IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-40238

STATE OF TEXAS; STATE OF ALABAMA; STATE OF GEORGIA; STATE OF IDAHO; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF WISCONSIN; PAUL R. LEPAGE, Governor, State of Maine; PATRICK L. MCCRORY, Governor, State of North Carolina; C. L. "BUTCH" OTTER, Governor, State of Idaho; PHIL BRYANT, Governor, State of Mississippi; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF FLORIDA; STATE OF ARIZONA; STATE OF ARKANSAS; ATTORNEY GENERAL BILL SCHUETTE; STATE OF NEVADA; STATE OF TENNESSEE,

Plaintiffs – Appellees,

v.

UNITED STATES OF AMERICA; JEH CHARLES JOHNSON, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; R. GIL KERLIKOWSKE, Commissioner of U.S. Customs and Border Protection; RONALD D. VITIELLO, Deputy Chief of U.S. Border Patrol, U.S. Customs and Border of Protection; SARAH R. SALDANA, Director of U.S. Immigration and Customs Enforcement; LEON RODRIGUEZ, Director of U.S. Citizenship and Immigration Services,

Defendants – Appellants.

Appeal from the United States District Court
for the Southern District of Texas

BRIEF *AMICUS CURIAE* OF THE IMMIGRATION REFORM LAW INSTITUTE, FEDERATION FOR AMERICAN IMMIGRATION REFORM, THE REMEMBRANCE PROJECT, AND NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF PLAINTIFFS-APPELLEES

Dale L. Wilcox, Esq.*
Michael M. Hethmon, Esq.
Immigration Reform Law Institute
25 Massachusetts Ave, NW, Suite 335
Washington, DC 20001
Phone: 202-232-5590
Fax: 202-464-3590
Email: litigation@irli.org
*DC Bar admission pending;
Under supervision

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Circuit Rule 29-2, the undersigned counsel of record certifies that, in addition to the persons and entities disclosed in the parties' certificates of interested persons, the following persons and entities have an interest in this *amici curiae* brief. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amici

Immigration Reform Law Institute (IRLI)

IRLI is a non-profit legal education and advocacy law firm working to defend the rights of individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful, to monitor and hold accountable federal, state, or local government officials who undermine, fail to respect, or comply with our national immigration and citizenship laws, and to provide expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public. IRLI's vision is a nation where our borders are secure, the American people are no longer disadvantaged and harmed by the deleterious effects of unlawful immigration, and legal immigration levels are set at a rate consistent with the national interest.

Federation for American Immigration Reform (FAIR)

FAIR is a non-profit membership organization of concerned citizens who share a common belief that our nation's immigration policies must be reformed to serve the national interest. FAIR's mission is to examine immigration trends and effects, to educate the American people on the impacts of sustained high-volume immigration, and to discern, put forward, and advocate immigration policies that will best serve American environmental, societal, and economic interests today and into the future. More specifically, FAIR seeks to improve border security, to stop illegal immigration, and to promote immigration levels consistent with the national interest.

The Remembrance Project

The Remembrance Project is a Texas-based non-profit organization whose mission is to bring honor and remembrance to Americans killed by illegal aliens and educates, raises awareness, and conducts outreach in order to support and protect Americans and their families' well-being and safety through upholding U.S. laws and following the Constitution. From this mission has emerged a national quilt of remembrance, The Stolen Lives Quilt. The Quilt, now in over 25 states, is a growing, visual reminder of the true cost of an open border, measured in lives stolen and forever lost to families, communities and to America's future. The Remembrance Project is interested in seeing the rule of law prevail in this case, as

every crime illegal aliens commit in the United States was potentially preventable if the illegal alien had been identified, apprehended, and removed before they victimized anyone.

National Sheriffs' Association (NSA)

Chartered in 1940, the NSA is a professional association dedicated to serving the Office of Sheriff and its affiliates through police education, police training, and general law enforcement information resources. NSA represents thousands of sheriffs, deputies and other law enforcement, public safety professionals, and concerned citizens nationwide. NSA's interest in this case stems from all represented Sheriffs' common goal of protecting the citizens that elected them, and making the quality of life of those citizens the best it can be.

Counsel

Dale L. Wilcox, Immigration Reform Law Institute

Michael M. Hethmon, Immigration Reform Law Institute

May 11, 2015
Date

/S/MICHAEL M. HETHMON
Michael M. Hethmon, Esq.
Attorney for *Amici Curiae*

AUTHORITY TO FILE AND RULE 29(c)(5) STATEMENT

Pursuant to Fed. R. App. P. 29(a), an *amicus curiae* may "may file a brief . . . if the brief states that all parties have consented to its filing." All parties have consented to *Amici Curiae* filing a brief. No counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

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INTRODUCTION

On November 20, 2014, the Secretary of Homeland Security issued his Enhanced Deferred Action for Childhood Arrivals (DACA+) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) memoranda. The Secretary claimed to give the Department of Homeland Security (DHS) permission to assert "prosecutorial discretion" at any stage of an enforcement proceeding, including the right to grant deferred action. The district court order enjoining DACA+ and DAPA found that the Secretary had cited no statutory basis for these assertions.

Judge Hanen observed that the issue was not whether the present administration's attempts to "fix our broken immigration system" through executive action were misguided. Rather, the preliminary injunction recognizes that states will be irreversibly harmed by Secretarial diktats that are unprecedented in their unlawfulness, unconstitutionality, and impact in undermining our statutory enforcement system.

