Nos. 18-587, 18-588 and 18-589

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, *et al.*,
Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Respondents.

(For Continuation of Caption See Inside Cover)

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEAL FOR THE NINTH, DC AND SECOND CIRCUITS

BRIEF OF FORMER HOMELAND SECURITY AND IMMIGRATION OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JEH C. JOHNSON
LIZA M. VELAZQUEZ
DAVID C. KIMBALL-STANLEY
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

MASHA G. HANSFORD
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, NW
Washington, DC 20006
(202) 223-7300

KAREN L. DUNN
JOSHUA RILEY
MENNO GOEDMAN
ANDREA R. FLORES
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, NW
Washington, DC 20005
(202) 237-2727

ALBERT GIANG
Counsel of Record
BOIES SCHILLER FLEXNER LLP
725 South Figueroa Street
Los Angeles, CA 90017
(213) 629-9040
agiang@bsfllp.com

Counsel for Amici Curiae

291551

KEVIN K. MCALEENAN, ACTING SECRETARY
OF HOMELAND SECURITY, *et al.*,
Petitioners,

v.

MARTIN JONATHAN BATALLA VIDAL, *et al.*,
Respondents.

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INTEREST OF *AMICI CURIAE*[1]

Amici are former leaders of the U.S. Department of Homeland Security ("DHS") and its component or predecessor agencies. *Amici* had direct involvement in the creation and administration of Deferred Action for Childhood Arrivals ("DACA") specifically and/or responsibility for administering and enforcing our nation's immigrations laws generally.

Jeh C. Johnson served as Secretary of DHS from December 2013 to January 2017, where he was responsible for enforcement and administration of the nation's immigration laws. Previously, Secretary Johnson served as General Counsel of the U.S. Department of Defense (2009–2012), General Counsel of the U.S. Air Force (1998–2001), and as an Assistant U.S. Attorney in the Southern District of New York (1989–1991).

Alejandro Mayorkas served as Deputy Secretary of DHS from December 2013 to October 2016. Prior to that, Deputy Secretary Mayorkas was Director of U.S. Citizenship and Immigration Services ("USCIS") from August 2009 to December 2013; in

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), written consents to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief.

that role, he was directly responsible for the launch, implementation, and subsequent administration of DACA. Earlier in his career, Deputy Secretary Mayorkas was United States Attorney for the Central District of California (1998–2001).

Leon Rodriguez served as Director of USCIS from 2014 to 2017, where he was also directly responsible for the administration of DACA. From 2007 to 2011, Mr. Rodriguez served in leadership positions at the Department of Health and Human Services and the Department of Justice.

Gil Kerlikowske served as Commissioner of U.S. Customs and Border Protection from March 2014 to January 2017. Previously, Commissioner Kerlikowske was Director of the Office of National Drug Control Policy (2009–2014) and served as the Commissioner or Chief of Police in four different cities, including an eight-year term in Seattle, Washington (2001–2009).

John T. Morton served as Director of Immigration and Customs Enforcement ("ICE") from May 2009 to August 2013. Previously, Mr. Morton served in leadership positions at the Department of Justice and was an Assistant U.S. Attorney in the Eastern District of Virginia (1999–2006).

Stevan E. Bunnell served as General Counsel of DHS from December 2013 to January 2017. Prior to that, he held various positions in law enforcement,

including Chief of the Criminal Division in the U.S. Attorney's Office for the District of Columbia.

Russell C. Deyo served as Acting Deputy Secretary of DHS from November 2016 to January 2017. Previously, Mr. Deyo served as Under Secretary for Management at DHS from May 2015 to November 2016. He also served as an Assistant U.S. Attorney for the District of New Jersey (1978–1985).

Bo Cooper served as General Counsel of the Immigration and Naturalization Service ("INS") from 1999 until 2003.[2]

T. Alexander Aleinikoff served as General Counsel and then as Executive Associate Commissioner for Programs of the INS from 1994 to 1997.

Roxana Bacon served as Chief Counsel of USCIS from 2009 to 2011.

Seth Grossman served as Chief of Staff to the General Counsel of DHS from 2010 to 2011, Deputy General Counsel of DHS from 2011 to 2013, and as Counselor to the Secretary at the same agency in 2013.

Stephen H. Legomsky served as Chief Counsel of

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[2] The INS is the predecessor agency to the federal offices within DHS that now have responsibility for enforcing the nation's immigration laws.

USCIS from 2011 to 2013 and as Senior Counselor to the Secretary of DHS on immigration from July to October 2015.

Jonathan E. Meyer served as Deputy General Counsel of DHS from 2014 to 2016 and as Senior Counselor to the General Counsel from 2011 to 2014. Previously, he served as Deputy Assistant Attorney General at the Department of Justice (2000–2001, 2009–2011).

