No. 21-40680

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

State of Texas; State of Alabama; State of Arkansas; State of Louisiana; State of Nebraska; State of South Carolina; State of West Virginia; State of Kansas; State of Mississippi,

Plaintiffs - Appellees,

v.

United States of America; Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security; Troy Miller, Acting Commissioner, U.S. Customs and Border Protection; Tae D. Johnson, Acting Director of U.S. Immigration and Customs Enforcement; Ur M. Jaddou, Director of U.S. Citizenship and Immigration Services,

Defendants - Appellants

Elizabeth Diaz; Jose Magana-Salgado; Karina Ruiz De Diaz; Jin Park; Denise Romero; Angel Silva; Moses Kamau Chege; Hyo-Won Jeon; Blanca Gonzalez; Maria Rocha; Maria Diaz; Elly Marisol Estrada; Darwin Velasquez; Oscar Alvarez; Luis A. Rafael; Nanci J. Palacios Godinez; Jung Woo Kim; Carlos Aguilar Gonzalez; State of New Jersey,

Intervenor Defendants - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APELLEES

Matt A. Crapo
Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590

Attorneys for *Amicus Curiae*

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1 and Fed. R. App. P. 26.1, *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

3) The following entity has an interest in the outcome of this case: Immigration Reform Law Institute.

DATED: February 14, 2022

Respectfully submitted,

/s/ Matt Crapo

Matt A. Crapo
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590

Attorney for *Amicus Curiae*

TABLE OF CONTENTS

Page

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 2

ARGUMENT 3

I. The States Have Standing 3

II. DACA is Unlawful 5

A. DACA's Promulgation was Procedurally Invalid 5

B. DACA is Contrary to Law 9

C. DACA Violates the Take Care Clause 14

III. The District Court Properly Vacated DACA 16

CONCLUSION 19

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander v. Sandoval,
532 U.S. 275 (2001).....16

Am. Meat Inst. v. United States Dep't of Agric.,
760 F.3d 18 (D.C. Cir. 2014) (*en banc*).....9

Am. Mining Congress v. Mine Safety & Health Admin.,
995 F.2d 1106 (D.C. Cir. 1993).....17

Arizona v. Inter Tribal Council of Ariz., Inc.,
570 U.S. 1 (2013).....11

Arizona v. United States,
567 U.S. 387 (2012).....13

Arizona Dream Act Coal. v. Brewer,
818 F.3d 901 (9th Cir. 2016) 1

Avoyelles Sportsmen's League, Inc. v. Marsh,
715 F.2d 897 (5th Cir. 1983) 6

Matter of C-T-L-,
25 I. & N. Dec. 341 (B.I.A. 2010) 1

Chambers v. NASCO, Inc.,
501 U.S. 32 (1991).....15

Chrysler Corp. v. Brown,
441 U.S. 281 (1979).....5, 6

City of Los Angeles v. Adams,
556 F.2d 40 (D.C. Cir. 1977).....11

Dames & Moore v. Regan,
453 U.S. 654 (1981).....14

Dep't of Homeland Sec. v. Regents of the Univ. of California,
140 S. Ct. 1891 (2020).....7

Fed'l Power Comm'n v. Transcon. Gas Pipe Line Corp.,
423 U.S. 326 (1976).....8

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000).....17

FTC v. Morton Salt Co.,
334 U.S. 37 (1948).....5

Galvan v. Press,
347 U.S. 522 (1954).....2

General Elec. Co. v. EPA,
290 F.3d 377 (D.C. Cir. 2002).....17

Hollingsworth v. Perry,
570 U.S. 693 (2013).....17

INS v. Chadha,
462 U.S. 919 (1983) 5

Judulang v. Holder,
565 U.S. 42 (2011).....13

Kamen v. Kemper Fin. Servs.,
500 U.S. 90 (1991).....18

Louisiana Pub. Serv. Comm'n v. FCC,
476 U.S. 355 (1986).....5

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992).....4, 16

Lutwak v. United States,
344 U.S. 604 (1953).....12

Manhattan Gen. Equip. Co. v. Commissioner,
297 U.S. 129 (1936).....9

McLouth Steel Products Corp. v. Thomas,
838 F.2d 1317 (D.C. Cir. 1988).....6

Medellin v. Texas,
552 U.S. 491 (2008).....14

Mistretta v. United States,
488 U.S. 361 (1989).....10

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983).....12

Nat'l Ass'n of Mfrs. v. NLRB,
717 F.3d 947 (D.C. Cir. 2013) 9

Nishimura Ekiu v. United States,
142 U.S. 651 (1892).....2

Save Jobs USA v. U.S. Dep't of Homeland Sec.,
942 F.3d 504 (D.C. Cir. 2019).....1