Appellants cannot unilaterally create policy programs inconsistent with the Immigration and Nationality Act (INA), give them the full force and effect of law, and usurp the power of Congress, as well as the immigration and appellate courts. Implementation of DACA+ and DAPA under the guise of prosecutorial discretion has received neither authorization nor funding from Congress. The Secretary

intends to implement these legislative programs without regard to the protections of the Administrative Procedure Act. Like Appellants, *amici* and millions of other Americans have been denied their opportunity for public comment.

The absence of clear error in Judge Hanen's findings is apparent to anyone with knowledge of the current immigration system. DACA+ and DAPA cannot be successfully integrated with our existing law into an effective immigration enforcement strategy. The INA is the framework for the removal of illegal aliens. DACA+ and DAPA are not premised on an assumption that the current law will remain in effect, but instead cynically promote its displacement by an amnesty law for most of the thirteen million illegal aliens unlawfully present in our country. Appellants acknowledge as much.

STATEMENT OF THE CASE

The structure of Judge Hanen's Memorandum Opinion (Mem.), following an outline of the elements for granting a preliminary injunction, presented the factual findings piecemeal.[1] *Amici* have collated the factual findings by issue, in order to better demonstrate their complete scope. Judge Hanen made important findings

[1] Judge Hanen noted that the 123 page length was due in part "to the overlap between the standing issues and the merits, [so] there is by necessity the need for a certain amount of repetition." He clarified that the factual statements in his Memorandum Opinion "should be considered as findings of fact regardless of any heading or lack thereof." Mem. at 6.

regarding DACA+ and DAPA. Nowhere in the Brief for the Appellants (Appellants' Br.) do Appellants point to clear error in these findings:

1. Factual findings as to the identity and legal status of the population of DACA+/DAPA beneficiaries.

Judge Hanen relied on Government estimates that over four million out of an estimated 11.3 million illegal aliens residing in the United States will apply for DAPA benefits alone. Mem. at 14. The evidence available to the District Court indicated that an estimated 50-67 per cent of potentially-eligible DAPA recipients have probably violated 8 U.S.C. § 1325, while the remaining potential recipients likely overstayed their permission to stay. Mem. at 80. Regardless of their mode of entry, DAPA putative recipients all fall into a category for removal. Mem. at 90. Expected DAPA recipients are by definition already illegally present. Mem. at 92. They are not aliens seeking visas or other forms of permission to come to the United States, but they have already entered illegally or overstayed their legal admission. Mem. at 92.

2. Factual findings as to the authority of Secretary Johnson to set agency priorities.

The ordering of agency priorities in the Secretary's DAPA and DACA+ November 2014 memoranda are not subject to judicial review. Mem. at 69. Secretary Johnson has the legal authority to set these priorities, and they are not

unlawful. Mem. at 92; *accord* Appellants' Br. at 13 (stating Judge Hanen did not enjoin DHS from establishing removal priorities).

3. Factual findings as to the operative elements of the DAPA and DACA+ programs.

The DHS Secretary announced that DHS will not enforce the immigration laws for over four million illegal aliens, despite the fact that they are otherwise deportable. Mem. at 60. The DAPA memorandum states that, for DHS to better perform tasks in one area, it is necessary to abandon enforcement in another. Mem. at 64. Through the use of mandatory language throughout the DAPA memorandum, the Secretary required the U.S. Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE) to take certain actions. Mem. at 76. DHS agents were instructed to terminate removal proceedings if the individual being deported qualifies for relief under the DAPA criteria. Mem. at 60. Absent extraordinary circumstances, DHS will not deport illegal aliens who apply for DAPA and are rejected. Mem. at 60, 99.

The Secretary ordered that implementation of certain measures under the DAPA memorandum was to be immediate. Mem. at 75. The DACA+ and DAPA programs were in effect and action was taken by DHS personnel pursuant to them between November 2014 and the effective date of the February 2015 injunction. Mem. at 76. ICE and U.S. Customs and Border Protection (CBP) were ordered to immediately begin identifying aliens who meet the criteria—both in their custody

and newly encountered individuals—to prevent the further expenditure of enforcement resources. Mem. at 75. ICE was instructed to review pending removal cases and seek administrative closure or termination for cases with potentially eligible deferred action beneficiaries. Mem. at 75. DHS set up a hotline for immigrants to alert DHS as to their eligibility so as to avoid their removal being effectuated. Mem. at 76. USCIS was given a specific deadline by which it should begin accepting applications under the new DACA+ expansion criteria, to be no more than 90 days from the date the program was announced. Mem. at 76.

DAPA confers upon its beneficiaries the right to stay in the country lawfully. Mem. at 76. The DAPA program is a program instituted to authorize for a certain, newly-adopted class of 4.3 million illegal aliens, all of whom are currently, by law, removable or deportable: (1) a new status of "legal" presence in the United States, (2) Social Security numbers, (3) work authorization permits, (4) the right to receive a myriad of governmental benefits to which they otherwise would not be entitled, and (5) the ability to travel. Mem. at 78, 85-86, 111.

4. Factual findings that classify the DAPA and DACA+ programs as legislative rulemaking for purposes of compliance with the APA notice-and-comment statute.

There is no specific law or statute that authorizes DAPA. Mem. at 90. Deferred action is not a status created or authorized by law or by Congress. Mem. at 15. The properties of deferred action have never been described in any relevant

legislative act. Mem. at 15. No congressionally-enacted statute gives DHS the affirmative power to turn DAPA recipients' unlawful presence into legal presence through deferred action, much less make such aliens eligible for multiple benefits. Mem. at 90. No executive orders or presidential proclamations exist instituting DACA+ or DAPA. Memo. at 6.

