No. 18-587

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.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE IMMIGRATION LAW SCHOLARS IN SUPPORT OF THE RESPONDENTS

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Additional Captions Listed on Inside Cover

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

—v.—

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KEVIN K. MCALEENAN, ACTING SECRETARY OF HOMELAND SECURITY, ET AL.,
Petitioners,

—v.—

MARTIN JONATHAN BATALLA VIDAL, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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INTEREST OF AMICI CURIAE[1]

Amici are 124 scholars of immigration law who have testified, lectured, researched, written, and advocated at length on immigration issues, including the principal subject of this appeal: The power of the Executive Branch to craft and deploy immigration-related deferred action policies. This brief reflects *amici's* long-standing interest in and knowledge regarding the historical use of deferred-action initiatives in immigration enforcement, as well as the legal doctrines and precedent supporting such use.

A complete list of *amici* is set forth in Appendix A.

SUMMARY OF ARGUMENT

In September 2017, the Department of Homeland Security (DHS) rescinded the agency's Deferred Action for Childhood Arrivals ("DACA") policy, purportedly on the basis that the policy was unconstitutional and otherwise unlawful. After unsuccessfully defending that position in court, DHS

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part; that no party or counsel for a party made a monetary contribution toward the preparation or submission of this brief; and that no person other than the amici curiae or their counsels made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, each party has consented to the filing of this brief, and copies of the consents are on file with the Clerk of the Court.

issued a second, *post-hoc* memoranda that offered additional reasons for rescinding DACA, including the assertion that the current administration prefers to determine eligibility for deferred action on an *ad hoc*, case-by-case basis rather than a policy by which immigrants who meet certain threshold criteria may obtain deferred action after the exercise of case-by-case review by immigration officials.

While the parties debate in their briefs DHS's ability to rely on *post-hoc* rationalizations for agency decisions, *amici* respectfully submit this brief for the purpose of demonstrating to the Court that DHS's *originally stated* basis for rescission—the purported unconstitutionality and/or illegality of DACA—is not supported by legal precedent or historical practice. *Amici* can state this conclusion with confidence because they have devoted their careers to studying and researching immigration law, including the means by which the Executive Branch has exercised its discretion to identify which cases present a high priority for removal, and which low-priority immigrants may appropriately be placed at the 'end of the line.'

By submitting this brief, *amici* seek to provide the Court with the benefit of their expertise and knowledge regarding the long-standing use of deferred action and other forms of prosecutorial discretion in immigration enforcement. Specifically, a*mici* catalogue the numerous instances in which the Executive Branch has exercised its discretion to provide temporary relief to categories of immigrants

who it determines, in its discretion, merit temporary relief from removal. These historical examples reveal that the exercise of discretion in immigration enforcement has long been driven by humanitarian considerations. *Amici* also identify the legal sources of prosecutorial discretion, and explain the ways in which Congress and the courts have supported and affirmed the validity of the exercise of discretion in setting priorities for immigration enforcement. And in an effort to be as helpful as possible, *amici* respond to the grounds on which DHS initially relied to rescind DACA, as well as the new arguments DHS has advanced in litigation, and explain why both fail to establish that DACA marks an unlawful departure from historical practice and precedent.

ARGUMENT

I. THE EXECUTIVE BRANCH HAS LONG USED PROSECUTORIAL DISCRETION AND CATEGORY-BASED DEFERRED ACTION INITIATIVES IN SETTING PRIORITIES FOR IMMIGRATION ENFORCEMENT

The DACA initiative is a form of prosecutorial discretion, a long-established and well-accepted practice in nearly every area of civil and criminal law enforcement. As a general matter, prosecutorial discretion in immigration enforcement provides a temporary reprieve from removal. But the use of prosecutorial discretion, while broad, has its limits: The Executive Branch does not have the discretion to grant permanent residency or eligibility to naturalize in the United States. Such powers are reserved to

Congress.

