Latinos.

Nor can national origin discrimination against Mexicans, or Latin Americans, be the vehicle for strict scrutiny here. Rescission of DACA concerns at most the disparate treatment of unadmitted or unlawfully present foreign nationals. Even if, for argument's sake, the President had an unstated policy to prioritize the expulsion of Mexicans, "[d]istinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive . . . [and must be upheld] [s]o long as [they] are not wholly irrational . . . ." *Narenji v. Civiletti*, 617 F.2d 745, 747

(D.C. Cir. 1979). Indeed, were this not so, the national-origin immigration quotas that Congress imposed between 1924 and 1965 would have been unconstitutional. That they were not flows from the plenary "power to expel or exclude aliens," which is "a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). *See also, e.g., Rajah v. Mukasey*, 544 F.3d 427, 435 (2d Cir. 2008) ("[I]mmigration regulation differs fundamentally from [other] legal contexts . . . because classifications on the basis of nationality are frequently unavoidable in immigration matters.").

At most, then, rational basis review should have been given to the DACA rescission. It passes that test easily. Ending a program because the Attorney General believes that it is unlawful is certainly an act rationally related to a legitimate government purpose, and, by the same token, the rescission can easily "be understood to result from a justification independent of unconstitutional grounds." *Trump v. Hawaii*, 138 S. Ct. at 2420.

Thus, even if the threshold requirement of different treatment of similarly situated persons had been pled, and even if presidential animus had been adequately pled, Plaintiffs failed to allege that the DACA rescission affected a suspect class, and thus the District Court erred by giving that rescission strict scrutiny.

V. CONCLUSION

For the foregoing reasons, the District Court's denial of Defendants' motion to dismiss Plaintiffs' equal protection claims should be reversed.

Dated: August 22, 2018

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
Law Office of Lawrence J. Joseph
1250 Connecticut Av NW, Ste 700-1A
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Immigration Reform Law Institute

Christopher J. Hajec,
DC Bar No. 492551
Michael M. Hethmon
DC Bar No. 1019386
Immigration Reform Law Institute
25 Massachusetts Ave, NW, Ste 335
Washington, DC 20001
Tel: 202-232-5590
Fax: 202-464-3590

CERTIFICATE OF SERVICE

Counsel hereby certifies that on August 22, 2018, I electronically filed the foregoing *amicus curiae* brief by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by said system.

/s/ Lawrence J. Joseph

Lawrence J. Joseph
Counsel for Amicus Curiae