The record is clear that the only discretion that has been or will be exercised is that already exercised by Secretary Johnson in enacting the DAPA program and establishing the binding criteria therein. Mem. at 108. In conferring benefits on recipients, DAPA severely restricts the discretion of agency personnel by imposing discrete obligations (based on detailed criteria) upon those charged with enforcing it. Mem. at 10-11, 111-12. The DAPA memorandum states that officers will be provided with specific eligibility criteria for deferred action. Mem. at 108. The Operating Procedure for DACA contains nearly 150 pages of specific instructions for granting or denying deferred action to applicants. Mem. at 109. DAPA clearly effects a binding substantive change in immigration policy. Mem., at 108, 111. There is no option for granting DAPA to an individual who does not meet each criterion. Mem. at 109. These criteria virtually extinguish discretion by executive branch personnel. Mem. at 109.

Detailed and mandatory commands within the INA provisions applicable to the Secretary's action in this case circumscribe agency discretion, including 8

U.S.C. §§ 1225(a), 1225(a)(3), 1225(b)(2)(A), 1229a(c)(2)(A), 1229a(c)(2)(B), 1182, and 1229a(e)(2). Mem. at 88-89.

5. Factual findings regarding harm to Appellees as a consequence of the Secretary's discretionary order to implement DAPA and DACA+.

The acts of Congress in the INA deeming the population of potential DAPA and DACA+ recipients as removable were passed in part to protect Appellees and their lawful residents. Mem. at 78. The evidence presented by Appellees demonstrates that the Government has required and will require states to take certain actions regarding DAPA recipients. Mem. at 65.

DHS through its DACA Directive directly caused a significant increase in driver's license applications. Mem. at 29. DAPA is a much larger program and will only exacerbate these damages. Mem. at 29. If the majority of DAPA beneficiaries residing in the state apply for drivers licenses, Texas will directly bear a per applicant expense costing the state millions of dollars. Mem. at 28.

Appellants conceded that "a direct and genuine injury to a State's own proprietary interests may give rise to standing." Mem. at 23 (citing Defs.' Mem. of P. & A. in Opp'n to Plfs.' Mot. for Prelim. Inj., Dist. Ct. Doc. No. 38, at 23). Appellees have shown that the DAPA program will directly injure their proprietary interests by creating a new class of individuals that is eligible to apply for driver's licenses. Mem. at 35.

Appellees will incur significant costs to process the applications and issue the licenses. Mem. at 35. Appellees cannot recoup the costs to process driver's licenses for DAPA beneficiaries. Mem. at 35. Any subsequent ruling that finds DAPA unlawful after it is implemented would result in Appellees facing the substantially difficult, if not impossible task, of retracting any benefits or licenses already provided to DAPA beneficiaries. Mem. at 116.

ARGUMENT

I. Appellants are unlikely to prevail on their claim of total hermetic authority over grants of lawful presence and the prosecution of removal proceedings.

A. Controlling federal law and Supreme Court separation of powers doctrine impose mandates and restrictions on DHS discretion.

In granting the preliminary injunction, Judge Hanen found that "the Government asserts that it has complete prosecutorial discretion over illegal aliens and can give deferred action to anyone it chooses." Mem. at 17. On appeal, Appellants again assert a presumption that total discretionary power to grant admission and relief from removal resides with the DHS Secretary. Appellants characterize the source of that power as a vesting by Congress of "enforcement authority in an Executive Branch agency." Appellants' Br. at 5. Seeking a stay of the preliminary injunction, Appellants claim that Congress, through the appropriations process, has "provided that at least $1.6 billion be used to identify

and remove criminal aliens," but "has not otherwise constrained DHS' discretion, instead simply providing a lump sum for 'necessary' enforcement and efforts." *Id.* at 7.

Appellants' view that they possess unrestricted discretionary power over the admission and removal of aliens is unlikely to prevail at trial. The U.S. Constitution delegates almost all immigration-related powers to Congress:

> The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, [and] the grounds on which such determination shall be based, have been recognized as matters *solely for the responsibility of the Congress*.

Harisiades v. Shaughnessy, 342 U.S. 580, 596-97 (1952) (Frankfurter, J., concurring) (emphasis added). The plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question. *INS v. Chadha*, 462 U.S. 919, 940 (1983).

The Constitution confers no enumerated powers over immigration upon the president. In contrast, Congress has exercised its plenary authority by creating a comprehensive legislative scheme, the INA, which delegates carefully circumscribed enforcement duties to the executive branch. *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968, 1973 (2011). A complete listing and analysis of these immigration statutes is provided in the Brief of *Amicus Curiae* Immigration Reform Law Institute (IRLI Br.) filed in the District Court. Record on Appeal (ROA) 1200-1218 (describing the matrix of statutory restrictions on DHS agency

discretion imposed by INA §§ 101(a)(13), 103, 235, 214, 211, 291, 240, and 241).

Presidential power to act in the face of congressional opposition is evaluated under the separation of powers doctrine. *Medellin v. Texas*, 552 U.S. 491, 524 (2008). When presidential actions conflict with congressional enactments, the power of the president "is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579, 637 (1952). In *Heckler v. Chaney*, the U.S. Supreme Court explained that "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." 470 U.S. 821, 833 (1985).

