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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of: Amicus Invitation No. 23-15-02 Notice to Appear	**Amicus Invitation No. 23-15-02**

REQUEST TO APPEAR AS AMICUS CURIAE AND BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE

REQUEST TO APPEAR AS *AMICUS CURIAE*

The Immigration Reform Law Institute respectfully requests leave to file this *amicus curiae* brief at the invitation of the Board of Immigration Appeals. *See* Amicus Invitation No. 21-30-09 (B.I.A. 2021). The *amicus curiae* brief is submitted with this request.

INTEREST OF AMICUS CURIAE

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies. For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs, drafted by IRLI staff, from IRLI's parent organization, the Federation for American Immigration Reform, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has a direct interest in the issues here.

ISSUE PRESENTED

1. Does a violation of 8 U.S.C. § 1324c(a)(2) for the knowing use of a forged, counterfeit, altered, or falsely made document in order to obtain employment and complete the employment eligibility verification Form I-9 constitute a "continuing violation" for the duration of employment at the employer to whom the document was presented? Or, does the knowing use occur only at the time the document is presented to obtain employment and complete the employment eligibility verification Form I-9?

SUMMARY OF ARGUMENT

Congress intended the knowing "use" of a fraudulent document in order to be hired by and complete Form I-9 for a U.S. employer to constitute a "continuing violation," lasting for the duration of the time services are performed for that employer. 8 U.S.C. § 1324c(a)(2) makes it a violation "to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this chapter or to obtain a benefit under this chapter." Had Congress intended to ban merely the presentation of a fraudulent document in order to be hired for a job, it would have used that or a similar word, not the word "use," which includes ongoing conduct. Congress's intention is particularly plain given its purpose, when it enacted § 1324c, of strengthening the penalties for alien employment fraud. It would have made little sense for it to do so merely by penalizing the one-time presentation of fraudulent documents to be hired, leaving the subsequent, continuing fraudulent use of those documents unpenalized.

The plain language of 8 U.S.C. § 1324c(a)(2) itself implies the same result. Violators of this provision "use" fraudulent documents not only to acquire jobs, but to keep them. This continuing use is seen when 8 U.S.C. § 1324c(a)(2) is read in conjunction with 8 U.S.C. § 1324a(a)(2). 8 U.S.C. § 1324c(a)(2) imposes an obligation on foreign nationals to refrain from committing fraud in order to obtain the benefit of employment in the United States when they are not authorized to hold such employment. 8 U.S.C. § 1324a(a)(2) imposes an affirmative obligation upon U.S. employers to refrain from continued employment of a foreign national once the employer becomes aware that the alien is, or has become, unauthorized to hold such employment. While 8 U.S.C. § 1324a(a)(2) explicitly references a continuing violation (that is, knowingly continuing to employ an alien who is not authorized to work in the U.S.) and 8 U.S.C.

§ 1324c(a)(2) does not use the term "continuing," the continuing obligation of the employer implies that the employee's "use" of the fraudulent document is also continuous. It is that document that prevents the employer from becoming aware that the alien is not authorized to be employed, and thus the employer's obligation to terminate the alien from being triggered. That document is thus continuously used by the employee to "obtain a benefit"—work in the United States for some period of time—"under this chapter."

Lastly, fraud offenses of the type addressed by 8 U.S.C. § 1324c(a)(2) are essentially continuing in nature, because their perpetrators rely on continuing deception to achieve their ends—here, the end of not merely being hired for a job, but the actual benefit of working in that job for some period of time and getting paid.

These kinds of fraud offenses are thus a classic reason for the existence of the continuing violation doctrine, for fraud continues as long as the deception it relies on operates. To hold that an alien's liability for perpetuating an ongoing fraud ends once an employer has accepted the alien's fraudulent documents and completed the Form I-9 would be a wholly unmotivated and anomalous exemption of § 1324c(a)(2) fraud from that doctrine.

ARGUMENT

1. In 8 U.S.C. § 1324c(a)(2), Congress clearly intended the knowing use of a forged, counterfeit, altered, or falsely made document in order to obtain employment and complete the employment eligibility verification Form I-9 to constitute a "continuing violation" for the duration of employment at the employer to whom the document was presented.