Where Congress appropriates fewer resources than will permit full enforcement, the use of prosecutorial discretion is unavoidable. DHS does not dispute that it cannot remove every undocumented immigrant who enters the country without authorization or enters under a valid visa that expires. When DACA was first announced, there were approximately 11 million undocumented immigrants living in the United States, yet Congress appropriated funds that allowed executive agencies to remove only 400,000 per year—less than 4% of that population.[2] DHS spends all of the money appropriated to it each year to remove this small percentage, and thus it must decide, within its broad discretion, those who are the highest removal priorities, and those who are not.[3] *See*

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[2] *See* Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens at 1 (Mar. 2, 2011), http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf, superseded by Memorandum from Jeh Charles Johnson, Sec'y of Homeland Security, Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

[3] *See Unconstitutionality of Obama's Executive Actions on Immigration: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 61-90 (2015) (written testimony of Stephen H. Legomsky, The John S. Lehmann University Professor at the Washington University School of Law) (hereinafter "Legomsky Written Testimony"); Shoba Sivaprasad Wadhia, *The Role of*

Arizona v. United States, 567 U.S. 387, 396 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials.").

A.

Given that the resources appropriated to immigration enforcement permit removal of only a small fraction of undocumented immigrants, the Executive Branch has long exercised prosecutorial discretion in setting immigration enforcement priorities, including through the use of deferred action.

Prosecutorial discretion played a role in immigration enforcement long before the Executive Branch began its current practice of issuing and publicizing formal memoranda and guidance, such as the 2012 DACA Memorandum. In the 1970s, attorney Leon Wildes learned through his representation of John Lennon and Yoko Ono that the INS had for many years granted "nonpriority status" to prevent the deportation of immigrants who presented "sympathetic" cases for non-enforcement.[4] Shortly

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Prosecutorial Discretion in Immigration Law, 9 CONN. PUB. INT'L L.J. 243, 268 (2010) (explaining that a just response to limited federal resources for immigration enforcement is to prioritize the removal of bad actors and, conversely, shift removal of noncitizens with desirable qualities to a lower priority).

[4] Shoba S. Wadhia, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 14-17 (2015).

after Wildes made this discovery, INS published its first formal, public deferred-action guidance in the form of "Operations Instructions," which required agents to consider deferred action "[i]n every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors."[5] The instructions identified factors for INS agents and officers to use in determining whether to refer a removal or deportation case for deferred action. These factors included (i) an immigrant's age; (ii) the number of years he or she had been present in the United States; (iii) whether any health condition required care in the United States; (iv) how removal of the immigrant would affect family remaining in the United States; and (v) the extent to which the immigrant had engaged in criminal or other disfavored conduct.[6]

Long before the Department of Justice's Office of Legal Counsel issued its 2014 opinion concerning the legality of DACA, extended DACA, and DAPA (Pet'n App. 102a-110a), federal immigration officials issued guidance documents that affirmed the legal basis for using prosecutorial discretion in immigration enforcement and directed officers to exercise discretion judiciously at every stage of enforcement. One of the first publicly available memoranda

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[5] *Id.* at 17 (citing INS Operations Instructions, O.I. § 103.1(a)(1)(ii) (1975)).

[6] *Id.* at 187 n.8(ii) (citing INS Operations Instructions, O.I. § 103.1(a)(1)(ii) (1975)).

promulgated by a federal official was authored in 1976 by then-INS General Counsel Sam Bernsen.[7] The Bernsen Memorandum explained that prosecutorial discretion is rooted in the common law, and identified the "Take Care" clause of the United States Constitution as a source of authority to exercise prosecutorial discretion over immigration matters.[8] In 2000, INS Commissioner Doris Meissner expanded upon the Bernsen Memorandum and provided additional guidance regarding the use of prosecutorial discretion in immigration enforcement.[9] During the last administration, additional memoranda setting out policies to govern the exercise of prosecutorial discretion were issued by the Director of U.S. Immigration and Customs Enforcement and, later, by the Secretary of DHS.[10] Deferred action was

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7 Memorandum from Sam Bernsen, Gen. Counsel of INS, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976), https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf.

8 *Id.*

9 Memorandum from Doris Meissner, Comm'r of INS, Exercising Prosecutorial Discretion (Nov. 17, 2000), http://library.niwap.org/wp-content/uploads/2015/IMM-Memo-ProsDiscretion.pdf.

10 Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, Policy No. 10075.1, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf; Memorandum from Jeh Charles Johnson, Sec'y of DHS,

mentioned specifically in nearly every one of the aforementioned guidance documents. Moreover, a federal immigration regulation in place since 1981 recognizes 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).