When confronted in the past with essentially the same claims to comprehensive institutional discretion asserted by DHS, the Supreme Court and courts of appeal have affirmed the plenary authority of Congress embodied in the INA. Congressional delegation of discretion to the executive branch as to whether to grant relief available by statute, after application, has never included discretion to define eligibility for such relief. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987); *see also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (stating an executive agency's policy preference about how to enforce (or, in this case, not enforce) an act of Congress cannot trump the power of Congress: a Court

may not, "simply … accept an argument that the [agency] may … take action which it thinks will best effectuate a federal policy" because "[a]n agency may not confer power upon itself"); *Succar v. Ashcroft*, 394 F.3d 8, 10 (1st Cir. 2005) ("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. *See* 8 U.S.C. §§ 1225(b)(1), (2).").

The president and federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress over resource allocations:

> Of course, an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes ….

Lincoln v. Vigil, 508 U.S 182, 193 (1993) (emphasis added). Similarly, Appellants may not ignore mandates in immigration statutes simply because Congress has not yet appropriated all of the money necessary to apply each mandate in every case. *See City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977) (noting 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"). Nor may the president or federal agencies rely on political guesswork about future congressional appropriations to justify ignoring existing legal mandates:

> Allowing agencies to ignore statutory mandates and prohibitions based on agency speculation about future congressional action—would gravely upset the balance of powers between the Branches and represent a major and unwarranted expansion of the Executive's power at the expense of Congress.

In re Aiken County, 25 F.3d 255, 260 (D.C. Cir. 2013).

The Secretary's belief that the Executive Branch possesses inherent prosecutorial discretion to defer essentially all civil removal proceedings, notwithstanding clear INA mandates, is dangerously overbroad. Prosecutorial discretion does not include the power to disregard other statutory obligations that apply to the executive branch, such as statutory requirements to issue rules. *See Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (explaining the difference). If the President is exercising his Article II prosecutorial discretion and pardon powers over federal criminal laws that punish convicted persons, he may do so "on any [policy] ground …." *In re Aiken County*, 725 F.3d at 266. However, "the President may disregard a [civil] statutory mandate or prohibition [placed by Congress] on the Executive only on constitutional grounds, not on policy grounds." *Id.* (emphasis added).

The President's Article II prosecutorial discretion powers cannot nullify statutorily mandated admission and removal procedures by analogy, because removal is a civil action and not punishment. *U.S. ex rel. Brazier v. Commissioner of Immigration*, 5 F.2d 162, 164 (2d Cir. 1924) (stating "[a] pardon is for a crime,

… *inter alia* it avoids or terminates punishment for that crime, but deportation is not a punishment, it is an exercise of one of the most fundamental rights of a sovereign, a right which under our form of government is exercised by legislative authority"); *Reno v. American-Arab Antidiscrimination Committee*, 525 U.S. 471, 491 (1999) (*AAADC*) (stating removal is not punishment, which would require the due process protections accorded to criminal defendants); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (same); *Fong Yue Ting v. U.S.*, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime. It is not a banishment …. It is but a method of enforcing the return to his own country of an alien …."). Moreover, relief from or deferral of civil removal, whether statutory or discretionary in origin, is an affirmative grant of an immigration benefit to the non-citizen recipient, not a sanction subject to the agency's prosecutorial discretion. *Kucana v. Holder*, 558 U.S. 233, 246 (2010) (describing substantive forms of discretionary relief from removal provided under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) as "immigration benefits" and distinguishing them from procedural due process rights).

B. Congress did not grant Appellants general discretionary authority to implement the DAPA and DACA+ initiatives.

Aware of the weakness of inherent prosecutorial discretion as authority for the DACA+ and DAPA initiatives, Appellants rely heavily on two purported

general congressional grants of discretion under the INA. First, 8 U.S.C. § 1103(a) "directs the Secretary to establish regulations that he deems necessary to execute the laws passed by Congress." Mem. at 91. Second, the Homeland Security Act (HAS), at 6 U.S.C. § 202, "delegates to the Secretary in Section 202(4) the authority to establish and administer rules that govern the various forms of acquiring legal entry into the United States under 6 U.S.C. § 236 (dealing with visas)." Mem. at 91-92. Closer examination of these two provisions, however, shows that Appellants' gloss is misleading.

Under the INA, Congress has delegated two *mandatory* statutory responsibilities to the DHS Secretary: (1) The "power and duty" to administer and enforce all laws relating to immigration, and (2) the mandatory duty to guard against "the illegal entry of aliens." 8 U.S.C. §§ 1103(a)(1) and (a)(5).

On the other hand, Congress limited its general grants of *discretionary* authority to the Secretary to two specific functions: (1) to establish regulations and "perform other acts," and (2) to "appoint employees." The INA allows the Secretary to perform or delegate these duties only where the Secretary deems it "necessary" to carry out the two mandated authorities. 8 U.S.C. §§ 1103(a)(3) and (5). Until 1996, the Attorney General could authorize the immigration courts or the Board of Immigration Appeals (BIA) to make determinations other than deportation orders, which would arguably include discretionary deferrals of

removal. *See* former INA § 242(b), 8 U.S.C. § 1252(b). That authority was never exercised by the Attorney General, was repealed by IIRIRA, Division C of Pub. L. 104–208, and thus could not have been transferred to DHS as "necessary" discretionary authority in 2002.

