Case No.15-15307

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Arizona Dream Act Coalition, *et al.*,
Plaintiffs-Appellees
v.
Jan K. Brewer, *et al.*,
Defendants-Appellants

Appeal from Injunction Issued Against Defendant-Appellants by the
United States District Court for the District of Arizona, (Campbell, J.)
Case No. CV12-02546

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLANTS AND SUPPORTING REVERSAL OF THE DECISION BELOW

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INTEREST OF AMICUS

Immigration Reform Law Institute Inc. (IRLI) previously filed an Amicus Brief in this case. Doc. No. 16. IRLI's interest remains the same. IRLI files this brief to ensure this Court is presented with an accurate history of executive discretion and the limited remedies available in this case.[1]

ARGUMENT

On July 17, 2015, this Court requested supplemental briefs addressing preemption, the Take Care Clause, and the Separation of Powers. IRLI supports the arguments made in Defendant-Appellant's ("Arizona") Supplemental Brief. IRLI's brief addresses aspects of these questions not fully addressed by either party.

I. ALTHOUGH WAIVED, THE COURT MAY CONSIDER PREEMPTION.

Both parties are correct that this Court may address preemption, but for reasons different than either states. *See* DREAM Supp. Br. 4; Ariz. Supp. Br. 25.

Plaintiff-Appellees waived the issue of preemption by not raising it in their merits brief. They inaccurately claim that "[b]oth parties addressed preemption concerns throughout their briefs[,]" DREAM Supp. Br. 6. Not only was

[1] Pursuant to Fed. R. App. 29(a), counsel for the parties do not object to the filing of this supplemental brief. No counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, has contributed money that was intended to fund preparing or submitting the brief.

preemption not argued in Plaintiff-Appellees' merits brief, the terms "preempt" and "preemption" appear nowhere in their brief. Their merits brief solely addressed equal protection and the constitutionality of DACA.

Furthermore, Arizona's Opening Brief notified Plaintiff-Appellees that they risked waiving their preemption claim. Arizona Opening Br. 18-19. Plaintiff-Appellees should have raised preemption at that point. Their failure resulted in waiver. *See United States v. Salman*, 2015 U.S. App. LEXIS 11555, *8 (9th Cir. 2015) (Appellant must "specifically and distinctly" argue an issue).

Arizona argues that "the Court's call for supplemental briefing, combined with the considerations articulated in *Olympia Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006), permit consideration of preemption in this case." Ariz. Supp. Br. 24. While supplemental briefing may permit consideration of preemption, *Olympia Pipe Line* is inapplicable. That case addressed whether a third party could contract away federal preemption and held that "[p]reemption is a power of the federal government, not an individual right of a third party that the party can 'waive'" in a contract. *Id.* at 882-83. Essentially, parties cannot circumvent preemption through contract.

Swan v. Peterson, 6 F.3d 1373, 1383 (9th Cir. 1993), also does not apply. *Swan* addressed whether an issue raised only by an Amicus could be reviewed by the court. *Swan* held that a court may address the issue if it "touches upon an issue

of federalism or comity that could be considered *sua sponte*." *Id.* However, *Swan* does not state that a court must address preemption if it is waived. This Court has repeatedly declined to address waived preemption claims. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 937 (9th Cir. 2008); *Brannan v. United States Student Aid Funds, Inc.*, 94 F.3d 1260, 1266 (9th Cir. 2007).

Despite waiver, this Court has discretion to address preemption if one of three exceptions apply: "(1) for good cause shown or if a failure to do so would result in manifest injustice, (2) when it is raised in the appellee's brief, or (3) if the failure to raise the issue properly did not prejudice the defense of the opposing party." *Salman*, 2015 U.S. App. LEXIS at *8 (citations and internal quotations omitted). The first two exceptions do not apply. The third exception likely applies because this Court sought supplemental briefing. *Id.* ("As both parties have had a full opportunity to brief this issue and to address it at oral argument, the Government cannot complain of prejudice."); *see also Alcaraz v. INS*, 384 F.3d 1150, 1161 (9th Cir. 1995) ("[T]he government is not prejudiced by [the Appellant's] failure to raise the issue ... because after oral argument we called for and received supplemental briefs by both parties ...").

Plaintiff-Appellees also assert that the constitutionality of DACA was waived—given their waiver issues, they take an interesting position. *See* DREAM Supp. Br. 35. Regardless, like preemption this Court sought supplemental briefing

on DACA's constitutionality, negating whatever waiver concerns Plaintiff-Appellees believe might have existed. Even if the issue were waived, which it was not, Arizona has a stronger argument than Plaintiff-Appellees for favorable discretion from this Court. Both parties fully briefed DACA's constitutionality on the merits, meaning that the second *Salman* exception also applies.