One of the "primary purpose[s] in restricting immigration is to preserve jobs for American workers." *Sure-Tan, Inc. v. NLRB*, 467 U. S. 883, 893 (1984). Consequently, controlling the unlawful employment of illegal aliens has long been recognized as an important aspect of U.S. immigration law. *See generally Immigration & Naturalization Serv. v. National Center for*

Immigrants' Rights, Inc., 502 U.S. 183, 187 (1991). In fact, well over a century ago, the Supreme Court acknowledged that the power to exclude alien laborers is "necessarily intertwined with the power to punish any who assist in their introduction." *Lees v. United States*, 150 U.S. 476, 478-79 (1893). In 1986, Congress exercised these powers by enacting the Immigration Reform and Control Act (IRCA). IRCA made it illegal to employ unauthorized aliens, established an employment eligibility verification system, and created various civil and criminal penalties against employers who violate the law. 8 U.S.C. § 1324a. In 1990, Congress passed 8 U.S.C. § 1324c specifically to strengthen the provisions of IRCA. In doing so, Congress clearly intended the knowing "use" of a fraudulent document in order to be hired by and complete Form I-9 for a U.S. employer to constitute a "continuing violation," lasting for the duration of the time services are performed for that employer.

Statutory construction begins with an analysis of the plain language of the statute in question, in order to determine its original intent. To determine a statute's original intent, courts first look to the words of a given statute and apply their typical and ordinary meanings, "assum[ing] 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *Immigration and Naturalization Service v. Phinpathya*, 464 U.S. 183, 189 (1984) (quoting *American Tobacco v. Patterson*, 465 U.S. 63, 68 (1982) (citations omitted)). "[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." *United States v. Missouri Pac. R.R. Co.,* 278 U.S. 269, 278 (1929). "Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses… '[absent] a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.'"

Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 772 (1984) (quoting *North Dakota v. United States*, 460 U.S. 300, 312 (1983) (citations omitted)).

8 U.S.C. § 1324c(a)(2) makes it a violation "to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this chapter or to obtain a benefit under this chapter." And I-9 fraud has repeatedly been found to constitute "obtaining a benefit" pursuant to the Immigration and Nationality Act (INA). Most recently, in *Dakura v. Holder,* 772 F.3d 994, 999 (4th Cir. 2014) the Fourth Circuit examined the language of § 1324a and held that an alien's application for private employment – even by fraudulent means – constitutes an effort to obtain "purpose or benefit under the INA." Previously, the Second, Third, Fifth, Sixth, Eighth and Tenth Circuits had all reached the same conclusion: *See Crocock v. Holder,* 670 F.3d 400, 403 (2d Cir.2012); *Castro v. Attorney Gen. of the United States,* 671 F.3d 356, 369 (3d Cir. 2012); *Theodros v. Gonzales,* 490 F.3d 396, 402 (5th Cir.2007); *Ferrans v. Holder,* 612 F.3d 528, 532 (6th Cir. 2010); *Rodriguez v. Mukasey,* 519 F.3d 773, 777 (8th Cir.2008); *Kechkar v. Gonzales,* 500 F.3d 1080, 1083–84 (10th Cir.2007).

The statute's reference to the "use" of forged, counterfeit, altered, or falsely made documents indicates that Congress sought to proscribe a course of fraudulent conduct. To say that one uses something "conveys ongoing action" and "clearly contemplates a prolonged course of conduct." *Toussie v. United States*, 397 U.S. 112, 120 (1970). By contrast, had it wished to, Congress could have easily limited the types of violations covered under 8 U.S.C. § 1324c(a)(2) by making explicit reference to the "submission" or "presentation" of fraudulent documents to an employer for the purposes of completing Form I-9. The submission or presentation of a

document is a discrete act. It begins when Party A tenders the document to Party B for a specified purpose. And it concludes when Party B receives the document from Party A. The transaction is complete when the document has changed hands. Instead, Congress's employment of the term "use" strongly suggests that it intended to proscribe a continuing violation that perpetuates on ongoing harm.

This intention is further shown by the fact that, in 1990, Congress added 8 U.S.C. § 1324c to the already extant provisions of IRCA in order to cure defects in that statute's enforcement scheme. It would have made little sense for Congress to have beefed up enforcement merely by banning the presentation of a fraudulent document, while leaving the vast, truly injurious extent of employment fraud—the continuing, fraudulent use of that document to work unlawfully in the United States, at the expense of American workers—unpenalized. For these reasons, it reflects the clear intent of Congress to read the knowing use of a forged, counterfeit, altered, or falsely made document in order to obtain employment and complete the employment eligibility verification Form I-9 as a "continuing violation" that perdures for the entire period of employment with the employer to whom the document was presented.

2. When 8 U.S.C. § 1324c(a)(2) is read in conjunction with 8 U.S.C. § 1324a(a)(2), which explicitly renders unlawful the *knowing* and *continuing* employment of an unauthorized alien, the plain language of § 1324c(a)(2) also implies a continuing violation.