Since 1960, the INS and its successor, DHS, have adopted at least 20 policies reflecting the use of prosecutorial discretion with respect to large, defined categories of undocumented immigrants.[11] Many of these policies included the use of "extended voluntary departure" (now known as "deferred enforced departure"), under which the President may temporarily delay removal of certain classes of individuals.[12] Historical policies that applied such prosecutorial discretion to categories of immigrants include:

- In 1956, Present Dwight D. Eisenhower used prosecutorial discretion in grants of

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on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

11 *See Regents v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 488 (9th Cir. 2018) (citing Andorra Bruno et al., Cong. Research Serv., *Analysis of June 15, 2012 DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (July 13, 2012)).

12 *See* U.S.C.I.S. Adjudicator's Field Manual 38.2(a)(2007), https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16764.html#0-0-0-591.

"parole" to authorize thousands of Hungarian "Freedom Fighters" (who had been fighting against Soviet incursions) to enter the United States.[13]

- In the same year, the Eisenhower Administration implemented an extended voluntary departure program for certain beneficiaries of a program for skilled or other workers.[14]

- In 1981, President Ronald Reagan issued temporary relief from deportation through extended voluntary departure to thousands of Polish nationals who were residing in the United States when Poland declared martial law.[15]

- In 1987, the Reagan Administration announced the "Family Fairness" executive action to defer deportations of children whose parents were eligible for permanent residency under the newly enacted Immigration Reform and

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13 *See* Wadhia, BEYOND DEPORTATION at 29-30.

14 *See* INS Operations Instructions, O.I. § 242.10(a)(6)(i) (1956).

15 *See* Stephen H. Legomsky & Cristina M. Rodriguez, IMMIGRATION AND REFUGEE LAW AND POLICY 1115-17 (5th ed. 2009); David Reimers, STILL THE GOLDEN DOOR: THE THIRD WORLD COMES TO AMERICA 202 (1986).

Control Act of 1986 (IRCA).[16] Under President George H.W. Bush, the Family Fairness policy was expanded to defer deportations of the spouses and children of immigrants who qualified for permanent residence under the same statute.[17] The Bush Administration predicted that the policy would affect 1.5 million non-citizen spouses and children of immigrants (expected at the time to affect 40% of the undocumented immigrant population).[18]

- Under President William Jefferson Clinton, the INS established a deferred action initiative for survivors of abuse by

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16 *See* 64 No. 41 Interpreter Releases 1191 (Oct. 26, 1987); *see also* Am. Imm. Council, *Reagan-Bush Family Fairness: A Chronological History* 1-2 (Dec. 2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/reagan_bush_family_fairness_final_0.pdf.

17 Marvine Howe, *New Policy Aids Families of Aliens*, N.Y. TIMES at B3 (Mar. 5, 1990), https://www.nytimes.com/1990/03/05/nyregion/new-policy-aids-families-of-aliens.html; 67 No. 8 Interpreter Releases 204 (Feb. 26, 1990); 67 No. 6 Interpreter Releases 153 (Feb. 5, 1990).

18 *See* Memorandum from Gene McNary, Comm'r of INS, Family Fairness: Guidelines for Voluntary Departure Under 8 C.F.R. 242.5 for Ineligible Spouses and Children of Legalized Aliens at 1-2 (Feb. 2, 1990); *see also* Legomsky Written Testimony at 83–85.

U.S.-citizen spouses.[19]

- In 2003, then-INS Director of Operations William Yates published memoranda that directed INS officers to use prosecutorial discretion (including deferred action) to protect victims who were eligible for statutory protections such as an "U" visa.[20]

- In 2005, President George W. Bush's administration instituted a deferred-action policy for foreign students affected by Hurricane Katrina.[21]

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19 Paul W. Virtue, Acting Exec. Assoc. Comm'r of INS, Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues (May 6, 1997).

20 Memorandum from William R. Yates, Assoc. Dir. of Ops., U.S.C.I.S., Centralization of Interim Relief for U Nonimmigrant Status Applicants (Oct. 8, 2003), http:///www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2003/ucntrl100803.pdf; Memorandum from William R. Yates, Assoc. Dir. of Ops., U.S.C.I.S., Assessment of Deferred Action Requests for Interim Relief from U Nonimmigrant Status Aliens in Removal Proceedings (May 6, 2004), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/uprcd050604.pdf.