II. COURTS MUST AVOID ADDRESSING BROAD CONSTIUTTIONAL QUESTIONS WHN POSSIBLE.

Amicus agrees that there is no order in which the Court must address preemption and equal protection because both are constitutional questions. DREAM Supp. Br. 10. However, before addressing those issues, this Court must address any non-constitutional issues raised by Arizona which could allow this Court to avoid ruling on a constitutional question. *See* Ariz. Supp. Br. 2-6; *Clark v. City of Lakewood*, 259 F.3d 996, 1016 n.12 (9th Cir. 2001); *Meinhold v. United States DOD*, 34 F.3d 1469, 1476 (9th Cir. 1994).[2]

III. EVEN IF PLAINTIFF-APPELLEES ARE SUCCESSFUL, THEY ARE NOT PERMITTED TO OBTAIN AN ARIZONA DRIVER'S LICENSE.

Plaintiff-Appellees' essentially argue that they are injured because the ADOT revised policy denies them driver's licenses. However, they omit that even

[2] To the extent Arizona's force of law argument raises a constitutional question, the Court must address that narrow issue before ruling on the broader grounds of preemption and equal protection. *Jones v. Bates*, 127 F.3d 839, 855 (9th Cir. 1997) (citations omitted).

if they prevail, federal and state law still prohibit them from obtaining Arizona driver's licenses. Thus, the only remedy available is an injunction prohibiting Arizona from providing driver's licenses other than in accordance with federal law.

"[A] court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation." *United States v. Oakland Cannabis Buyers' Coop*, 532 U.S. 483, 497 (2001) (citation and internal quotations omitted). "A district court cannot ... override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited." *Id.* at 497. "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is ... for the courts to enforce them when enforcement is sought." *Id.* (citation omitted). "Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute." *Id*.

A driver's license is a public benefit provided by a state. *See* Ariz. Supp. Br. 51; *see also United States v. Alabama*, 691 F.3d 1269, 1298 (11th Cir. 2012) (cited by *Texas v. United States*, 787 F.3d 733, 754, n.48 (5th Cir. 2015)). Congress expressly prohibits states from providing unlawfully present aliens, including DACA recipients, most public benefits. 8 U.S.C. § 1621(a). However, "through the enactment of a State law ... which affirmatively provides for such eligibility[,]" a State may choose to provide public benefits. 8 U.S.C. § 1621(d). Neither a DHS

policy change nor a state administrative policy may circumvent this statutory threshold for public benefit eligibility.

Arizona has not affirmatively passed a law granting illegal aliens driver's licenses. Instead, Arizona forbids aliens from obtaining drivers licenses who cannot demonstrate lawful presence. Ariz. Rev. Stat. 28-3153(D). Arizona has not "convey[ed] a positive expression of legislative intent to opt out of section 1621(a) by extending state or local benefits to unlawful aliens." *Kaider v. Hamos*, 975 N.E. 2d 667, 674 (Ct. App. Ill. 2012). This Court lacks the authority to grant a benefit prohibited by statute. *See Oakland Cannabis*, 532 U.S. at 497. Instead, if Plaintiff-Appellees are successful, "the appropriate remedy is a mandate of *equal* treatment, [which] can be accomplished by withdrawal of benefits from the favored class ...." *Heckler v. Mathews*, 465 U.S. 728, 740 (1984) (emphasis in original).[3]

IV. DACA IS UNCONSTITUTIONAL *ULTRA VIRES* AGENCY ACTION.

A. Immigration statutes control over conflicting Executive Branch policymaking.

The U.S. Constitution delegates almost all immigration-related powers to Congress. "The conditions for entry of every alien, the particular classes of aliens

[3] This same analysis is true for preemption. Even if this Court finds the ADOT policy somehow preempted, § 1621(a) still prohibits DACA aliens from obtaining driver's licenses. *Oakland Cannabis*, 532 U.S. at 497

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). Congress's plenary authority over aliens under Article I, section 8, clause 4 of the United States Constitution, is not open to question. *INS v. Chadha*, 462 U.S. 919, 940 (1983). Congress has exercised its plenary authority by creating a comprehensive legislative scheme, the Immigration and Nationality Act (INA), which delegates carefully circumscribed enforcement duties to the executive branch. *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968, 1973 (2011).