John R. Sandweg served as Acting Director of ICE from 2013 to 2014, as Acting General Counsel of DHS from 2012 to 2013, as Senior Counselor to the Secretary of DHS from 2010 to 2012, and as Chief of Staff to the General Counsel of the same agency from 2009 to 2010.

David A. Martin served as Principal Deputy General Counsel of DHS from January 2009 through December 2010 (including four months as Acting General Counsel) and as General Counsel of the INS from August 1995 to January 1998.

Paul Virtue served as General Counsel of the INS from 1998 to 1999. He also served as Executive Associate Commissioner of the INS from 1997 to 1998 and as Deputy General Counsel from 1988 to 1997.

Paul M. Rosen served as Chief of Staff to the Secretary of DHS from 2015 to 2017. Previously, Mr. Rosen served in various positions at DHS from 2013 to 2015. Earlier in his career, Mr. Rosen served at

the U.S. Department of Justice (2009–2013) and as Counsel to the U.S. Senate Judiciary Committee for then-Senator Joseph R. Biden, Jr. (2006–2009).

Amici submit this brief to offer their first-hand perspective on the virtue, historical pedigree, and lawfulness of deferred action in the enforcement of federal immigration law and to provide context as to why a decision to rescind DACA as unlawful cannot and should not stand.

SUMMARY OF ARGUMENT

DACA is not government benevolence, inaction, or—as some have derisively labeled it—"amnesty." Rather, as the *amici* can personally attest, DACA is sound, smart policy given the inherent limitations of government resources. It confers no legal status and it serves important government interests (including public safety and national security) by encouraging young people who are the lowest priorities for removal, but who live in the shadows of American life, to come forward, engage in their communities, and contribute to the economy.

Discretionary relief policies have existed within the landscape of executive branch authority for decades and have been used by administrations of both political parties. DACA is thus neither novel nor unprecedented. The authority to adopt DACA and the accompanying authority to issue work authorization both derive from the prosecutorial discretion routinely exercised by the executive branch and from Congress' broad delegations of authority in the immigration context. Further statutory authority expressly endorsing the manner in which that prosecutorial discretion is exercised is not necessary.

STATEMENT OF THE CASE

There are an estimated 11 million people present in this country without documentation. Another 300,000 to 450,000 immigrants are apprehended trying to enter the country illegally each year. This year, the figure likely will approach 850,000—the highest in over a decade.[3]

Historically, the executive branch has lacked the resources required to take action against every person residing in the United States who may be removable. The institutions and personnel of immigration enforcement—including immigration courts, judges, federal attorneys, asylum officers, and DHS enforcement and removal personnel—can remove only a small fraction of those who are removable. Re-

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[3] Jens Manuel Krogstad et al., *5 Facts About Illegal Immigration in the U.S.*, Pew Res. Ctr. (June 12, 2019), https://pewrsr.ch/2lpzIfn; U.S. Customs & Border Protection, *CBP Enforcement Statistics FY 2019*, http://bit.ly/2lhBbo7; Steven Kopits, *Apprehensions, Illegal Entries Forecast for 2019 (August)*, Princeton Pol'y Advisors (Sept. 10, 2019), http://bit.ly/2mqdY36; U.S. Customs & Border Patrol, *United States Border Patrol Nationwide Illegal Alien Apprehensions Fiscal Years 1925 – 2018*, http://bit.ly/2mQqMzV.

cently, the government has removed 220,000 to 260,000 people per year from the country's interior.[4]

Inevitably, then, choices must be made. Priorities for removal must be developed. Prosecutorial discretion must be exercised.

For more than fifty years, presidents and their administrations have done just that: exercising prosecutorial discretion to prioritize enforcement against those individuals who pose threats to public safety or national security, while deferring action against and authorizing the right to work (where economically necessary) for those who do not.

The Obama Administration was no exception. Just as seven of his predecessors had done, including nearly every president since Eisenhower, President Obama implemented deferred action, whereby immigration officials exercised discretion to defer the removal of young people who otherwise were in the United States unlawfully. *See generally Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (Feb. 25, 2015) (Written Testimony of Stephen H. Legomsky at 2–26), http://bit.ly/2lFGM7I (explaining the legality of such policies, including DACA).

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[4] U.S. Immigr. & Customs Enforcement, *Fiscal Year 2018 ICE Enforcement and Removal Operations Report* 10, http://bit.ly/2mwAVl3.

Established on June 15, 2012, DACA authorizes the deferral of removal and other proceedings on a case-by-case basis for young people who were under the age of sixteen when they entered the United States, under the age of thirty-one as of June 15, 2012, and who meet specific educational and public-safety criteria. *See* Memorandum from Janet Napolitano to David V. Aguilar et al., Sec'y of Homeland Sec., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* 1–2 (June 15, 2012), http://bit.ly/2mVOUkJ ("Napolitano Memorandum"). Importantly, however, satisfying these criteria is a necessary, but not sufficient, condition to receiving deferred action under DACA; immigration officials retain authority to deny deferred action even to those individuals who satisfy these criteria. *See* Br. for Amici DACA Recipients & State of New Jersey at 9–25.