SEC v. Chenery Corp.,
318 U.S. 80 (1943).....12

Shell Offshore Inc. v. Babbitt,
238 F.3d 622 (5th Cir. 2001) 6, 17

Sierra Club v. Glickman,
156 F.3d 606 (5th Cir. 1998) 4

Matter of Silva-Trevino,
26 I. & N. Dec. 826 (B.I.A. 2016) 1

Sure-Tan, Inc. v. Nat'l Labor Relations Bd.,
467 U.S. 883 (1984).....10

Texas v. Biden ("*Texas MPP*"),
20 F.4th 928 (5th Cir. 2021) 8, 9, 18

Texas v. United States ("*Texas DAPA*"),
809 F.3d 134 (5th Cir. 2015) ..... 2, *passim*

Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.,
576 U.S. 519 (2015).....13

Texas Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd.,
201 F.3d 551 (5th Cir. 2001) 6, 17

Thomas v. Union Carbide Agric. Prods. Co.,
473 U.S. 568 (1985).....15

Touche Ross & Co. v. Redington,
442 U.S. 560 (1979).....16

Town of Chester v. Laroe Estates, Inc.,
137 S. Ct. 1645 (2017).....18

Trump v. Hawaii,
138 S. Ct. 2392 (2018).....1

United States v. CITGO Petroleum Corp.,
801 F.3d 477 (5th Cir. 2015) 11

United States v. Johnson,
632 F.3d 912 (5th Cir. 2011) 4

United States v. Picciotto,
875 F.2d 345 (D.C. Cir. 1989).....7

United States v. Texas,
136 S. Ct. 906 (2016).....14

United States v. Texas,
136 S. Ct. 2271 (2016).....1

Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.,
74 F. Supp. 3d 247 (D.D.C. 2014).....1

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001).....10

Woodall v. Commissioner,
964 F.2d 361 (5th Cir. 1992).....12

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952).....13, 16

STATUTES

Administrative Procedure Act ("APA"):

5 U.S.C. §§ 551-706 2

5 U.S.C. § 553(b) 5

5 U.S.C. § 706(2)(B)-(C).....9

5 U.S.C. § 706(2)(D) 7

Homeland Security Act of 2002:

6 U.S.C. § 202(5).....10

Immigration and Nationality Act ("INA"):

8 U.S.C. §§ 1101-1537 2

8 U.S.C. § 1103(a)(3).....10

8 U.S.C. § 1182(n).....10

8 U.S.C. § 1184(g).....10

8 U.S.C. § 1188.....10

8 U.S.C. § 1225(b) 9

8 U.S.C. § 1225(b)(2) 8

8 U.S.C. § 1324a(h)(3).....10

U.S. CONST. art. II, § 3.....2, 15

U.S. CONST. art. III, § 2 3

REGULATIONS

8 C.F.R. § 274a.12(a)(1)-(16) 7

8 C.F.R. § 274a.12(c)(14) 7

MISCELLANEOUS

Fed. R. App. P. 29(a)(2).....1

H.R. REP. NO. 99-682 (1986) 13

H.R. REP. NO. 104-725 (1996) 14

Michael X. Marinelli, *INS Enforcement of the Immigration Reform and Control Act of 1986: Employer Sanctions During the Citation Period*, 37 CATH. U. L.R. 829, 833-34 (1988) 13

INTEREST OF *AMICI CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens, and also to assisting courts in understanding and accurately applying federal immigration law. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 901 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 942 F.3d 504 (D.C. Cir. 2019); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

[1] Pursuant to Fed. R. App. P. 29(a)(2), counsel for Plaintiffs-Appellees, Defendants-Appellants, and Intervenor Defendants-Appellants have consented to the filing of this *amicus* brief. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

This case is largely controlled by this Court's decision in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) ("*Texas DAPA*"), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016). Following that case, several of the same state plaintiffs (collectively, the "States") sued the United States and relevant immigration officials to overturn the program known as Deferred Action for Childhood Arrivals ("DACA"), which was first adopted by the Department of Homeland Security ("DHS") in 2012.