21 Press Release, USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina (Nov. 25, 2005),

- Two years later, President Bush's administration announced a policy of deferred enforced departure applicable to certain Liberians, in recognition of the ongoing Liberian armed conflict. The policy has been extended for periods of twelve to eighteen months at a time, most recently by President Donald J. Trump in March 2019.[22]

- And in 2009, President Barack Obama implemented deferred action for widows and widowers whose visa applications had not been adjudicated when their U.S.-citizen spouses died.[23]

As a general matter, agency officials have recognized that prosecutorial discretion should be informed by humanitarian considerations, and have regularly reminded agents to take humanitarian factors into account when deciding which cases may be eligible for

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https://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf.

22 U.S.C.I.S., *Deferred Enforced Departure – Liberia*, https://www.uscis.gov/humanitarian/deferred-enforced-departure/ded-granted-country-liberia/ded-granted-country-liberia (last updated Apr. 4, 2019).

23 Memorandum from Donald Neufeld, Acting Assoc. Dir. of USCIS, Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (Sept. 4, 2009), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2009/June%202009/surviving-spouses-deferred-action-guidance.pdf.

deferred action.[24] Thus, in addition to adopting policies directed at categories of immigrants who may warrant relief based on the same humanitarian considerations, INS and DHS have exercised discretion on a case-by-case basis to grant deferred action to people with serious medical conditions, those who entered the country at a young age, those who have strong family ties to citizens, and those with lengthy terms of residence in the United States.[25]

B.

Congress has effectively delegated to DHS (and INS before) the power and authority to make prosecutorial discretion decisions. It has explicitly charged the Secretary of Homeland Security with the "administration and enforcement of . . . all . . . laws

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[24] *See, e.g.*, Memorandum from Doris Meissner, Comm'r of INS, Exercising Prosecutorial Discretion (Nov. 17, 2000), http://library.niwap.org/wp-content/uploads/2015/IMM-Memo-ProsDiscretion.pdf; *see also* Memorandum from Johnny N. Williams, Exec. Assoc. Comm'r, Off. of Field Ops., INS, Family Unity Benefits and Unlawful Presence (Jan. 27, 2003) (reminding regional directors that they have authority to refrain from bringing charges on the basis of unlawful presence and may rely on humanitarian factors to make this assessment); *see generally* Wadhia, BEYOND DEPORTATION at 27-28 (collecting examples).

[25] *See* Statement of Karen T. Grisez on behalf of the American Bar Association to the U.S. Senate Committee on the Judiciary at 7 (May 18, 2011), *available at* http:///www.americanbar.org/content/dam/aba/uncategorized/2011/2011may18_grisezs_t.authcheckdam.pdf.

relating to . . . immigration and naturalization . . . ," 8 U.S.C. § 1103(a)(1), and has made the Secretary "responsible" for "[e]stablishing national immigration enforcement policies and priorities," 6 U.S.C. § 202(5).

Congress has also enacted numerous pieces of immigration legislation that assume that the Executive Branch has the power to grant deferred action to certain classes or categories of otherwise removable immigrants. As the Office of Legal Counsel recognized in 2014, "Congress has long been aware of the practice of granting deferred action, including in its categorical variety" and "has enacted several pieces of legislation that have either assumed that deferred action would be available in certain circumstances, or expressly directed that deferred action be extended to certain categories of aliens."[26] For instance, in Section 237(d)(2) of the Immigration and Nationality Act (codified at 8 U.S.C. § 1227(d)(2)), Congress specified that the denial of a request for an administrative stay of an order of removal "shall not preclude the alien from applying for . . . deferred action." Similarly, Section 1503(d)(3) of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1522 (codified at 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV)), makes certain covered immigrants "eligible for deferred action and work authorization."

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[26] Office of Legal Counsel, U.S. Dept. of Justice, The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others at 18 (Nov. 19, 2014).

Moreover, members of Congress from both major political parties have urged the Executive Branch to de-prioritize specific categories of removal cases on humanitarian grounds. For instance, after Congress amended the INA in 1996 to mandate that INS detain "arriving aliens" (including asylum seekers) and limit the discretion of immigration judges to release detainees on bond, a bi-partisan group of twenty-eight members of Congress (including some co-sponsors of the 1996 amendments) urged the INS Commissioner to issue guidelines on prosecutorial discretion based on the concern that INS was pursuing the deportation of productive and sympathetic non-citizens "when so many other more serious cases existed."[27]

In fact, Congress has never curtailed the Executive Branch's use of deferred action over the almost 50 years such initiatives have been employed, despite amending the INA on numerous occasions and passing annual agency appropriation bills. To the contrary, Congress has made the Executive Branch's use of deferred action and other forms of prosecutorial discretion unavoidable, by consistently appropriating far less than DHS needs to remove every person eligible for removal.