The INA provisions governing the removal of aliens fall under the Secretary's mandatory "power and duty" to enforce the INA by controlling and guarding the borders against illegal entry. Since the enactment of the INA, the primary statutory enforcement function of federal immigration officers has always been "to seek out, question, and detain suspected illegal aliens." *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1222 (D.C. Cir. 1981). IIRIRA re-affirmed that mandate, by making illegal entrants other than asylum applicants inadmissible.[2]

Appellants' claimed discretionary authority under the Homeland Security Act is equally illusory. Expected DAPA recipients, who by definition are already illegally present, are not encompassed by the HAS because they are not aliens seeking visas or other forms of permission to come to the United States. 6 U.S.C. § 602(4). Instead, Judge Hanen found that individuals covered by DAPA have already entered and either achieved entry illegally, or unlawfully overstayed their legal admission. Mem. at 91-92. The HSA's delegation of authority thus cannot be

[2] IIRIRA § 301(c), amending INA § 212(a)(6)(A).

construed to delegate to DHS the right to establish a national rule or initiative awarding legal presence—"one which not only awards a three-year, renewable reprieve, but also awards over four million individuals, who fall into the category that Congress deems removable, the right to work, obtain Social Security benefits, and travel in and out of the country." *Id.* at 92.

Under current law, regardless of the genesis of their illegality, DHS is charged with the duty of removing aliens who qualify for the DACA+ and DAPA initiatives. *Id.* at 96. Subsection 1225(b)(1)(A) states unequivocally that DHS "shall order the alien removed from the United States without further hearing or review …." A corresponding INA section, 8 U.S.C. § 1227, "orders the same for aliens who entered legally, but who have violated their status." *Id.* Judge Hanen observed that, "Notably, the applicable statutes use the word 'shall,' not the permissive term 'may'…. 'Shall' indicates a congressional mandate that does not confer discretion—*i.e.*, one that should be complied with to the extent possible and to the extent one's resources allow. It does not divest the Executive Branch of its inherent discretion to formulate the best means of achieving the objective, but it does deprive the Executive Branch of its ability to directly and substantially contravene statutory commands." Mem. at 97. "Nowhere has Congress given it the option to either deport these individuals or give them legal presence and work permits …. The word 'shall' is imperative and, regardless of whether or not it

eliminates discretion, it certainly deprives the DHS of the right to do something that is clearly contrary to Congress' intent." *Id*. at 97-98.

C. Appellants' claim that past actions of Congress constitute historical legislative acquiescence to deferred action practices does not comport with controlling Supreme Court jurisprudence.

Appellants claim Congress has acquiesced to their policy-based deferred action interpretation through inaction. Mem. at 100-102. However, nowhere in Appellants' brief or the record on appeal have they presented to this Court evidence that "Congress considered and rejected the 'precise issue' presented before the Court," which is what an acquiescence theory requires to be forceful. *Rapanos v. U.S.*, 547 U.S. 715, 750 (2006).

It is the responsibility of the court to ensure an administrative practice is consistent with statutory authority, even if the practice is longstanding. Age alone does not immunize an administrative practice from judicial review. "Arbitrary agency action becomes no less so by simple dint of repetition." *Judulang v. Holder*, 132 S.Ct. 476, 488 (2011); *Sloan v. SEC*, 436 U.S. 103 (1978) (finding SEC practice of serial suspensions, though consistent and longstanding for thirty-four years, was in excess of agency authority because it was inconsistent with enabling statute); *F.J. Vollmer Co.v. Magaw*, 102 F.3d 591, 598 (D.C. Cir. 1996) (stating "applying an unreasonable statutory interpretation for several years [cannot] transform it into a reasonable interpretation").

Likewise, the history of practices at issue here does not exempt them from judicial review. What is more, unlike the agency practices in *Sloan*, a stark feature of deferred action initiatives at issue is their frequently changing scope and criteria over the years. In the absence of any regulations controlling the practice, internal agency memoranda directing agency personnel not to pursue the removal of otherwise removable aliens have undergone frequent changes, in many cases corresponding to the political concerns of different administrations. *See* IRLI Br. (ROA 1219-1231) (providing a summary history of changes in former Immigration and Naturalization Service (INS) and DHS deferred action policies between 1940 and 2000).

Significantly, Appellants have not identified to which of these distinct deferred action policies Congress has in fact acquiesced, let alone provided any evidence that it acquiesced to any particular policy. But even if Appellants could actually demonstrate that Congress had acquiesced to a prior deferred removal policy in the past, it would undermine their legal claim to total agency discretion. Once Congress has acquiesced to an agency interpretation, the agency no longer has discretion to change the interpretation. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 152–56 (2000). As Appellants' interpretation has evolved over the years with different administrations, they cannot support a claim of congressional acquiescence.

The doctrine of ratification also is not applicable as Appellants cannot identify any deferred removal initiative that was ever ratified without change. Under the ratification doctrine, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). The DACA+ and DAPA policies are not statutes and thus could have never been reenacted without change as in *Lorillard*.

Even where there has been reenactment without change, *Lorillard* only creates a presumption. *AFL-CIO v. Brock*, 835 F.2d 912, 916 n.6 (D.C. Cir. 1987). Congress must not only have been made aware of the administrative interpretation, but must also have given some "affirmative indication" of such intent. *Comm'r v. Glenshaw Glass*, 348 U.S. 426 (1955). Appellants have never publicly acknowledged congressional reenactment of any policy governing deferred action and have repeatedly changed their deferred action policies—as Appellants emphatically state in their brief—at will. To the contrary, the former INS sharply changed its written policies regarding deferred action in 1981 and 1997. *See* Paul W. Virtue, Acting Executive Associate Commissioner, INS, Memorandum: *INS Cancellation of Operations Instructions* (June 27, 1997), *available at* 2 Bender's Immigr. Bull. 867.