As in *Texas DAPA*, the States challenged DACA under the notice-and-comment rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 ("INA"), and the Constitution's Take Care Clause, U.S. CONST. art. II, § 3. The State of New Jersey and a group of DACA beneficiaries intervened as defendants. Ultimately, the district court granted the States' motion for summary judgment, vacated DACA, and permanently enjoined DACA nationwide.

It has long been recognized that the power "to forbid the entrance of foreigners … or to admit them only in such cases and upon such conditions as it may see fit to prescribe" is an inherent sovereign prerogative entrusted exclusively in Congress. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *see also Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of

aliens and their right to remain here are . . . entrusted exclusively to Congress . . . .”). In the INA, Congress fashioned a comprehensive immigration scheme in which it defined which classes of aliens are considered lawfully present, which are eligible for work authorization or parole, and which are subject to removal. Although Congress has permitted DHS to exercise broad discretion in enforcing many aspects of the immigration system, it did not give the Executive branch free reign to expand statutory relief or lawful status to classes of aliens other than those set forth in the INA.

By making substantive immigration law without complying with the APA’s procedural rulemaking process, DHS violated the separation of powers principle that underlies our government. Further, the DACA program is “manifestly contrary” to Congress’s carefully crafted scheme governing immigration. *Texas DAPA*, 809 F.3d at 186. Accordingly, the district court properly vacated the program and enjoined DHS from enrolling new applicants, and this Court should affirm that judgment.

ARGUMENT

I. The States Have Standing

The federal judicial power extends, *inter alia*, to “Cases … arising under [the] Constitution [and] the Laws of the United States.” U.S. CONST. art. III, § 2. At its minimum, standing presents the tripartite test of whether the party invoking a

court's jurisdiction raises a sufficient "injury in fact" under Article III that (a) constitutes "an invasion of a legally protected interest," (b) is caused by the challenged action, and (c) is redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992) (interior quotation marks omitted). The States amply demonstrate the requisite injury, causation, and redressability. *See* Appellee's Br. at 17-24.

All that *Amicus* would add is that the States' procedural claim bolsters their standing because procedural injuries lower Article III's threshold for immediacy and redressability. *See Defenders of Wildlife*, 504 U.S. at 571-72 & n.7; *United States v. Johnson*, 632 F.3d 912, 921 (5th Cir. 2011). For procedural-rights redressability, all the States must show is that vacating DACA and remanding the issue to the agency for proper rulemaking would give the States a chance to protect their interests:

> although a procedural rights plaintiff is not held to the normal standards for [redressability], in the sense that the plaintiff need not show that the procedural remedy that he is requesting will in fact redress his injury, the plaintiff must nonetheless show that there is a possibility that the procedural remedy will redress his injury. In order to make this showing, the plaintiff must show that "the procedures in question are designed to protect some threatened concrete interest of [its] that is the ultimate basis of [its] standing."

Sierra Club v. Glickman, 156 F.3d 606, 613 (5th Cir. 1998) (quoting *Defenders of Wildlife*, 504 U.S. at 573 n.8) (alterations in *Sierra Club*). A court order vacating

DACA would clearly provide the States with a chance to protect their interests that suffices for Article III standing.

II. DACA is Unlawful

A. DACA's Promulgation was Procedurally Invalid

By granting APA rulemaking authority to agencies, Congress delegated functions that the Constitution vests initially in Congress itself. To be procedurally valid under that delegation, agency rules must fully satisfy either the APA rulemaking requirements or fall within an APA exemption.[2] DACA does neither.

[2] When an agency fails to follow the procedures ordained by Congress, the resulting rule violates the core constitutional requirements for making law, which "are *integral* parts of the constitutional design for the separation of powers." *INS v. Chadha*, 462 U.S. 919, 946 (1983) (emphasis added). Valid legislative rules must either satisfy bicameralism and presentment requirements—which "represent[] the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure," *Chadha*, 462 U.S. at 951—or they must fully satisfy the limited administrative exemption that the APA provides. *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) ("the burden of proving justification or exemption … generally rests on one who claims its benefits"). Here, DHS purported to rely on the APA exemptions in 5 U.S.C. § 553(b), but it failed to qualify for that exemption. Failure either to follow or to avoid the required APA procedures renders the resulting agency action both void *ab initio* and unconstitutional. *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act … unless and until Congress confers power upon it"). In essence, when an agency fails to follow the procedures ordained by Congress—here, the APA delegation of rulemaking power—the resulting rule violates the "integral" constitutional requirements for making law. When acting within the APA requirements, a federal agency *might* be on solid ground. When acting outside those requirements, however, a federal agency simply usurps congressional legislative power.