8 U.S.C. § 1324c(a)(2) imposes an obligation on foreign nationals to refrain from committing fraud in order to obtain the benefit of employment in the United States when they are not authorized to hold such employment. 8 U.S.C. § 1324a(a)(2) imposes an affirmative obligation upon U.S. employers to refrain from continued employment of a foreign national once the employer becomes aware that the alien is, or has become, unauthorized to hold such employment. An alien who has presented an employer with a fraudulent document that is

convincing enough to result in continued employment over time is—through ongoing fraud—deliberately impeding the employer from determining the alien's true employment eligibility status and terminating the alien in accordance with 8 U.S.C. § 1324a(a)(2).

While 8 U.S.C. § 1324a(a)(2) explicitly references a continuing violation (that is, knowingly continuing to employ an alien who is not authorized to work in the U.S.), 8 U.S.C. § 1324c(a)(2) does not use the term "continuing." Nevertheless, the continuing obligation of the employer shows that the employee's "use" of the fraudulent document is every bit as continuous. As noted, 8 U.S.C. § 1324c(a)(2) makes it a violation "to use . . . [a fraudulent] document in order . . . to obtain a benefit under this chapter." Employment in the United States for some period of time is "a benefit under this chapter." 8 U.S.C. § 1324c(a)(2). Thus, the fraudulent document that prevents an employer from becoming aware that the alien is not authorized to be employed, and thus prevents the employer's obligation to terminate the alien from being triggered, is continuously used by the alien to "obtain a benefit under this chapter"—work in the United States for some period of time. Thus, by its very terms, § 1324c(a)(2), read in conjunction with § 1324a(a)(2), sets forth an offense—using a fraudulent document in order to obtain a benefit under this chapter—that is continuous in nature.

3. The "use" of fraudulent documents as described under 8 U.S.C. § 1324c(a)(2) is exactly the type of breach of law that comes under the civil "continuing violation doctrine" and the analogous criminal "continuing offense doctrine."

Generally speaking, an act that violates a civil or criminal proscription is complete when every element of the violation has occurred and any applicable statute of limitations will immediately begin to run. *See generally Pendergast v. United States*, 317 U.S. 412, 418 (1943). A well-recognized exception, however, exists for "continuing violations" (in the civil context) and "continuing offenses" (in the criminal context). *Havens Realty v. Coleman*, 455 U.S. 363,

380-381 (1982); *Toussie v. United States*, 397 U.S. 112, 113–14 (1970). In the civil context, this doctrine may also be referred to as the "continuing wrong doctrine," *Committee of Blind Vendors v. District of Columbia,* 736. F. Supp. 292, 295 (D.D.C. 1990) or the "continuing tort doctrine," *Railing v. United Mine Workers*, 429 F.2d 780, 783(4th Cir. 1970); *Syms v. Olin Corp.,* 408 F.3d 95, 108 (2d. Cir. 2005). These exceptions pertain to situations where the perpetrator's breach of law is not deemed complete until his or her entire course of violative conduct ceases—because an ongoing course of conduct continually generates harm until the behavior in question ceases. For this reason, the staleness problems that statutes of limitations are designed to prevent do not arise in the context of a continuing violation. *Havens Realty*, 455 U.S. 380-381.

The civil theory applicable here, moreover, is based on the equitable notion that the statute of limitations should not begin to run until a reasonable person would have become aware that a violation of the law has been perpetrated. *Martin v. Nannie & Newborns*, Inc., 3 F.3d 1410, 1415 n.6 (10th Cir. 1993). That notion undeniably applies to fraud offenses of the type addressed by 8 U.S.C. § 1324c(a)(2). An alien who uses fraudulent documents embarks on an ongoing scheme of deception with two related goals: 1) to deceive the employer into believing that the alien is authorized to accept employment, so that the employer offers the alien a job; and 2) to maintain the material misrepresentation so that the employer does not terminate the alien, in order to comply with 8 U.S.C. § 1324a(a)(2), upon discovering that the alien lacks employment authorization. Indeed, from a practical standpoint, the initial part of the scheme is meaningless if the alien is unable to exchange his or her labor long enough to obtain some form of compensation; an alien must keep the employer in the dark in order for his or her violation to accomplish anything. That need for continuing deception makes the equitable concept articulated in *Martin*, *supra*, especially apt here. To say the least, it would be unmotivated and anomalous

simply to suspend this principle when it comes to fraud committed under § 1324a(a)(2), when such fraud—that is, fraud that requires continuing deception to be efficacious—is the very reason for the principle.

CONCLUSION

For the foregoing reasons, a violation of 8 U.S.C. § 1324c(a)(2) should be considered a "continuing violation" that perdures for the entire period of employment at the employer to whom the document was presented.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2023, I, Matthew J. O'Brien, submitted three (3) copies of the foregoing *amicus curiae* brief to the Board of Immigration Appeals at the following address:

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February 27, 2021

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