C.

Finally, this Court has repeatedly confirmed

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[27] *See* Letter from Members of Congress to Janet Reno, Attorney General, Department of Justice, Guidelines for Use of Prosecutorial Discretion in Removal Proceedings (Nov. 4, 1999), http://www.ice.gov/doclib/foia/ \ prosecutorial-discretion/991104congress-letter.pdf.

the Executive Branch's lawful right and need to employ prosecutorial discretion policies in various contexts, including immigration. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387, 396 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials"); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion"). Indeed, in *Reno v. American-Arab Anti-Discrimination Committee*, Justice Scalia, writing for an eight-Justice majority, confirmed that deferred action constituted a "regular practice" by which the INS exercised prosecutorial discretion "for humanitarian reasons or simply for its own convenience." 525 U.S. 471, 483-84 (1999).

II. THE DACA INITIATIVE FITS SQUARELY INTO THE EXECUTIVE BRANCH'S LONGSTANDING USE OF CATEGORY-BASED DEFERRED ACTION INITIATIVES

DACA fits squarely within the legal, historical practice of identifying categories of immigrants for whom removal is not a high priority, such that "enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities." 2012 DACA Memorandum at 98a. The policy sets out criteria that must be satisfied before an individual is "considered for an exercise of prosecutorial discretion," which include age (eligibility is limited to

those thirty years old or under); dates of entry, and, to the extent applicable, re-entry into the United States (the applicant must have first arrived in the United States when he or she was under sixteen years old, must have resided in the United States on a continuous basis for the past five years, and must have been present in the United States as of the date the DACA policy was first promulgated); education (the applicant must be in school, have graduated from high school or have a GED, or have been honorably discharged from the armed services); and threat to public safety (the applicant must not have been convicted of a felony, a significant misdemeanor or multiple misdemeanors, or otherwise pose a threat to national security or public safety). *Id.* Applicants must also pass a background check. *Id.* at 99a.

The memorandum announcing the DACA initiative specified that satisfying the above criteria would not guarantee relief from removal. Rather, "requests for relief pursuant to this memorandum are to be decided on a case-by-case basis." *Id.* at 99a. Then-Secretary Napolitano also confirmed that the memorandum "confers no substantive right, immigration status or pathway to citizenship," but rather "set[s] forth policy for the exercise of discretion within the framework of the existing law." *Id.* at 101a.

To date, every court to substantively address DACA has found it to be a lawful exercise of Executive

Branch discretion.[28]

III. THE DACA INITIATIVE IS A LAWFUL EXERCISE OF DISCRETION IN IMMIGRATION ENFORCEMENT

DHS's stated reasons for declaring DACA unconstitutional or otherwise unlawful cannot be squared with the broad discretion the Executive Branch has historically exercised over matters of immigration enforcement. DHS acknowledges—as it must—that both Congress and this Court have recognized and affirmed the use of prosecutorial discretion and deferred action as integral to

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[28] The only instance in which a deferred action policy has been found unlawful did not involve a full hearing on the merits. In *Texas v. United States*, a district court in Brownsville, Texas granted a request by the attorneys general of several states to enjoin the implementation of DAPA and "extended DACA"—deferred-action initiatives that applied to much larger groups of immigrants than DACA—after finding that the states were likely to prevail on the merits of their claims that DHS violated the procedural requirements of the Administrative Procedure Act by adopting these policies. 86 F. Supp. 3d 591, 671-72 (S.D. Tex. 2015). The U.S. Court of Appeals for the Fifth Circuit affirmed, and an equally divided Court allowed the ruling to stand. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam). In 2018, the same district court determined that a group of states were likely to prevail on claims that DACA violated the APA, but declined to enjoin the program on the ground that the plaintiff states had not demonstrated that they would suffer irreparable harm if the program were allowed to remain in place for the pendency of the litigation. *Texas v. United States*, 328 F. Supp. 3d 662, 712-42 (S.D. Tex. 2018). The Texas court's limited-record rulings have no bearing on DACA's viability.