Even if DACA were *substantively* consistent with immigration law, its promulgation nonetheless would violate the APA notice-and-comment requirements. The APA exemptions for policy statements and interpretive rules do not apply when agency action narrows the discretion otherwise available to agency staff. *See Texas DAPA*, 809 F.3d at 172-73; *Texas Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd.*, 201 F.3d 551, 556 (5th Cir. 2001). Nor are these exemptions available when an agency promulgates the regulatory basis upon which benefits are conferred. *Chrysler*, 441 U.S. at 302 (defining a "substantive rule—or a legislative-type rule—as one affecting individual rights and obligations") (interior quotation marks omitted); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983) ("Legislative rules ... grant rights, impose obligations, or produce other significant effects on private interests") (interior quotation marks omitted, alteration in original); *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001). Just as this Court held for DAPA, DACA fails these tests and is subject to the APA's notice-and-comment procedural requirement.

Further, regardless of substantive validity, a procedurally infirm rule is null and void *ab initio*. *See Avoyelles*, 715 F.2d at 909-10 (describing rule as "null"); *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1322-23 (D.C. Cir. 1988). Because DACA is procedurally infirm, this Court must "hold unlawful and set aside [this] agency action … found to be … without observance of procedure

required by law." 5 U.S.C. § 706(2)(D). Accordingly, DACA's procedural infirmities alone render it null and void and require its *vacatur*.

DACA plainly *affects* individual rights under *Chrysler*. The Court's decision in *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020), arguably expands the scope of review by considering DACA's immigration forbearance as being distinct from its benefits. *Regents*, 140 S. Ct. at 1912. But with respect to each prong, *Regents* recognizes that "DACA is not simply a non-enforcement policy" and that "it created a program for conferring affirmative immigration relief." *Id.* at 1906. That alone is dispositive on the APA procedural issue. DACA required regular notice-and-comment rulemaking.

DACA's benefits and forbearance prongs are *each* procedurally invalid. Even if one prong otherwise might survive the States' procedural and substantive challenges, DACA's lack of a severability clause should cause this Court to vacate DACA in its entirety. DACA's benefit provisions are the easier half of the APA analysis. As *Regents* indicates, the *Texas DAPA* decision focused on benefits. *Regents*, 140 S. Ct. at 1911 (citing *Texas DAPA*, 809 F.3d, at 168 & n.108). DACA's employment authorization is a benefit that is "granted" to beneficiary aliens, 8 C.F.R. § 274a.12(c)(14), under sixteen specific circumstances, 8 C.F.R. § 274a.12(a)(1)-(16), none of which apply to the across-the-board DACA program. *Cf. United States v. Picciotto*, 875 F.2d 345, 346-48 (D.C. Cir. 1989) (agency

cannot add new, specific, across-the-board conditions under general, case-by-case authority to consider changes). Under the foregoing APA criteria, DACA qualifies as a legislative rule, and both the Constitution and the APA prohibit agencies from issuing such by memoranda, policy, or interpretation.

DACA's immigration-forbearance is equally unlawful. Through DACA, DHS purports to channel aliens into deferred action under prosecutorial discretion, without initiating statutorily mandated removal proceedings. These procedures are mandatory, not discretionary. *Texas v. Biden*, 20 F.4th 928, 994-96 (5th Cir. 2021) ("*Texas MPP*") (discussing the mandatory nature of 8 U.S.C. § 1225(b)(2)). DACA seeks to short circuit these mandatory INA procedures, and thus would violate the APA's procedural requirements, even if DACA's changes complied with the INA substantively.

Since DACA lacks a severability clause, this Court should vacate DACA in its entirety if any substantial part of DACA—such as the benefits prong that this Court already has rejected—is procedurally invalid. The "power to affirm, modify, or set aside" an agency action "in whole or in part … is not power to exercise an essentially administrative function." *Fed'l Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 333-34 (1976) (interior quotation marks omitted). This Court should leave it to the agency to redraft a new policy if a substantial part of the existing policy is flawed.