Deferred action for DACA recipients is "especially justified," because they "were brought to this country as children" and many "know only this country as home." Napolitano Memorandum at 1–2. President Obama recognized that it would cause irreparable harm to remove these individuals to countries where they lacked familial or economic ties. There is thus a compelling humanitarian interest in affording DACA recipients some explicit protection against removal.

Like deferred action and similar policies before it, DACA is not available to anyone who has been convicted of certain offenses or to anyone who poses a threat to national security. *Id.* at 1. DACA's emphasis on public safety and national security is consistent with historical practice—immigration enforcement generally has prioritized dangerous criminals and those apprehended at the border. *See generally Arizona v. United States*, 567 U.S. 387, 396–97 (2012).

DACA's authorizing memorandum provides that USCIS "shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action." Napolitano Memorandum at 3. Significantly, however, the authorizing memorandum confers neither a right to work nor a right to petition DHS for approval to work. Rather, a DACA recipient is eligible to apply for work authorization under a federal regulation that predates DACA and has been available for decades to qualifying recipients of discretionary relief.

Since its adoption, DACA has been an overwhelming success. As of 2017, before the Trump Administration attempted to rescind DACA on the incorrect assertion that its hands were tied legally, nearly fifty-five percent of DACA recipients were employed, while sixty-two percent of those not in the

labor force were enrolled in school.[5] The DACA population includes students, teachers,[6] licensed physicians,[7] members of the U.S. military,[8] students at top law schools,[9] and those admitted to practice law in various states.[10] In short, today's DACA population is by-and-large either full-time employed or otherwise in school. In the course of their duties, *amici*

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[5] Jie Zong et al., *A Profile of Current DACA Recipients by Education, Industry, and Occupation*, Migration Pol'y Inst. (Nov. 2017), http://bit.ly/2lrezS1; *see also* Tom Wong et al., *Results from 2019 National DACA Study*, Ctr. Am. Progress 2, 6 (2019), https://ampr.gs/2lWJyWp (explaining that, since their applications were approved, seventy percent of DACA recipients have enrolled in educational programs that were previously unavailable to them and almost sixty percent became employed for the first time).

[6] *See* Roberto G. Gonzalez et al., *Taking Giant Leaps Forward: Experiences of a Range of DACA Beneficiaries at the 5-Year Mark*, Ctr. Am. Progress 5 (June 22, 2017), https://ampr.gs/2lu5tDU.

[7] *Ibid.*

[8] Kathryn Watson, *Pentagon Says DACA Recipients in Military Number Fewer than 900*, CBS News (Sept. 6, 2017), https://cbsn.ws/2kTFlSR.

[9] *Statement from Dean Manning on the End of the DACA Program*, Harv. L. Sch. (Sept. 5, 2017), http://bit.ly/2kWugjZ.

[10] Raquel Muñiz et al., *DACAmented Law Students and Lawyers in the Trump Era*, Ctr. Am. Progress (June 7, 2018), https://ampr.gs/2lrqFKM.

personally met a number of these outstanding young people who, after years of living in this country, have become *de facto* Americans.

Amici know from personal experience that DACA is sound, smart policy, and firmly rooted in precedent. Now, after more than seven years, rescinding DACA is neither compelled by law nor warranted in fact. President Trump himself has observed that DACA recipients should "rest easy" because the "policy of [his] administration [is] to allow the dreamers to stay." J.A. 435. The human cost of now rescinding DACA on the erroneous assertion that the law compels it would be enormous; it is no overstatement to say that if DACA perishes, many of the 700,000 young people who placed their faith in the U.S. government would be gravely harmed.

ARGUMENT

I. Deferred Action Is Firmly Rooted in Historical Practice.

Deferred action, including discretionary, systematic relief granted on a case-by-case basis to large numbers of people otherwise removable, has in various forms occupied the landscape of executive au-

thority for decades.[11] Federal law long has recognized this reality, codifying and sanctioning deferred action as "an act of administrative convenience to the government which gives some cases lower priority." 8 C.F.R. § 274a.12(c)(14) (2019); *see also* 6 U.S.C. § 202(5) (2018) (making the Secretary of Homeland Security "responsible" for "establishing national immigration enforcement policies and priorities").

Below are a handful of salient examples, all of which involve executive action that occurred absent, or in excess of, statutory authority granted by Congress.