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); s*ee also Louisiana Pub. Serv. Comm'n v. FCC* 476 U.S. 355, 374 (1986) ("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.").

DHS may not ignore statutory mandates or prohibitions merely because of policy disagreements with Congress regarding resource allocations. *See Lincoln v. Vigil*, 508 U.S 182, 193 (1993).

Similarly, DHS may not ignore mandates in the immigration statutes simply because Congress has not yet appropriated all of the money. *See City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977). Nor may it rely on speculation about "future congressional action" without "grave[ly] upset[ing] 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).

Plaintiff-Appellees' belief that the Executive Branch possesses "absolute" prosecutorial discretion to categorically defer essentially all civil removal proceedings, notwithstanding clear INA mandates, is dangerously overbroad. DREAM Supp. Br. 52. "Prosecutorial discretion does not include the power to disregard statutory obligations that apply to the executive branch[.]" *In re Aiken County*, 725 F.3d at 266 (citing *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007)). Prosecutorial discretion is used to "not enforce a law against private

parties; it does not encompass the discretion not to follow a law imposing a mandate or prohibition on the Executive Branch." *In re Aiken*, 725 F.3d at 266, n.10.

The President's Article II prosecutorial discretion powers cannot nullify statutorily mandated admission and removal procedures. Removal is a civil action, not punishment. *United States ex rel. Brazier v. Commissioner of Immigration*, 5 F.2d 162, 164 (2d Cir. 1924) ("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); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). The President can exercise prosecutorial discretion under Article II pardon powers in *criminal* cases for any reason; but, he must comply with statutory mandates in the civil context. *See In re Aiken*, 725 F.2d at 266, n.10. Whether statutory or discretionary, relief from or deferral of civil removal is an affirmative grant of an immigration benefit to the non-citizen recipient, not a punishment subject to the agency's prosecutorial discretion. *Kucana v. Holder*, 558 U.S. 233, 246 (2010).

B. Congress barred or displaced presidential authority to grant deferred action relief on a categorical basis.

The comprehensive system of federal immigration laws, in particular the historic reforms to the INA enacted under the Anti-Terrorist Effective Death Penalty Act of 1996 (AEDPA),[4] the Illegal Immigration Reform and Immigrant Relief Act of 1996 (IIRIRA)[5], the Immigration Act of 1990 (IMMACT 90)[6], and the REAL ID Act of 2005[7], have restricted the authority of the executive branch to independently grant deferred action relief on a categorical basis. 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). "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." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985).

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[4] Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996).
[5] Pub. L. No. 104-208, 110 Stat. 3009 (Sep. 30, 1996).
[6] Pub. L. No. 101-649, 104 Stat. 2099 (Nov. 29, 1990).
[7] Pub. L. No. 109-13, 119 Stat. 302 (May 11, 2005)

Through IIRIRA, Congress indisputably intended to "to prevent delay in the removal of illegal aliens."[8] The reforms provided the executive branch with meaningful standards to administer the alien admission and removal processes which a court can assess—one of the circumstances where judicial review of agency non-enforcement actions is authorized. *Heckler v. Chaney*, 470 U.S. at 830.[9] Today, this core legislative framework is codified in eight INA sections of universal application.

1. INA §103 (Powers and Duties of the Secretary)

Congress has delegated two *mandatory* statutory responsibilities to the Secretary of Homeland Security—the "power and duty" to administer and enforce all laws relating to immigration, 8 U.S.C. §1103(a)(1), and to guard against "the illegal entry of aliens." *Id.* at (5). Congress limited its grants of *discretionary* authority to the Secretary to two functions: (1) establishing regulations and performing other acts and (2) appointing employees. *Id.* at (3), (5). As no DACA regulations have been issued or even proposed, the INA provisions governing the

[8] *Tutu v. Blackman*, 9 F. Supp. 2d 534, 536-537 (E.D. Pa. 1998), *citing* H.R. Rep. No. 104-469 (I), 104th Cong., 2d Sess. 359, 463 (1996).

[9] In *Perez v. Casilla*, 903 F.2d 1043 (5th Cir 1990), the Fifth Circuit upheld INS nonenforcement discretion based on former INA §244. The court called it a "permissive statute" with "no standards ... that would provide courts with law to apply." *Id.* at 1048. Congress responded in IIRIRA by replacing former §244 with current INA §240B, which imposed meaningful specific restrictions on voluntary departure that are in no way "permissive."

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.