In the D.C. Circuit, "[s]everance and affirmance of a portion of an administrative regulation is improper if there is substantial doubt that the agency would have adopted the severed portion on its own." *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 963-64 (D.C. Cir. 2013) (collecting cases), *overruled in part on other grounds*, *Am. Meat Inst. v. United States Dep't of Agric.*, 760 F.3d 18, 22-23 (D.C. Cir. 2014) (*en banc*). Under that rule, *vacatur* of DACA in its entirety would be appropriate. It would have made no sense to adopt a forbearance policy for aliens who already were not being removed, *see* note 4, *infra*, if the agency did not add the unlawful work-authorization benefits. Without the benefits, forbearance would provide nothing over the status quo.

B. DACA is Contrary to Law

DACA violates the INA on both substantive and procedural grounds, and either type of violation renders DACA a nullity. *See* 5 U.S.C. § 706(2)(B)-(C); *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936) (holding that a "regulation [that] … operates to create a rule out of harmony with the statute, is a mere nullity" because an agency's "power … to prescribe rules and regulations … is not the power to make law" but rather "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute").

Procedurally, DACA's forbearance provisions violate the mandated INA procedures set forth in 8 U.S.C. § 1225(b). *See Texas MPP*, 20 F.4th at 994-96.

Substantively, the Court should reject the miscellaneous strands of statutory authority with which the government attempts to elevate prosecutorial discretion *in any given matter* into a rights-granting framework *for all matters*.[3] The central problem with cobbling these innocuous snippets together into DACA is that the asserted executive authority has no stopping point. It would allow DHS administratively to authorize work for *any class* of alien, without regard to the protections that Congress included in the INA. *See*, *e.g.*, 8 U.S.C. §§ 1182(n), 1184(g), 1188 (protecting American workers from competition from aliens); *Sure-Tan, Inc. v. Nat'l Labor Relations Bd.*, 467 U.S. 883, 893 (1984) ("[a] primary purpose in restricting immigration is to preserve jobs for American workers"). Congress would not authorize DHS to overturn those concrete statutory protections through "vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Alternatively, if these innocuous snippets did "hide elephants in mouse holes," *id.*, by delegating *carte blanche* authority to DHS, these statutory subsections would violate the nondelegation doctrine, which requires "an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Mistretta v. United States*, 488 U.S.

[3] These snippets include 8 U.S.C. §§ 1103(a)(3), 1324a(h)(3) and 6 U.S.C. § 202(5). *See* DOJ Br. at 26-28.

361, 372 (1989). Under the doctrine of constitutional avoidance, this Court could avoid the constitutional nondelegation issue by reading the statute not to delegate the claimed authority. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17-18 (2013); *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 483 n.6 (5th Cir. 2015). To resolve the merits, the Court need not decide whether these snippets delegate no authority or if they unconstitutionally delegate authority. Either way, they cannot support DACA.

Even if some form of deferred action lawfully could apply to some DACA beneficiaries, DACA would remain an invalid form of deferred action. While an agency faced with limited resources necessarily has discretion to implement congressional mandates as best it can, the power to set priorities for action does not authorize ignoring all statutory mandates: "the agency administering the statute is required to effectuate the original statutory scheme *as much as possible*, within the limits of the added constraint." *City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977) (emphasis added). DACA, however, did not "effectuate the original statutory scheme as much as possible" within the limits set by the lack of funds,[4] so DACA cannot be preserved on a funds-preserving theory: "the courts

[4] Indeed, DACA was not created because of lack of resources. The aliens protected by it were already rarely removed. Memorandum from Jeh Charles Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who are Parents of U.S. Citizens or Permanent Residents* 3 (Nov. 20, 2014)

may not accept appellate counsel's post hoc rationalizations for agency action [because] an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *SEC v. Chenery Corp.,* 318 U.S. 80, 88 (1943) (same for pre-APA equity suits).