enforcement of the immigration laws. In addition, DHS acknowledges that, because it lacks the resources to remove the entire population eligible for removal at any given time (and, in fact, has the funds to remove only a small fraction of those immigrants), DHS *must* exercise discretion in deciding who to prioritize for removal. Despite these concessions, DHS has taken the position that the exercise of deferred action embodied by DACA is somehow patently improper. *Amici* respectfully submit that DHS's reasons have no support in the historical facts or jurisprudential underpinnings of Executive Branch discretion in the field of immigration enforcement.

A.

In announcing and attempting to justify its decision to rescind DACA, DHS relied in significant part on its conclusion that the policy is "unconstitutional." On September 4, 2017, then-Attorney General Sessions wrote to Acting DHS Secretary Elaine Duke to "advise" that DHS rescind the June 2012 DACA Memorandum. Sessions described DACA as an "unconstitutional exercise of authority by the Executive Branch" based on his conclusion that the policy constituted an "open-ended circumvention of immigration laws." JA 877. Acting Secretary Duke quoted this portion of the letter in her September 5, 2017 Rescission Memorandum (*see* Duke Mem. 116a), and concluded, "it is clear that the June 15, 2012 DACA program should be terminated" based on Sessions's legal analysis as well as the factual findings in a lawsuit in which "the original DACA policy was not challenged." Duke Mem. 114a &

117a.[29]

DHS has not explained why Acting Secretary Duke concluded that DACA was unconstitutional, either in the appellate courts below or in its merits brief here. Neither Attorney General Sessions nor Acting Secretary Duke pointed to a specific supporting law or doctrine. In fact, the lone case on which the Acting Secretary relied to find DACA unconstitutional did not address DACA's lawfulness at all, much less the constitutionality of exercising prosecutorial discretion. *Texas v. United States*, 809 F.3d 134, 178-86 (5th Cir. 2015), *aff'd per curiam by an equally divided panel*, *United States v. Texas*, 136 S. Ct. 2271 (2016).

Prior to the attempt to rescind DACA, those who challenged the constitutionality of the policy generally grounded their objections on the President's obligation to "take Care that the Laws be faithfully

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[29] Although this brief focuses on whether DACA is a legal exercise of prosecutorial discretion, and leaves it to others to address the extent to which DHS's rescission of the policy comported with the Administrative Procedure Act, *amici* note that a court's review of agency action is generally limited to the record before the agency at the time it made the decision under review, rather than an agency's *post-hoc* rationalizations developed for the purpose of litigation. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Here, Attorney General Sessions and Acting Secretary Duke both adopted the view that DACA was unconstitutional at the time of their decision. As a result, although DHS does not attempt to defend its original justification for its action, *amici* will briefly address the extent to which DACA is a constitutional exercise of discretion by the Executive Branch.

executed." U.S. CONST. art. II, § 3. Certain commentators argued that the President's willingness to temporarily defer pursuit and deportation of successful DACA applicants constitutes a failure to "execute" the immigration laws. But, as the Congressional Research Service observed in 2013, "no court appears to have invalidated a policy of non-enforcement founded upon prosecutorial discretion on the grounds that the policy violated the Take Care Clause." Kate Manuel & Tom Garvey, Congressional Research Service, *Prosecutorial Discretion in Immigration Enforcement* at 17 (Dec. 27, 2013). This unbroken pattern has held among the lower courts that have since considered challenges to DACA. *See Arpaio v. Obama*, 27 F. Supp. 3d 185, 209-10 (D.D.C. 2014), *aff'd on other grounds*, 797 F.3d 11 (D.C. Cir. 2015) (rejecting constitutional attack on DACA); *Crane v. Johnson*, 783 F.3d 244, 251-55 (5th Cir. 2015) (dismissing on standing grounds plaintiff's claim that DACA is unconstitutional).