2. INA §101(a)(13) (Admission defined)

The most significant AEDPA/IIRIRA reform for the rollback of executive discretion was replacing physical entry into the United States as the threshold criteria for lawful presence with the inspection and admission of all previously non-admitted aliens, as "applicants for admission."[10] IIRIRA made application for admission into the United States the fundamental obligation imposed on aliens. Admission is defined as "a lawful entry ... into the United States *after* inspection and authorization by an immigration officer." 8 U.S.C. §1101(a)(13)(A) (emphasis added). In effect, IIRIRA §301 created a virtual legal border which all aliens must individually apply for and receive permission to cross, in addition to the physical frontier.

3. INA § 235 (Inspection by immigration officers)

Congress has mandated strict non-discretionary standards for the universal inspection of aliens, to include a determination of each alien's admissibility. The

[10] AEDPA §414 provided that an alien "found" in the United States who has not been inspected and admitted is subject to examination and exclusion (expedited removal) proceedings, created by AEDPA §422. Entrants without inspection ("EWIS") as designated applicants for admission were thus subject to "summary exclusion" and no longer eligible for suspension of deportation. IIRIRA repealed AEDPA §§ 414 and 422. IIRIRA §301 then replaced the definition of entry in INA §101 with a new definition of "admission." 8 U.S.C. §1101(a)(13).

INA clarifies that "an alien present in the United States who has not been admitted *shall*[11] be deemed for purposes of this Act an applicant for admission." 8 U.S.C. §1225(a)(1).

All aliens must appear in person before an immigration officer for inspection. *Clark v. Suarez Martinez*, 543 U.S. 371, 373 (2005). Prior to 1996, the INA required inspection only for "aliens arriving at ports ... at the discretion of the Attorney General." 8 U.S.C. §1225(a) (1995). In 1996, Congress removed that discretionary language to mandate that DHS inspect *every* applicant for admission: "All aliens ... who are applicants for admission ... shall be inspected by immigration officers." 8 U.S.C. §1225(a)(3). Executive branch officials may not waive or decline to comply with this congressional mandate. *Clark*, 543 U.S. at 373. Congress also requires all immigration officers to detain aliens for removal proceedings who are not clearly and beyond a doubt entitled to be admitted. 8 U.S.C. §1225(b)(2)(A); *see Richardson v. Reno*, 162 F.3d 1338, 1348 (11th Cir. 1998) (noting IIRIRA created new stringent custody rules for aliens).[12]

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[11] When a statute "uses the word 'shall', Congress has imposed a mandatory duty upon the subject of the command." *United States v. Monsanto*, 491 U.S. 600, 607 (1989); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress' "use of a mandatory 'shall' ... to impose discretionless obligations").

[12] On close scrutiny the President's supposed discretionarypower to *not* commence removal proceedings for aliens who have failed inspection seems nothing more than an extra-regulatory agency claim that DHS may decline to file the required charging document, the Notice to Appear (NTA), with the immigration court. *See*,

4. INA §§ 211, 214, 291 (Alien's burden of proof).

In three closely related statutes, Congress restricted executive authority from assuming or waiving an alien's statutory burden to establish immigrant status, or entitlement to admission. First, 8 U.S.C. §1184(d) mandates that "[e]very alien," other than certain nonimmigrants, "shall be presumed to be an immigrant until he establishes to the satisfaction of ... the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant visa …." That section also mandates that admission of "any alien as a nonimmigrant" may only be "for such time and under such conditions as the [Secretary of Homeland Security] may by regulations prescribe ...." *Id.* at (a)(1). Second, 8 U.S.C. §1181(a) mandates that no immigrant be admitted to the United States unless at the time of application for admission he has a valid immigrant visa and presents a valid passport or other suitable document. Third, 8 U.S.C. §1361 mandates that the burden of proof is on the alien to establish eligibility to receive a visa and that he is

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e.g., *Matter of Avetisyan*, 25 I&N Dec. 698, 690-91 (BIA 2012); *Matter of Bahta*, 22 I&N Dec. 1381, 1391-92 (BIA 2000) (citing the jurisdiction stripping provision 8 U.S.C. §1252(g)). However, INA §235(b)(2)(A) contains a double mandate that supercedes informal "filing" discretion: (1) The unadmitted applicant "shall be detained" and (2) such detention shall be "for a [removal] proceeding." *Succar*, 394 F.3d at 10. INA §239(a)(1) also makes service of an NTA mandatory ("shall be given"). The INA thus forecloses the "no paperwork" loophole on which DACA so furtively relies.

not inadmissible. If the burden is not sustained, the alien is "presumed to be in the United States in violation of law." *Id.*

Fulfilling the statutory burden of proof created by these provisions is a required precondition for admission. The statutes are unambiguously mandatory, and cannot be waived or excused through agency discretion. *See Cardoza-Fonseca*, 480 U.S. at 443.