Rather than a mere marshalling and focusing of scant resources, DACA reflects DHS's policy judgment that these aliens should be free to live and work in the United States without fear of deportation. Far from "effectuat[ing] the original statutory scheme as much as possible," this policy judgment is at odds with the INA and congressional intent. In making it illegal for illegal aliens to work here, Congress wished to discourage illegal entry and to encourage removable aliens to remove themselves, even if enforcement by removal is underfunded and slow to

---

(explaining that DACA applies to individuals who "are extremely unlikely to be deported given [the] Department's limited enforcement resources") (Pls.' Mot. Summ. J., Ex. 7, (Tr. Ct. Dkt. ECF #487-8)). This statement is scarcely consistent with Secretary Napolitano's bald assertion that "additional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities." Memorandum from Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* 1 (June 15, 2012) (Pls.' Mot. Summ. J., Ex. 1 (Tr. Ct. Dkt. ECF #487-1)). Admissions against interest are admissible evidence, but self-serving statements are not. *Compare Lutwak v. United States*, 344 U.S. 604, 617-18 (1953) ("admissions … are admissible … under a standard exception to the hearsay rule applicable to the statements of a party") *with Woodall v. Commissioner*, 964 F.2d 361, 364-65 (5th Cir. 1992).

reach low-priority cases. *See Arizona v. United States*, 567 U.S. 387, 404 (2012) ("Congress enacted IRCA as a comprehensive framework for combating the employment of illegal aliens") (citations and interior quotation marks omitted); *Texas DAPA*, 809 F.3d at 981 (noting that granting work authorization to DAPA applicants would "dramatically increase the number of aliens eligible for work authorization, thereby undermining Congress's stated goal of closely guarding access to work authorization and preserving jobs for those lawfully in the country"); Michael X. Marinelli, *INS Enforcement of the Immigration Reform and Control Act of 1986: Employer Sanctions During the Citation Period*, 37 CATH. U. L.R. 829, 833-34 (1988) ("Congress postulated that unauthorized aliens currently in the United States would be encouraged to depart") (citing H.R. REP. NO. 99-682, at 46 (1986)). DACA thus exceeds the authority that the INA delegates to DHS.

Finally, in addition to consistently and expressly rejecting DACA legislation, Congress has not implicitly ratified DACA. Prior instances of Executive misconduct cannot "be regarded as even a precedent, much less an authority for the present [misconduct]." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649 (1952). "Arbitrary agency action becomes no less so by simple dint of repetition." *Judulang v. Holder*, 565 U.S. 42, 61 (2011). There has simply not been the "unanimous holdings of the Courts of Appeals" and subsequent legislation required for Congress to have accepted and ratified DACA. *See Tex.*

Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 536 (2015). Ratification requires more: "'a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned'" "can 'raise a presumption that the [action] had been [taken] in pursuance of its consent.'" *Medellin v. Texas*, 552 U.S. 491, 531 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)) (alterations in *Medellin*). For DACA's purposes, the INA's history is considerably "broken" by Congress's later action to clamp down on illegal aliens: "illegal aliens do not have the right to remain in the United States undetected and unapprehended." H.R. REP. NO. 104-725 (1996), at 383. On balance, the claim that Congress ratified deferred-action plans like DACA is simply not plausible. Instead, this Court should simply follow the INA's plain text to glean what Congress intended. Congress did not authorize DACA.

C. DACA Violates the Take Care Clause

In granting review in the DAPA case, the Supreme Court ordered "the parties … to brief and argue '[w]hether [DAPA] violates the Take Care Clause of the Constitution.'" *United States v. Texas*, 136 S. Ct. 906 (2016). The district court declined to reach the Take Care Clause under the doctrine of constitutional avoidance, as well as the lack of clear guidance from the Supreme Court. Although *Amicus* respectfully submits that the Take Care issue is clearer than the district

court suggested, IRLI acknowledges that the Court need not resolve the constitutional issue to find DACA unlawful.

The take-care issue goes further than the substantive INA violations discussed above. Though, at some level, any substantively or even procedurally *ultra vires* action represents a failure faithfully to execute the laws, U.S. CONST. art. II, § 3, it requires more to violate the Take Care Clause—a failure even to "take Care that the Laws be faithfully executed." *Id.* That failure, however, is amply present here. Indeed, the Obama administration itself candidly acknowledged the unlawfulness of DACA numerous times before issuing DACA for political reasons when Congress did not enact the legislation that the administration sought. A court issuing an equitable remedy in these circumstances could find that the Executive willfully failed to take care, then tailor the remedy to account for that willfulness. *Cf. Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592 (1985) (distinguishing between faithful arbitrators and "arbitrators who abuse or exceed their powers or willfully misconstrue their mandate under the governing law"); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46-47 (1991) (upholding sanctions for willful violations of court orders). Presidents are not free to adopt any policies they want. Instead, the Constitution requires presidents to see to it that the laws that Congress has passed are faithfully executed. U.S. CONST. art. II, § 3. Courts must hold presidents to that standard.