Eisenhower Administration. In 1956, President Eisenhower "paroled" approximately one thousand foreign-born children who had been adopted by American citizens overseas but who were barred entry into the United States by statutory quotas. President Dwight D. Eisenhower, *Statement by the President Concerning the Entry into the United States of Adopted Foreign-Born Orphans* (Oct. 26, 1956),

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[11] *See, e.g.*, Memorandum from Andorra Bruno et al., *Analysis of June 15, 2012 DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* 20–23, Cong. Res. Serv. (July 13, 2012), http://bit.ly/2liwPNz ("CRS Analysis").

http://bit.ly/2mtocQe ("Eisenhower Statement").[12] With this authority, President Eisenhower was empowered to permit the physical presence in the country of individuals who otherwise were inadmissible under the governing statutes.[13] The President explained that he had been "particularly concerned over the hardship" the quotas imposed, especially on members of the Armed Forces who were "forced to leave their adopted children behind" after completing tours of duty. Eisenhower Statement at 1. The President adopted the parole policy in the face of Congressional inaction. *Ibid.*

As the Cold War entered its second decade, the Eisenhower Administration began to use the parole power as an instrument of foreign policy.[14] For example, President Eisenhower ordered the parole of

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[12] *See Executive Grants of Temporary Immigration Relief, 1956–Present*, Am. Immigr. Counsel 3 (Oct. 2014), http://bit.ly/2lstw6k ("AIC Report").

[13] *See* Immigration and Nationality Act, Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (1952); *see also Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearing Before the S. & H. Subcomms. on the Judiciary*, 82d Cong. 713 (1951) (Statement of Peyton Ford, Deputy Att'y Gen.) (recognizing a long history of executive parole "under emergent and humanitarian circumstances" absent any authorizing "provision in existing law" before 1952).

[14] *See* AIC Report at 3.

Cubans fleeing their country's oppressive communist regime.[15] The Kennedy, Johnson, and Nixon Administrations continued this parole program, which ultimately allowed over 600,000 otherwise inadmissible persons to enter the United States.[16]

Ford & Carter Administrations. The Ford and Carter Administrations each granted "Extended Voluntary Departure"[17] to certain classes of immigrants, many of whom came from war-torn or communist countries, including individuals of Lebanese and

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[15] *Ibid.*

[16] *Ibid.*

[17] Since 1990 and continuing through today, Extended Voluntary Departure has been known as Deferred Enforced Departure. USCIS Policy Manual § 38.2, https://bit.ly/2mnY09H. These terms refer to "a temporary, discretionary, administrative stay of removal granted to aliens from designated countries." *Ibid.*

Ethiopian descent.[18] Under these deferred action policies, immigration officials "temporarily suspend[ed] enforcement" of the immigration laws for "particular group[s] of aliens." *Hotel & Rest. Emps. Union, Local 25 v. Smith*, 846 F.2d 1499, 1510 (D.C. Cir. 1988) (en banc) (per curiam) (separate opinion of Mikva, J.).[19]

Reagan Administration. The Reagan Administration made two significant contributions to the history of deferred action. First, it continued and broadened the use of deferred action, in particular by implementing the Family Fairness Program.[20] Second, and of equal importance, President Reagan's INS promulgated a regulation enabling deferred ac-

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[18] *See* AIC Report at 4. Petitioners suggest that this policy "had a plausible basis" in the Immigration and Nationality Act. Pet. Br. at 49. But as the United States previously recognized, Extended Voluntary Departure was distinct from the statutorily authorized policy. *See id.* at 49 n.10; *see also Hotel & Rest. Emps. Union, Local 25 v. Smith*, 846 F.2d 1499, 1519 (D.C. Cir. 1988) (en banc) (per curiam) (separate opinion of Silberman, J.) (affirming Extended Voluntary Departure as the President's "extrastatutory decision to withhold enforcement"). In our view, informed by decades of collective work administering our nation's immigration laws, Extended Voluntary Departure was clearly distinct from the policy authorized by statute. Because it did not in fact have express statutory authorization, the policy is indistinguishable from DACA.

[19] *See also* AIC Report at 3–5; CRS Analysis at 20–21.

[20] CRS Analysis at 21–22.

tion recipients to apply for work authorization. *See* 46 Fed. Reg. 25,079, 25,081 (May 5, 1981). This regulation remains in effect and applies to present-day deferred action recipients, including those covered by DACA. 8 C.F.R. § 274a.12(c)(14).

At the start of President Reagan's term, Congress expressly approved the Administration's continued use of Extended Voluntary Departure as a means of prosecutorial discretion for certain citizens of El Salvador who claimed a risk of persecution in their homeland. *See* International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 731, 95 Stat. 1519, 1557 ("It is the sense of the Congress that the administration should continue to review, on a case-by-case basis, petitions for extended voluntary departure made by citizens of El Salvador who claim that they are subject to persecution in their homeland, and should take full account of the civil strife in El Salvador in making decisions on such petitions.").

Later, following passage of the Immigration Reform and Control Act of 1986 ("IRCA"), President Reagan's Administration established the Family Fairness Program. *See* Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394. At the time, IRCA provided a pathway to lawful status for certain people who otherwise were present illegally in the United States. *See ibid.* But the statute said nothing about the relatives of people who might qualify for lawful status

under IRCA. "What to do when some but not all members of an alien family qualify for legalization" thus became "a controversial issue." *See Recent Developments,* 67 No. 6 Interpreter Releases 153, 153 (Feb. 5, 1990), http://bit.ly/2mtPlmh.