Read together, the 8 U.S.C. §1225 mandates of application for admission and inspection, placement of the burden of proof upon the alien applicant for admission by sections 1181, 1184, and 1361, and the presumption under section 1361 that aliens who fail to comply with those mandates are unlawfully present, confirm that Congress imposed inspection as a non-discretionary duty on both DHS personnel and applicants for admission, including DACA applicants.

5. INA § 240 (Removal proceedings)

In IIRIRA, Congress restrained or repealed prior executive discretion to provide relief from removal. IIRIRA repealed the former authority of the Attorney General to authorize determinations other than deportation. *See* IIRIRA §306(a) (repealing former INA §242(b)). IIRIRA also circumscribed the pre-1996 discretion of immigration judges to grant relief from removal. IIRIRA §§ 304(b) (repealing INA §212(c)) and 308 (repealing INA §244(a)).

Now, 8 U.S.C. §1229a(a)(1) mandates that "an immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien." Additionally, "a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." *Id.* at (3). This section also limits to immigration judges the exercise of discretionary authority over relief from removal during the removal proceeding. *Id.* at (c)(4)(B).

Congress also shifted the burden of proof of eligibility for admission or relief during proceedings from the executive branch to the alien. IIRIRA imposed new and exacting burdens of proof on the alien to establish his or her eligibility for admission or relief from removal. *See id.* at (c)(2) ("in the proceeding the alien has the burden of establishing – (A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under [INA] section 212; or (B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission."). "Beyond doubt" is more stringent than the criminal conviction standard of "beyond a reasonable doubt." Mailman et al., *Immigration Law & Practice*, rel. 133, § 64.03[2][b] (2011).

In 2005, Congress further restricted executive authority to independently waive proof of eligibility for "any form of relief granted in the exercise of

discretion." The REAL ID Act, § 101(d), clarified that the alien—and not the government—has the burden of proof to establish *during* removal proceedings that with respect to "*any form of relief that is granted in the exercise of discretion*, that the alien merits a favorable exercise of discretion." 8 U.S.C. § 1229a(c)(4)(A) (emphasis added).

6. INA § 241 (Detention and removal of aliens ordered removed)

For aliens in federal custody awaiting final adjudication in a removal proceeding, Congress restricted the exercise of discretion by DHS over detention to one of three choices: (1) Continue to detain the alien, (2) release the alien on a bond with security and conditions approved by the Secretary, or (3) release the alien under the very restricted terms of a "conditional parole." 8 U.S.C. §1226(a).[13] "When an alien is ordered removed, the [Secretary] shall remove the alien from the United States within a period of 90 days ...." 8 U.S.C. §1231(a)(1)(A). Detention is mandatory during that period. *Id.* at (2).

Not until after the immigration judge issues a final order of removal has Congress delegated any significant discretion to DHS. DHS may permit most aliens, including likely DACA recipients, to voluntarily depart the United States at the alien's own expense in lieu of removal proceedings, but can only delay departure for up to 120 days. 8 U.S.C. §1229c.

[13] Detention during removal proceedings is mandatory for a criminal alien within one of the categories described in 8 U.S.C. § 1226(c).

After the removal period has commenced, Congress restricted executive discretionary authority to two actions: (1) Release certain aliens detained beyond the statutory removal period under an order of supervision, *see* 8 U.S.C. § 1231(a)(6), or (2) stay the removal order if immediate removal is "not practical" for an alien detained upon arrival at a port of entry. *Id.* at (c)(2).[14] In this phase, DHS may exercise discretion in selecting certain options which will most efficiently effect the removal or voluntary departure. *See, e.g.*, 8 U.S.C. §§ 1229c, 1253(a)-(b).

Today, no INA provision authorizes categorical extra-statutory deferrals of removal, or deferred action, by any executive agency. The phrase "deferred action" appears in just two subsections of the INA and in one other uncodified provision. *See* 8 U.S.C. §§ 1154(a)(1)(D)(i)(IV) (eligibility of domestic violence victims), 1227(d)(2) (denial of administrative stay does not preclude alien from applying for other immigration benefits), 1151 note (extension of posthumous benefits to certain surviving spouses, children, and parents). None of these provisions authorizes categorical deferred action as agency prosecutorial discretion, and its implementation under DACA was illegitmate.