Finally, the insurmountable hurdle to a finding of congressional

ratification of deferred action is that there can never be ratification of a regulatory interpretation that is contrary to the plain language of the statute. *Demarest v. Manspeaker*, 498 U.S. 184, 603–604 (1991).

D. Appellants misconstrue *Reno v.AAADC* as Supreme Court recognition of congressional acquiescence to DHS categorical exercises of deferred action.

Appellants argue that "Congress enacted 8 U.S.C. 1252(g) in 1996 to protect discretionary determinations concerning deferred action from judicial intrusion. Appellants' Br. at 8 (citing *AAADC*, 525 U.S. at 483-85). Appellants argue that the Supreme Court decision in *AAADC* established that "at each stage of the removal process, the Executive has discretion to abandon the endeavor," Appellants' Br. at 6, and moreover that "Congress enacted 8 U.S.C. § 1252(g) in 1996 to protect discretionary determination concerning deferred action from judicial intrusion." *Id.* at 8 (citations omitted). Appellants' reliance on the IIRIRA court-stripping provision codified at 8 U.S.C. § 1252(g) is misplaced and readily distinguishable.

First, the *AAADC* comments about deferred action were dicta, and dicta referring to pre-IIRIRA practices, at that. The Supreme Court in *AAADC* held that the § 1252(g) bar is construed narrowly. 525 U.S. at 487. Section 1252(g) does not nullify the mandates of Congress restricting prosecutorial discretion during the exclusion process. IIRIRA did circumscribe the authority of federal courts to hear appeals of agency decisions to remove an inadmissible alien, but only for "any

cause or claim *by or on behalf of any alien* arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or executive removal orders ….” 8 U.S.C. § 1252(g) (emphasis added). Similarly, IIRIRA’s “zipper clause” restriction on judicial review in a different paragraph of 8 U.S.C. § 1252 only applies by its explicit terms to “any action taken or proceeding brought to remove an alien from the United States.” INA § 242(b)(9), 8 U.S.C. § 1252(b)(9).

The plain language of the two clauses only restricts judicial review for (1) claims brought by or on behalf of any alien, and (2) actions brought to remove an alien. Neither ground applies to this case, which is a challenge by Appellees to the Secretary’s categorical deferred action initiatives based on APA procedural, APA substantive, and constitutional separation of powers causes of action. Furthermore, no alien is a party to this suit, or directly constrained by the preliminary injunction at issue.

II. Appellants are unlikely to prevail on their claim that 8 U.S.C. § 1324a delegates unlimited discretion to the DHS Secretary to issue work permits to inadmissible nonimmigrant aliens.

On appeal, Appellants rely on a misleadingly constructed chain of claims of delegated authority to grant work authorization to DACA+ and DAPA beneficiaries. First, Appellants claim that “while work authorization may follow from the Secretary’s choice of deferred action, an alien’s ability to obtain work

authorization flows from a decades-old, unchallenged regulation that was itself the product of notice-and-comment rulemaking." Appellants' Br. at 4. Appellants clarify that "work authorization is a consequence of DHS's discretionary decision to defer action, not a legal benefit that the Guidance itself confers." *Id.* at 46-47.

Appellants' authority for their "decades-old unchallenged regulation" claim is misleading. Of the four federal register notices cited, two are completely irrelevant to any fact or point of law in this case.[3] The other two (a provisional 1980 notice and final 1981 notice, adding a new regulation at 8 C.F.R. § 109.9(b)(6)) provided employment authorization for aliens whose deferred action status was "recommended by the District Director." 45 Fed. Reg. 19563 (Mar. 26, 1980); 46 Fed. Reg. 25079 (May 5, 1981). But this regulation does not help Appellants as INS withdrew the regulation in May 1987 because the passage of IRCA had fundamentally changed the controlling statutory scheme. 52 Fed. Reg. 16220 (May 1, 1987). Even if the regulation was still operable it would not help Appellants as Judge Hanen found below that the 2014 DACA+ and DAPA Guidance Directives severely restrict the discretion of District Directors to deny form and fee-based applications for these immigration benefits from aliens who are prima-facie eligible. Mem. at 10-11, 108-109, 111-112.

Second, Appellants claim that "Congress has made it unlawful to employ an

[3] 44 Fed. Reg. 43480 (1979) (Agricultural Credit Act of 1978); 46 Fed. Reg. 25081 (1981) (Border Crossing Cards).

'unauthorized alien,' *see* 8 U.S.C. § 1324a(a)(1), but has provided that an alien 'authorized to be so employed by the Attorney General' (now the Secretary) is not subject to this prohibition, *id*. § 1324a(h)(3)." Appellants' Br. at 8. Appellants' claim is contrary to the plain text of the IRCA statute. IRCA section 101 (creating a new section § 274a of the INA codified at 8 U.S.C. § 1324a) for the first time criminalized and imposed civil sanctions on the act of hiring an alien who is not authorized to work in the United States. Section 274a(h)(3) defines the term *unauthorized alien* as those whom it is unlawful for employers to hire:

> (3) DEFINITION OF UNAUTHORIZED ALIEN.—As used in this section, the term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.