Confronted with that issue, INS Commissioner Alan Nelson acknowledged that there was "nothing in [IRCA or the legislative history] that would indicate Congress wanted to provide immigration benefits to others who didn't meet the basic criteria, including the families of legalized aliens." Alan C. Nelson, *Legalization and Family Fairness: An Analysis* (Oct. 21, 1987), *reprinted in* 64 No. 41 Interpreter Releases 1191 app. I, at 1201. The INS therefore lacked express statutory authority to grant lawful permanent resident status to anyone who did not qualify for it on their own merits. *Ibid*. That situation was indistinguishable from the one addressed by DACA.

The Reagan Administration, however, knew that the INS was not legally required to *remove* all such persons, even if the INS was prohibited from granting them legal status. That is, the Reagan Administration recognized the distinction between: (a) granting individuals lawful permanent resident status, which the Attorney General could not do without express statutory authorization, and (b) merely deferring removal actions against certain persons unlawfully present, which the Attorney General was

empowered to do by law. *See ibid.*

As Commissioner Nelson stated: "INS is exercising the Attorney General's discretion by allowing minor children to remain in the United States even though they do not qualify on their own, but whose parents (or single parent in the case of divorce or death of spouse) have qualified under the provisions of IRCA. The same discretion is to be exercised as well in other cases which have specific humanitarian considerations." *Ibid.*

G.H.W. Bush Administration. President George H.W. Bush's Administration then expanded the Family Fairness Program. In 1990, INS Commissioner Gene McNary instructed that "[v]oluntary departure will be granted to the spouse and to unmarried children under 18 years of age, living with the legalized alien" so long as those individuals can establish that they meet certain criteria, including residence in the United States for a specified period of time and the lack of a felony conviction. Gene McNary, INS Comm'r, to INS Reg'l Comm'rs, *Family Fairness: Guidelines for Voluntary Departure Under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* 1 (Feb. 2, 1990), *reprinted in* 67 No. 6 Interpreter Releases 153 app. I, at 164–65 (Feb. 5, 1990) ("McNary Memorandum"). The McNary Memorandum also made clear that anyone who qualified under the Family Fairness Program was eligible to work. *Ibid.* Contemporaneous government estimates

indicated that as many as 1.5 million people would be eligible under the expanded program.[21] *See Immigration Act of 1989 (Part 2): Hearing before the Subcomm. on Immigration, Refugees, and International Law of the H. Comm. on the Judiciary* at 56, 101st Cong. (Feb. 21, 1990) (testimony of INS Commissioner Gary McNary); *see also id.* at 49. It is estimated that this figure amounted to approximately forty percent of immigrants without documentation in the United States at the time.[22]

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[21] We dispute Petitioners' claim that the Family Fairness Program served only an estimated 100,000 individuals. Pet. Br. at 49. As Petitioners themselves note, this is inconsistent with contemporaneous accounts by the head of the INS, which estimated as many as 1.5 million recipients. *Ibid.* Moreover, the authority relied upon by Petitioners in support of the lower estimate appears to be three newspaper articles, which cannot overcome the authoritative estimate proffered by the INS. *See ibid.* (citing *Recent Developments*, 67 No. 6 Interpreter Releases 153, 153 (Feb. 5, 1990), which itself relies on articles in the *Los Angeles Times*, the *New York Times*, and the *Washington Post* as authority for the 100,000 figure). But regardless of the exact numbers, the point remains: a ruling that DACA is unlawful would mean that this program and others like it were illegal and should have been struck down by the courts.

[22] *See* Jeffrey S. Passel et al., *As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled*, Pew Res. Ctr. 4, 7 (Sept. 3, 2014), https://pewrsr.ch/2m4CK8F (estimating the unauthorized-immigrant population in 1990 to be 3.5 million people).

President Bush later reaffirmed the executive branch's inherent authority to implement policies like deferred action in a signing statement accompanying his approval of the Immigration Act of 1990. The Act authorized the Attorney General to grant Temporary Protected Status ("TPS") to allow otherwise removable persons to remain in the United States "because of their particular nationality or region of foreign state of nationality." Pub. L. No. 101-649, § 302, 104 Stat. 4978, 5035 (1990). President Bush objected to language purporting to make this the "exclusive" avenue for providing such relief, stating: "I do not interpret this provision as detracting from any authority of the executive branch to exercise prosecutorial discretion in suitable immigration cases. Any attempt to do so would raise serious constitutional questions." *See* President George H.W. Bush, *Statement on Signing the Immigration Act of 1990* (Nov. 29, 1990), http://bit.ly/2mWGaL7.