The narrow specificity of these three provisions, when contrasted with the absence of the term "deferred action" from the rest of the INA and uncodified

[14] *See also* 8 C.F.R. § 241.6.

federal immigration law, instead supports application of the statutory construction canon, *expressio unius est exclusio alterius*, that is, the one is exclusion of the other. *See Nken v. Holder*, 556 U.S. 418, 430 (2009).

B. Congress has consistently rolled back executive discretion.

Plaintiff-Appellees point to a tradition of immigration agency programs which they claim condones current deferred action practices. DREAM Supp. Br. 39. This motif of agency authority to act in the face of Congressional acquiescence is essentially a legal fantasy. In all major areas of relief from removal, the historical record shows Congress consistently acted to eliminate or restrict extra-statutory discretionary practices.

1. Pre-INA attempts to informally authorize agency discretion over deportation.

"The various acts of Congress since 1916 evince a progressive policy of restricting immigration." *Karnuth v. U.S.*, 279 U.S. 231, 242 (1929). For example, the Immigration Act of 1924 repealed statutory time limits on deportations. "Prior to 1940, the Attorney General had no discretion with respect to the deportation of an alien who came within the defined category of deportable persons. The expulsion of such a person was mandatory; his only avenue of relief in a hardship case was by a private bill in Congress." *Foti v. INS*, 375 U.S. 217, 222 (1963).

Various bureaucratic attempts to circumvent the intent of Congress to restrict relief by statute developed prior to 1952, under the general rubric of pre-

examination. In 1952, enactment of the INA ended these informal practices. *Matter of B*, 5 I & N Dec. 542 (1953). The Senate criticized the scope of pre-examination practices as excessive in providing extra-statutory relief for excludable or deportable aliens in the United States. *See* S. Rep. No. 81-1515, at 384 (1950). In their place, Congress enacted more restrictive statutory options for relief, notably INA § 212(c) (waiver of deportability), INA § 244(a) (suspension of deportation), INA § 244(b) (voluntary departure), and INA § 245 (adjustment of status).

2. Extended Voluntary Departure and Non-Priority Program

After passage of the INA, the Attorney General in the late 1950s developed an *ad hoc* categorical variant of deferred action, Extended Voluntary Departure (EVD), to provide extra-statutory relief from removal to groups of aliens present in the United States, on the basis of nationality. EVD was granted administratively to at least fifteen nationalities over a period of more than twenty years, before the enactment of the Temporary Protected Status (TPS) statute in 1990.[15] Although EVD beneficiaries were deportable aliens, they were designated for categorical relief on the basis of nationality, rather than individual evaluations of the risk of harm from dangerous conditions within the designated foreign state.[16] No statute or

[15] INA § 244 (1990), codified at 8 U.S.C. § 1254a, as amended.
[16] Gordon & Rosenfeld, *Immigration Law & Practice* (IL&P), Vol 1A, §5.3e(6a) (1981).

regulation explicitly authorized blanket grants of EVD. While former 8 U.S.C. § 1252(b) arguably gave the Attorney General authority to authorize *individual* administrative grants of EVD or other discretionary relief, that authority was repealed by IIRIRA in 1996.

The exercise of extra-statutory prosecutorial discretion practices by INS officials in *individual* civil deportation proceedings was first disclosed in 1975, under the rubric of a "non-priority program."[17] In 1979, INS rescinded this policy after a Ninth Circuit decision held that it was a humanitarian right and subject to due process requirements. *Akhbari v. INS*, 678 F.2d 575, 576 (5th Cir. 1982). In 1981, the INS issued a revised deferred action "Operations Instruction" (OI) which stated that grants of deferred action status were an administrative choice by the agency, and did not constitute a humanitarian "entitlement" to the noncitizen.[18] In 1997 the INS rescinded its 1981 deferred action OI, due to its conflict with AEDPA and IIRIRA.[19] Rescission of the OI is important evidence that the Clinton administration recognized that IIRIRA restricted federal discretion to defer removal proceedings for illegal entrants.

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[17] *See Lennon v. INS*, 527 F. 2d 187, 189 (2nd Cir 1975); *Lennon v. U.S.*, 378 F. Supp. 39, 42 n.11 (S.D.N.Y. 1974).

[18] INS Operations Instructions, O.I. §103.1(a)(1)(ii) (1981).