Under separation-of-powers principles, it falls to Congress to make the laws, to the Executive to enforce the laws faithfully, and to the judiciary to interpret the laws:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.
>
> Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

Youngstown, 343 U.S. at 655 (Jackson, J., concurring). This Court clearly must reject DACA's overreach here.

III. The District Court Properly Vacated DACA

As the States point out, Appellees' Br. at 48, only the Intervenor Defendants-Appellants contend that vacatur was not the appropriate remedy. But in contrast with the Plaintiff-Appellee States and the federal Defendants-Appellants, the Intervenor Defendants-Appellants lack standing to pursue any relief beyond that sought by the federal defendants. As noted above, standing requires a judicially cognizable right or "legally protected interest," *Defenders of Wildlife*, 504 U.S. at 560, and the Intervenors here premise their rights on DACA.

Even assuming *arguendo* that agencies could create rights,[5] however, DACA

[5] Agencies cannot create rights, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 n.18 (1979); *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001), and their

would have needed to undergo notice-and-comment rulemaking before any rights would obtain. *See Texas DAPA*, 809 F.3d at 171; *Shell Offshore*, 238 F.3d at 629; *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). Similarly, accepting from *Regents* that DACA's promulgation so bound the agency as to preclude DACA's rescission, DACA needed to undergo notice-and-comment rulemaking (but did not) before binding agency discretion. *Texas DAPA*, 809 F.3d at 172-73; *Texas Sav.*, 201 F.3d at 556; *General Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002). Either way, because DACA did not undergo the requisite notice-and-comment rulemaking, DACA is a nullity and void *ab initio*, *see* Section II.A., *supra*, and as such clearly cannot provide cognizable rights to support Intervenors' standing in this case.[6]

The same Article III limits that apply to original parties also apply to intervenors, so intervenors must have standing to seek relief beyond the relief

---

inability to do so is an independent rationale for rejecting any suggestion that DACA created rights.

[6] As for New Jersey and any institutional Intervenor Defendants-Appellants, they "lack[] a judicially cognizable interest in the prosecution *or nonprosecution* of another," which "applies no less to prosecution for civil [matters] … than to prosecution for criminal [matters]." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 204 (2000) (emphasis added, interior quotation marks omitted). Similarly, it is a "fundamental restriction on [judicial] authority" that "a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties," *Hollingsworth v. Perry*, 570 U.S. 693, 708 (2013) (interior quotation marks omitted). Thus, third-party institutional and state defendants-intervenors would lack a judicially cognizable interest.

requested by the party supported:

> The same principle applies to intervenors of right. Although the context is different, the rule is the same: For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right. Thus, … an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests.

Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1651 (2017). Thus, without their own Article III standing, Intervenors cannot seek relief beyond the relief that the federal defendants seek. Accordingly, *Amici* respectfully submit that Intervenors are not entitled to a ruling on anything other than *purely jurisdictional* arguments against this litigation.[7]

In any event, remand with vacatur is the default remedy for procedural and unlawful agency rules. *See Texas MPP*, 20 F.4th at 1000. The States show that vacatur is proper. *See* Appellees' Br. at 48-49. *Amicus* would simply add that because DACA was not promulgated with the requisite notice-and-comment rulemaking procedure, it is null and void *ab initio*, as argued above. *See* Section II.A., *supra*. Thus, vacatur is the only proper remedy.

[7] In *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 97 n.4 (1991), the Supreme Court recognized courts should consider jurisdictional arguments, even if raised only by an *amicus*.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's judgment.

DATED: February 14, 2022

Respectfully submitted,

/s/ Matt Crapo
Matt A. Crapo
Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590

Attorneys for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with Fed. R. App. P. 32(a)(7) and 29(a)(5) because it contains 4,483 words, as measured by Microsoft Word software. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, Roman-style typeface of 14 points or more.

DATED: February 14, 2022

Respectfully submitted,

/s/ Matt Crapo
Matt A. Crapo

CERTIFICATE OF SERVICE

I certify that on February 14, 2022, I electronically filed the foregoing *amicus* brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Matt Crapo
Matt A. Crapo