Enactment of the Immigration Act of 1990 was significant for an additional reason: it conveyed and confirmed Congress' express approval of the Family Fairness Program as it had been implemented to that point. Specifically, while the Act codified a temporary stay of removal and work authorization for certain eligible immigrants to preserve "family unity," Congress made clear that this provision would not become effective until the following year—and that administration of the Family Fairness Program

should not be modified in any manner before such date. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 301(g), 104 Stat. 4978, 5030 ("[T]he delay in effectiveness of this section shall not be construed as reflecting a Congressional belief that the existing family fairness program should be modified in any way before such date.")

Clinton Administration. President Clinton provided deferred action for individuals without documentation who might later prove eligible for relief under the Violence Against Women Act. *See* Memorandum from Paul W. Virtue, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* 3 (May 6, 1997), http://bit.ly/2mXIcuw (noting that "[b]y their nature, VAWA cases generally possess factors that warrant consideration for deferred action"). And later, following the end of the Liberian civil war and ahead of the looming expiration of TPS protections for Liberian refugees in 1999, President Clinton invoked his "constitutional authority to conduct the foreign relations of the United States" to grant Deferred Enforced Departure ("DED") of Liberian nationals who were present in the United States when their TPS expired. *See* President William J. Clinton, *Memorandum for the Attorney General: Measures Regarding Certain Liberians in the United States* (Sept. 27, 1999),

http://bit.ly/2kUd8ew ("Clinton Memorandum").[23] President Clinton also authorized employment for Liberians receiving discretionary relief under this policy. *See ibid.*

G.W. Bush Administration. At the start of his administration in 2001, President Bush extended President Clinton's DED policy for certain Liberian nationals.[24] Later, in 2007, the Bush Administration granted DED for Liberian nationals a second time, again permitting deferred action following expiration of TPS (which had been reinstated following a change of country conditions in Liberia in 2002). *See* 72 Fed. Reg. 53,596 (Sept. 19, 2007).

President Bush also granted deferred action to foreign students affected by Hurricane Katrina who otherwise were removable because of their failure to fulfill the requisite F-1 visa full-time student requirement.[25] This included an express grant of eligi-

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[23] *See also* CRS Analysis at 23.

[24] *See* USCIS, *Liberia Temporary Protected Status (TPS) Questions and Answers* 2 (Sept. 27, 2002), http://bit.ly/2mXOgmM (explaining DED availability).

[25] USCIS, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina, Frequently Asked Questions* 1 (Nov. 25, 2005), http://bit.ly/2mARJr9.

bility to apply for work authorization, provided that the students could demonstrate economic necessity.[26]

Finally, the George W. Bush Administration enacted regulations that deferred action for individuals petitioning for U nonimmigrant status—a classification available to victims of criminal activity who assist the government's investigation and prosecution of that activity. 72 Fed. Reg. 53,014, 53,027 (Sept. 17, 2007). The rules allowed these petitioners, like DACA recipients, to apply for employment authorization and excluded the period during which their petitions were pending from counting towards the accrual of unlawful presence. *Ibid.*; *see* 8 C.F.R. § 214.14(d)(3).

Trump Administration. President Trump's Administration, like at least eight administrations before it, also engaged in deferred action—contradicting its own stated position that any form of deferred action not expressly authorized by statute is illegal. *See* Pet. Br. at 11. For example, from at least January 2017 through September 2019, USCIS continued to process deferred action renewal requests

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[26] *Ibid.*

from individuals who themselves or whose family faced life-threatening health crises.[27]

II. Allowing Deferred Action Recipients to Apply for Work Authorization Is Consistent With Historical Practice and Benefits the United States.

The Executive's core authority to prioritize the removal of certain individuals above others—whether for public safety, national security, or humanitarian reasons—gives rise to a closely related consideration: how to structure discretionary relief policies to best serve the American economy.

Administration after administration has answered this question by authorizing recipients of deferred action to petition the federal government for work authorization if the recipients can prove economic necessity. That solution is sensible, as it increases social security and tax revenues, boosts our country's GDP, and provides better access to work protections for discretionary relief recipients. *See*

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[27] *See* Camilo Montoya-Galvez, *Trump Administration to Process Some Deferred Deportation Requests from Sick Immigrants*, CBS News (Sept. 2, 2019), https://cbsn.ws/2lt1ash; *see also* Ted Hesson, *DHS Walks Back Decision to Halt Medical Deportation Relief*, Politico (Sept. 19, 2019), https://politi.co/2myWK3s (quoting USCIS spokesperson that "USCIS is resuming its consideration of non-military deferred action requests on a discretionary, case-by-case basis").

generally Brief for Professional Economists and Scholars in Related Fields as Amici Curiae in Support of Petitioners, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674). It also reduces the likelihood that a recipient of deferred action will become a public charge, thereby furthering the purpose of federal immigration law. Immigration Act of 1990 § 212(a)(4), 8 U.S.C 1182(a)(4) (2018) (aliens are inadmissible if they are likely to become a public charge).