[19] Memorandum from Paul W. Virtue, Acting Executive Associate Commissioner, Immigration and Naturalization Service, *INS Cancellation of Operations Instructions* (June 27, 1997), available at 2 Bender's Immigr. Bull. 867.

3. INA § 244 (Temporary Protected Status).

The enactment of Temporary Protected Status (TPS) in 1990 created a single statutory procedure for the executive to address the problem of foreign nationals whose repatriation would "pose a serious threat to their personal safety" due to "ongoing armed conflict," or constitute a "substantial, but temporary disruption of living conditions in the area affected" due to an "environmental disaster in the state," or which would occur when "there exist extraordinary and temporary conditions in the foreign state that prevent aliens of the state from returning to the state in safety ...." 8 U.S.C. §1254a.[20] Importantly, TPS is the "exclusive authority of the [DHS Secretary] under law to permit aliens who are or may become otherwise deportable or have been paroled into the United States to remain in the United States temporarily because of their particular nationality or region of foreign state of nationality[,]" displacing any other similar discretion. *Id.*

4. Deferred Enforced Departure and the Foreign Policy Justification.

Despite the TPS statute, the practice of extended agency deferrals of departure for favored nationalities has continued on an extra-legal basis. The Bush I administration revived the practice in 1990 and renamed it Deferred Enforced Departure (DED). When the Clinton, Bush II, and Obama administrations implemented DED group deferrals, they mischaracterized the actions as a "grant"

[20] Former INA § 244A, 8 U.S.C. § 1254a (1952) was amended by, *inter alia*, IMMACT90, P.L. 101-649 and redesignated as INA § 244 by IIRIRA § 308.

under authority asserted to be the president's "constitutional authority to conduct the foreign relations of the United States."[21] Although the president has "the lead role ... in foreign policy," *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003), that role "do[es] not allow [the judiciary] to set aside first principles [of separation of powers]. The president's authority to act "must stem either from an act of Congress or from the Constitution itself." *Medellin*, 552 U.S. at 523.

"[W]hile the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws." *Massachusetts*, 549 U.S. at 534. The authority over immigration admissions and removals delegated to the president by Congress "in the international realm cannot be said to invite" domestic agency action concerning aliens. *Medellin*, 552 at 529. This limitation is particularly applicable to DACA beneficiaries because they have been physically residing in the United States for years, and thus fall under the domestic administrative jurisdiction of the Departments of Homeland Security and Justice.

Because the language of the statutes and DACA conflict, the third or "lowest ebb" *Youngstown* analysis requires that DACA only be upheld if it is shown that DACA was created through exclusive executive branch authority. The Supreme Court recently explained that where the question is whether Congress or the Executive is "aggrandizing its power at the expense of another branch," the proper

[21] *See*, *e.g.*, President Obama, Memorandum Extending Deferred Enforced Departure for Liberians (Aug. 6, 2011).

approach is to determine whether federal statutes "impermissively encroach on the President's 'exclusive power.'" *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012).

But the Supreme Court has never held that the scope of the president's lead foreign policy role includes an exclusive extra-statutory executive power over immigration removals. To the contrary, Congress in 1996 provided a specific way for DHS to "avoid removals that are likely to ruffle diplomatic feathers." *Jama v. ICE*, 543 U.S. 335, 348 (2005). IIRIRA also directly restricted executive branch foreign policy discretion in the sensitive area of noncooperation in repatriations by the home nations of aliens with final orders of removal. Congress directed that the executive branch act on the basis of comity, by restricting the issuance of U.S. visas to nationals of non-cooperating nations. 8 U.S.C. §1253(d).

5. INA §240B (Voluntary Departure).

Prior to 1996, the INA contained no limitation on the time period that an alien subject to deportation orders could remain in the United States pending voluntary departure. 8 U.S.C. §1252(b) (1995) ("In the discretion of the Attorney General and under such regulations as he may prescribe, deportation proceedings ... need not be required in the case of any alien who admits to [being] deportable ... if such alien voluntarily departs ....").

Congress repealed former section 1252 and replaced it with tight restrictions on the Attorney General's discretion to extend voluntary departure orders, and imposed sweeping sanctions on aliens who failed to voluntarily depart. IIRIRA, §308 (repealing §244), §304(a)(3) (enacting INA §240B, 8 U.S.C. §1299c). After 1996, permission to depart voluntarily in lieu of or prior to the conclusion of removal proceedings is now restricted to a maximum of 120 days. 8 U.S.C. §1229c(a)(2)(A).