(codified at 8 U.S.C. § 1324a(h)(3)). Section 101 of IRCA does not grant Appellants any authority to allow aliens to work. It merely prohibits *employers* from hiring unauthorized aliens. The exclusion of those "authorized to be employed by … the Attorney General" from being unauthorized aliens simply makes the section work rationally with the rest of IRCA. § 1324a(h)(3)(B). Other sections of IRCA contain seven specific, mandatory directives for the Attorney General to authorize aliens without visas who are in the legalization process to engage in employment. *See*, *e.g.*, § 201 ("Legalization"), 100 Stat. 3397, 3399 (two); § 301 ("Lawful Residence for Certain Special Agriculture Workers"), 100

Stat. 3418, 3421 (two), 3428. In the absence of the clause "or by the Attorney General" in § 1324a(h)(3)(B), such aliens would be authorized to work but it would be illegal for employers to hire them. *See* S. Rep. 99-132, p. 43 (1986) ("An alien employed as a transitional worker and in possession of a properly endorsed such work permit or other documentation shall, for purpose of INA section 274A, be considered to be authorized by the Attorney General to be so employed during the period of time indicated on such documentation.").

Furthermore, Appellants' new interpretation of § 1324a nullifies other provisions of the INA. The court should scrutinize Appellants' claim of general executive discretion *in pari materia* with the multiple mandatory INA provisions regulating employment-based admissions. *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 315-16 (2006) (stating a body of statutes addressing the same subject matter is read as if they were one law). Looking at the INA as a whole, Appellants' claim of unfettered executive discretion over alien employment authorization would nullify the many provisions of the Act governing alien employment. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (stating courts have a "duty to give effect, if possible, to every clause and word of a statute") (internal citations omitted).

One example is INA § 212(a)(5)(A), which bars the admission of "any alien who seeks to enter the United States for the purpose of performing skilled or

unskilled labor" unless the Secretary of Labor—not DHS—has "determined and certified" that such employment will not adversely affect the employment, wages or working conditions of similarly employed U.S. workers. 8 U.S.C. § 1182(a)(5)(A).[4] Aliens who have already been admitted who are "present in the United States in violation of this Act" and fail to request and receive labor certification from the Secretary of Labor, are also removable. 8 U.S.C. § 1227(a)(1)(A)–(B).

Other relevant examples of immigration statutes that would be nullified by the construction of § 1324a(h)(3) urged by Appellants include 8 U.S.C. § 1101(a)(15)(H)(i)(B), which restricts the admission of nonimmigrants coming temporarily to the United States to perform services in specialty occupations to those with a labor condition application approved by the Secretary of Labor, 8 U.S.C. § 1184(c)(2)(E), which expressly authorizes employment for spouses of aliens admitted as managerial or specialist employees of foreign corporations, and 8 U.S.C. § 1105a, which grants the secretary discretion to authorize employment

[4] Section 1182(a)(5)(A) was restored in the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 101-649, § 302(e)(6), 105 Stat. 1733, 1746. Under the canon *leges posteriores priores contrarias abrogant*, it must be considered as precedential when construing the IRCA definition of unauthorized alien. *See Beals v. Hale*, 45 U.S. 37, 53 (1846) (applying rule). Nonetheless, there is no conflict that requires invoking that canon unless one adopts the revolutionary new DHS interpretation of § 1324a. *Id*.

for battered spouses of certain nonimmigrants.[5] Nothing in the legislative history of IRCA or subsequent federal legislation regarding the employment of aliens supports Appellants' freewheeling interpretation of § 1324a.

There is no precedent in the Fifth Circuit holding that § 1324a gives Appellants the authority to authorize aliens to work in the United States. Appellants have cited a Ninth Circuit opinion, *Arizona Dream Act Coalition v. Brewer*, in support of their position. 757 F.3d 1053, 1062 (9th Cir. 2014). However, *Arizona Dream Act* is directly contradicted on that point by another opinion from the Ninth Circuit. *Guevara v. Holder,* 649 F.3d 1086 (9th Cir. 2011). In *Guevara*, the Ninth Circuit held that there was "nothing in the statute [8 U.S.C. § 1324a] or administrative regulation to provide for more" than "merely allow[ing] an employer to legally hire an alien (whether admitted or not) while his [adjustment of status] application is pending." *Id.* at 1095.

The Court should reject Appellants' power-grab and join the otherwise unanimous view of its sister Circuits, supported by Supreme Court dicta, that the purpose of § 1324a is to restrict alien employment (not to grant Appellants

[5] This last provision states that the Secretary "may" authorize employment under specific circumstances. If the Secretary has unfettered discretion as Appellants claim, Congress would not have needed to vest the Secretary with this discretion. Appellants' theory transforms this provision into surplusage, which courts resist. *Yates v. U.S.*, 135 S. Ct. 1074, 1085 (2015) (stating "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme") (citation omitted).

unfettered discretion to authorize aliens to work). *See Rivera v. United Masonry*, 948 F.2d 774, 776 (D.C. Cir. 1991); *Richmond v. Holder*, 714 F.3d 725, 728 n.1 (2d Cir. 2013); *Castro v. AG of the U.S.*, 671 F.3d 356, 369 n.9 (3d Cir. 2012); *Ferrans v. Holder*, 612 F.3d 528, 532 (6th Cir. 2010); *Guevara*, 649 F.3d at 1095; *U.S. v. Alabama*, 691 F.3d 1269, 1289 (11th Cir. 2012); *Hoffman Plastic Compounds Inc., v. NLRB*, 535 U.S. 137, 147 (2002).