Granting work authorization to recipients of deferred action is expressly permitted by regulation and is a necessary practice for the coherent administration of federal immigration law. *See* 8 C.F.R. § 274a.12(c)(14). Ending this policy would present not only an unprecedented disruption of the federal immigration system, it would upend an employment practice upon which the American economy and immigration system have relied for nearly half a century.

A. Work authorization is permitted under federal law.

It is undisputed that federal law permits all recipients of deferred action to request work authorization based upon a showing of "economic necessity." 8 C.F.R. § 274a.12(c)(14); *see* Pet. Br. at 44–45. Critically, federal law does not permit *all* recipients of deferred action to receive work authorization.

Rather, work authorization is available only to those deferred action recipients who can demonstrate that they are unable to support themselves economically without entering the formal economy.

Contrary to Petitioners' claim, Pet. Br. at 44–45, this limited right is not a reason to reject DACA's lawfulness. To begin, work authorization is not unique to DACA. Rather, it is a product of federal regulations that predate DACA by decades, that have been invoked by administrations of both parties since the 1970s, and that Congress has approved since 1986. *See* 8 U.S.C. § 1324a(h)(3) (recognizing executive authority to grant work authorization). *See generally* J.A. 833–35 & n.11 (OLC opinion explaining the history of this authority). Further, the accompanying effect is modest and beneficial to this country. Finally, it also is smart policy: if these individuals are to remain in the United States, even for short periods of time, immigration officials recognize that it is in the national interest to ensure that they can be economically self-sufficient.

B. Work authorization is consistent with historical practice.

Like deferred action, the grant of work authorization is a long-standing practice of the executive branch. DHS and its predecessor agencies have granted work authorization to certain immigrants since at least 1952. *See*, *e.g.*, 17 Fed. Reg. 11,488,

11,489 (Dec. 19, 1952) (codified at 8 C.F.R. § 214.2(c) (1952)) (prohibiting some aliens from working in the United States "unless such employment or activity has first been authorized by the district director").

The policy of granting work authorization to recipients of deferred action began in the early 1970s and continues today. Congress has endorsed the practice throughout this period. *See* Sam Bernsen, *Lawful Work for Nonimmigrants*, 48 No. 21 Interpreter Releases 168, 315 (June 21, 1971).

1970s. In 1975, the INS's General Counsel explained that the INS authorized certain aliens to work in cases "when we do not intend or are unable to enforce the alien's departure," even though such work authorization "doesn't make his illegal stay here any less illegal." Sam Bernsen, *Leave to Labor*, 52 No. 35 Interpreter Releases 291, 294–95 (Sept. 2, 1975). As under DACA, such grants of work authorization were not given "automatically," but rather required a "request" by the individual. *Id.* at 295. Earlier, Congress had recognized and approved this practice in the Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, § 7(5), 88 Stat. 1652, 1655, which made it unlawful for farm labor contractors knowingly to employ any "alien not lawfully admitted for permanent residence *or who has not been authorized by the Attorney General to accept employment*" (emphasis added).

1980s. In 1981, President Reagan's INS codified "the procedures and criteria for the grant of employment authorization to aliens in the United States." *See* 46 Fed. Reg. 25,080–25,081 (May 5, 1981). The Reagan Administration stipulated that the Attorney General could grant work authorization to certain deferred action recipients, as well as other categories of individuals who lacked specific statutory authorization for employment. *Id.* at 25,081 (codified at 8 C.F.R. § 109.1(b)(6) (1982) (citing 8 U.S.C. § 1103)). Granting deferred action recipients the right to seek approval to work was necessary, the INS emphasized, "because humanitarian or economic needs warrant administrative action." *Ibid.*

Five years later, Congress endorsed President Reagan's codification of work authorization. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359. By enacting IRCA, Congress made it unlawful for an employer to hire "an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment." 8 U.S.C. § 1324a(a)(1). In defining "unauthorized alien," however, Congress *excluded* individuals who had been "authorized to be so employed by [the INA] or *by the Attorney General*." 8 U.S.C. § 1324a(h)(3) (emphasis added). This language reaffirmed both the Attorney General's authority to grant work authori-

zations *and* the manner in which the INS had been exercising that authority.[28]

The following year, the INS reaffirmed the work authorization rule (after extensive notice and comment) and reiterated the important policy goals that supported its adoption. In 1987, the Reagan Administration denied a petition for rulemaking that sought to rescind the rule on grounds that it was "inconsistent" with IRCA's alleged purpose of protecting the "American labor force." 51 Fed. Reg. 39,385–39,386 (Oct. 28, 1986); 52 Fed. Reg. 46,092–46,093 (Dec. 4, 1987) (denying the petition). In rejecting the petition, the INS explained that the work authorization rule relates to and supports a variety of IRCA's policy objectives, including because it furthers international exchange, encourages family reunion, protects those who fear persecution, facilitates diplomatic relations, fulfills international treaty require-