Voluntary departure at the conclusion of a removal proceeding is limited to 60 days, while aliens not physically present in the United States for at least one year prior to service of a Notice to Appear are categorically ineligible for relief. *Id.* at (b)(1)(A), (2). IIRIRA also stripped discretion to grant "any further relief" for a period of 10 years for any alien who fails to depart within the time restrictions. *Id.* at (d)(1)(B). Congress provides no agency discretion to extend eligibility for voluntary departure, or to create discretionary administrative substitutes.

6. INA § 249 (Registry of certain long-time residents) and INA § 240A (Cancellation of removal).

DACA was claimed to be justified, in part, to protect aliens who had remained in the United States for a longer period of time. As previously noted, Congress has repeatedly rejected a law nearly identical to DACA. *See* Ariz. Supp. Br. 3. But Congress has also already addressed which longtime residents merit favorable treatment, under the "registry" statute. 8 U.S.C. §1259. That statute

restricts the grant of discretionary relief from removal on the basis of extended physical presence to aliens who have continuously resided in the United States since January 1, 1972. In 1986, Congress advanced the eligibility date to 1972 under the Immigration Reform and Control Act (IRCA) Pub. L. 99-603, 100 Stat. 3445, §203 (Nov. 6, 1986). In 1996, Congress again amended the registry statute, but did not change the date. IIRIRA §308(g)(10)(C), §413(e).

IIRIRA also repealed the suspension of deportation statute, INA §212(c), which granted relief from deportation without numerical limits to certain deportable aliens who had been continuously present for extended periods, and replaced it with cancellation of removal (COR). *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2015 (2012). COR restricted the conditions whereby aliens who have eluded inspection in the interior for many years may request discretionary relief from removal. Discretion under COR is far more circumscribed than under the pre-1996 suspension of deportation statutes. COR requires an alien to concede inadmissibility or deportability and, with few exceptions, is subject to a quota of 4,000 eligible aliens per year. 8 U.S.C. §1229b(e)(1). Inadmissible or deportable nonimmigrant aliens are ineligible until they have been continuously present in the United States for not less than ten years. *Id.* at (b)(1)(A).

Through the registry statute and cancellation of removal, Congress has addressed what it believes is the appropriate response to the issue of longtime alien residents of the United States.

7. INA § 212(d)(5)(A) (Parole).

Finally, the record of Congressional action in the area of parole authority follows the same restrictive pattern. Prior to the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (Mar. 17, 1980) the INA authorized the parole of aliens into the United States without a grant of admission, but only for (1) emergency reasons or (2) reasons deemed strictly in the public interest. 8 U.S.C. §1182(d)(5)(A)(1979). Even in that era, Congressional intent was unambiguous that the parole provisions "authorize[d] the Attorney General to act only in emergent, individual, and isolated situations ... and not for the immigration of classes or groups outside of the limit of the law." Senate Rep. No. 89-748, at 17 (1965); accord H.R. Rep. No. 89-745, at 15-16 (1965).

However, in practice the INS took advantage of the absence of express statutory restrictions on categorical grants of parole. For example, between 1959 and 1961, more than 20,000 Cubans were paroled into the United States, as opposed to being admitted as refugees fleeing political persecution.

In the 1980 Refugee Act, Congress reacted to what was perceived as an institutional abuse of discretion by prohibiting the discretionary exercise of parole

for any "alien who is a refugee," unless the Attorney General made an individualized determination that "compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207." 8 U.S.C. §1182(d)(5)(B) (1980).[22]

In 1996, Congress again restricted excessive agency discretion. IIRIRA section 602 extended the prohibition on categorical parole to all aliens, by restricting section 1182(d)(5)(A) to authorize parole "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." Congress mandated this statutory prohibition on the categorical exercise of agency discretion out of "concern that parole under section 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)).

Thus, throughout the history of the INA, Congress has consistently rolled back extra-statutory exercises of "discretion." This legislative history demonstrates that Congress has restricted, not broadened, areas of executive discretion over time.

[22] Refugee Act of 1980, § 203(f). Congress has also provided a relaxed "public interest parole," the Lautenberg Amendment, Pub. L. No. 101-167, 103 Stat. 1263 (1990), but eligibility was carefully restricted to certain favored ethnic groups.

CONCLUSION

For the reasons stated above and for the reasons stated in Amicus's prior brief, the Court should reverse the decision below.

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August 7, 2015

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 7, 2015.

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