III. Appellants are unlikely to prevail on their claim that DHS decisions to grant categorical amnesty to inadmissible nonimmigrant aliens are shielded from judicial review.

Appellants argue that principles of nonjusticability applied to the field of immigration law preclude Appellees from demonstrating Article III standing. Appellants' Br. 20-22. In contrast, the District Court below found standing based, *inter alia*, on direct harm to Appellees' proprietary interests, *see* Mem. at 25, 28, 35, and failure of Appellants to comply with the procedural notice-and-comment requirements of the APA. Mem. at 108-112.

To assess the challenge to Appellees' standing, this Court must consider the question under Appellees' view of the merits: For standing purposes, "both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *see also Catholic Social Service v. Shalala*, 12 F.3d 1123, 1126 (D.C. Cir. 1994) (stating courts "must assume the validity of a

plaintiff's substantive claim at the standing inquiry," even if that "substantive claim may be difficult to establish"). Failure to recognize this presumption is among the most notable flaws in the arguments of the various *amici* who represent state and local government agencies in support of Appellants.

The duty of the Fifth Circuit in responding to Appellants' standing challenge is not to decide which side best describes the policy outcomes of the DACA+ and DAPA initiatives. Instead, when the case or controversy turns on a dispute over the source of agency authority, "an agency interpretation that is inconsistent with the design and structure of the statute as a whole, does not merit deference." *Utility Air Regulatory Group v. EPA,* 134 S.Ct. 2427, 2442 (2014). In other words, the question on appeal is not which party is correct but, assuming *arguendo* that the Appellees are correct on their substantive claim, whether the District Court was presented with a live case or controversy appropriate for the federal judicial power.

Moreover, in seeking review of Appellants' action under the APA's procedural provisions, the District Court correctly concluded that there is a favorable presumption that Appellees satisfy the necessary standing requirements. Mem. at 20 (citing *Mendoza v. Perez,* 754 F.3d 1002, 1012 (DC Cir. 2014)).

As to Appellees' argument that the costs of granting driver's licenses (and other state-funded services) to the thousands of aliens in Texas and millions nationwide who would become eligible solely through a grant under the DACA+

or DAPA initiatives, the District Court found that Appellants conceded that "a direct and genuine injury to a State's own proprietary interests may give rise to standing." *Id.* (citing Defs.' Resp. to Mot. for Prelim. Inj., Doc. No. 38, at 23). The District Court found that the DAPA program would directly harm Appellees' driver's license programs, by (1) furnishing the documentation necessary to apply for a license and (2) providing an economic incentive for application. Mem. at 32-33. These costs represented "a direct injury to their fiscal interests." *Id.*

As to the second ground for Appellees' standing, there is no dispute that Appellants did not comply with the APA notice and comment requirements. Appellants only challenge the District Court's characterization of the DACA+ and DAPA initiatives as legislative rulemaking. Appellants' Br. at 36-37.

The APA extends the right of judicial review to agency actions "for which there is no other adequate remedy in a court." Mem. at 19 (citing 5 U.S.C. § 704). When an agency fails to follow required APA rulemaking procedures, that failure renders the resulting agency action void *ab initio. Chrysler Corp. v. Brown,* 441 U.S. 281, 303 (1979). Separate indication of congressional intent to make agency action reviewable under the APA is not necessary, as a cause of action for judicial review of agency action is available under the Act absent some clear and convincing evidence of legislative intention to preclude review. *Japan Whaling Asso. v American Cetacean Soc.*, 478 US 221 (1986). "The fact that DAPA

undermines the INA statutes enacted to protect the states puts the Plaintiffs squarely within the zone of interest of the immigration statutes at issue." Mem. at 36.

Appellants have failed to meet their burden of persuasion to overcome the presumption that Appellees have APA standing, which alone is sufficient to sustain the preliminary injunction going forward. Standing doctrine has no nexus requirement outside standing. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78-81 (1978). "[O]nce a litigant has standing to request invalidation of a particular agency action, it may do so by identifying all grounds on which the agency may have failed to comply with its statutory mandate." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 353 & n.5 (2006) (citations omitted).

CONCLUSION

For the foregoing reasons, the Court should sustain the District Court's issuance of a preliminary injunction.

DATE: May 11, 2015

Respectfully Submitted,
Amici Curiae,
By their Attorneys,

/S/ MICHAEL HETHMON
Dale L. Wilcox, Esq.*
Michael M. Hethmon, Esq.
Immigration Reform Law Institute
25 Massachusetts Ave, NW, Suite 335
Washington, DC 20001
Phone: 202-232-5590
Fax: 202-464-3590
Email: litigation@irli.org

*DC Bar admission pending;
Under supervision

CERTIFICATE OF COMPLIANCE

I certify that pursuant to F.R.App.P. 32(a)(7)(c), the attached *amici curiae* brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010, in 14 point font size, Times New Roman, and contains 6,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

May 11, 2015
Date

/S/MICHAEL M. HETHMON
Michael M. Hethmon, Esq.
Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2015, I electronically filed a copy of the foregoing Brief *Amici Curiae* using the ECF System for the United States Court of Appeals for the Fifth Circuit, which will send notification of that filing to all counsel of record in this litigation.

Dated: May 11, 2015

/S/ MICHAEL HETHMON
Michael M. Hethmon
Attorney for *Amici Curiae*