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[28] At the time Congress enacted IRCA, it was aware that the INS had promulgated work authorization regulations: the INS sent a letter to Congress asserting its claimed authority to grant work authorization, and Congress included this letter in IRCA's legislative history. *See* Letter from Robert McConnell, Dep't of Justice, to Rep. Romano Mazzoli (Apr. 4, 1983), *included in Immigration Reform and Control Act of 1983: Hearings before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 98th Cong. 1441, 1450 (1983) ("INS currently has authority to define classes of aliens who may be employed in the U.S. . . . .").

ments, provides due process for removable individuals, and affords some humanitarian assistance in meritorious cases. 52 Fed. Reg. at 46,092. The INS further explained that "the only logical way to interpret" Section 1324a(h)(3)'s definition of "unauthorized alien" is to recognize that Congress was fully aware of the Attorney General's practice and wanted to exclude *both* "aliens who have been authorized employment by the Attorney General through the regulatory process" *and* "those who are authorized employment by statute." *Id.* at 46,093. Congress has not interfered with or sought to end this process in the years since.

1990s. The George H.W. Bush and Clinton Administrations granted discretionary relief and work authorization in support of their humanitarian and foreign policy objectives.

In 1991, the George H.W. Bush Administration granted voluntary departure to the "ineligible spouses and children of legalized aliens" who did not qualify for statutory protection under IRCA. McNary Memorandum at 165. The Administration also granted work authorization to these individuals, recognizing that family members of newly legalized individuals required both protection from removal *and* the means to economically support themselves. *Ibid*.

In 1996, Congress again preserved the Attorney General's authority to grant work authorization,

even as it imposed new limits on the Attorney General's ability to do so. For example, Congress provided that "[n]o alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding . . . that the alien cannot be removed" or that "the removal of the alien is otherwise impracticable or contrary to the public interest." Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 305(a)(3), 110 Stat. 3009-546, 3009-600 (codified as amended at 8 U.S.C. § 1231(a)(7)).

In late 1997, President Clinton ordered the Attorney General to provide certain Haitian nationals with DED. *See* President William J. Clinton, *Memorandum on Deferred Enforced Departure for Haitians* (Dec. 23, 1997), http://bit.ly/2nemnqS. President Clinton also granted these Haitian nationals "authorization for employment," pursuant to which they could seek approval to work. *Ibid.* Like DACA recipients, these Haitian nationals were eligible for deferred action and employment authorization so long as they had been continuously present in the United States for a specified period of time. *Ibid.*

Finally, as discussed *supra* p. 22-23, President Clinton in 1999 extended DED to certain Liberian nationals based upon "compelling foreign policy reasons[.]" Clinton Memorandum at 1. President Clinton supported his foreign policy rationale with an

economic one, making work authorization available to Liberians who received discretionary relief. *Ibid.*

2000s. During the second Bush Administration, the INS continued to grant work authorization to aliens who might qualify as potential trafficking or crime victims under the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, 114 Stat. 1464. *See* Memorandum from Michael D. Cronin, Acting Exec. Assoc. Comm'r, INS, to Michael A. Pearson, Exec. Assoc. Comm'r, Off. of Programs, INS, *VTVPA of 2000 Policy Memorandum #2—"T" and "U" Nonimmigrant Visas* 4 (Aug. 30, 2001), http://bit.ly/2mEG5vA (discussing how potential applicants of new VAWA categories could be eligible for work authorization under 8 C.F.R. § 274a.12(c)(11), (c)(14)). After Hurricane Katrina, work authorization was similarly extended to students newly eligible for deferred action.[29]

As this history suggests, Congress and the executive repeatedly have granted work authorization to recipients of deferred action. They have done so because economic and humanitarian needs compel it. DACA is no different.

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[29] *See* USCIS, Press Release, USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina 1 (Nov. 25, 2005), http://bit.ly/2lHjWfZ.

CONCLUSION

DACA is a lawful and prudent response to challenges inherent in the enforcement of our nation's immigration laws. It also is entirely consistent with the practice of prior administrations dating back to the 1950s. And while DACA does not create any specific right for young people to work, existing federal law does, and the practice has been accepted by the executive and legislative branches since the 1970s. For these reasons, the judgment of the courts below should be affirmed.

Respectfully submitted,

JEH C. JOHNSON
LIZA M. VELAZQUEZ
DAVID C. KIMBALL-STANLEY
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

MASHA G. HANSFORD
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, NW
Washington, DC 20006
(202) 223-7300

KAREN L. DUNN
JOSHUA RILEY
MENNO GOEDMAN
ANDREA R. FLORES
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, NW
Washington, DC 20005
(202) 237-2727

ALBERT GIANG
Counsel of Record
BOIES SCHILLER FLEXNER LLP
725 South Figueroa Street
Los Angeles, CA 90017
(213) 629-9040
agiang@bsfllp.com

Counsel for Amici Curiae

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