The exercise of prosecutorial discretion to prioritize which immigrants to remove from the United States is, if anything, a *necessary* component of the President's obligation to "take care" to execute faithfully all immigration laws, not an abdication of that responsibility. The law requires the President, as "prosecutor-in-chief" for the immigration enforcement system, to make the hard choices necessary to properly "administer systematic enforcement in the huge gap between the unauthorized population of over eleven million and the annual enforcement capacity of

[a small percentage] of that figure."[30] The President's "faithful execution of the immigration laws" therefore "includes prioritizing the deportable population in a cost-effective and conscientious manner and providing benefits to deportable noncitizens when they qualify" under other laws.[31]

In any event, DHS long ago abandoned its argument that DACA constitutes a violation of the President's Article II obligations under the "Take Care" clause. And DHS does not identify any other constitutional provision that prohibits it from engaging in its long-standing practice of using deferred action to carry out its enforcement priorities.[32] As a result, any challenge to DACA's lawfulness must be based on the notion that this exercise of discretion is inconsistent with federal

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30 Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 28 (2015).

31 Wadhia, BEYOND DEPORTATION at 107; *see also* Shoba S. Wadhia, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L.R. 59, 62-63 (2013).

32 An *amicus* brief filed by the Cato Institute and Professor Jeremy Rabkin "supporting DACA as a matter of policy but petitioners as a matter of law" argues that Attorney General Sessions's and Acting Secretary Duke's objections to the constitutionality of the policy can be understood as an application of this Court's non-delegation or "major questions" precedent. Although a full rebuttal of this argument is outside of the scope of this brief, *amici* are unaware of any historical or legal precedent that would support curtailing the exercise of a power that is unique to the executive—prosecutorial discretion—on grounds that it constituted an exercise of Congress's power to legislate.

immigration law.

B.

DHS's remaining reasons for contending that the DACA policy is unlawful are impossible to square with the legal and historical precedent supporting the broad use of prosecutorial discretion in immigration enforcement.

1.

First, DHS appears to take the position that DACA impinges on Congress's authority to legislate the terms under which an otherwise removable immigrant may be permitted to remain in the United States. To this end, DHS points to various provisions of the INA that, in its view, form a "comprehensive, detailed scheme for affording certain aliens relief or reprieve from removal." DHS Br. at 44. It then suggests that, although DHS retains authority to address "interstitial matters of immigration enforcement," the INA does not permit the agency to pursue this particular form of deferred action. *Id.*

This argument simply ignores the differences between the limited grounds for relief or reprieve from removal afforded by the INA and the Executive Branch's right, as reflected in DACA, to make decisions about which cases to prioritize for removal. Statutory provisions that offer durable relief from removal (including the adjustment of status to lawful permanent residency) are fundamentally different from deferred action. Deferred action is an "act of administrative convenience to the government which

gives some cases lower priority." 8 C.F.R. § 274a.12(c)(14). It is a policy of temporary, time-limited non-enforcement. *See* DHS Br. at 46; JA 799 (2014 OLC Memorandum) ("Deferred action does not confer any lawful immigration status, nor does it provide a path to obtaining permanent residence or citizenship. Grants of deferred action under the proposed programs would, rather, represent DHS's decision not to seek an alien's removal for a prescribed period of time.").

There is no indication that, in providing statutory remedies for certain immigrants who might otherwise be removable, Congress intended to prevent the Executive Branch from exercising discretion to set enforcement priorities with respect to removable immigrants who do not qualify for asylum or other forms of statutory relief. To the contrary, Congress has repeatedly recognized that the agencies that enforce immigration laws may exercise prosecutorial discretion (including deferred action) in prioritizing cases for removal, and has noted, for example, the possibility of such temporary relief in the same statutes that contain provisions affording relief to asylum seekers, immigrants eligible for "T" or "U" visas. The provisions DHS identifies as forming a "comprehensive and detailed scheme" do not provide remedies for every immigrant who may warrant relief from removal on humanitarian grounds.[33] Indeed, each of the deferred action initiatives identified in

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[33] *See, e.g.*, 8 U.S.C. § 1229b (capping the Attorney General's authority to adjust the status of immigrants who are eligible for an adjustment under the provision to 4,000 immigrants in any fiscal year);

Section I, *infra*, was pursued at a time when the operative immigration laws included provisions that provided relief or reprieve from removability.

Meanwhile, Congress has repeatedly chosen not to provide sufficient funding for DHS to initiate removal proceedings against every immigrant subject to removal. Thus, the temporal order of removal is hardly an area in which Congress intended to occupy the field and leave the agency room only to pursue "interstitial" or "gap-filling" measures. DHS Br. at 44. Instead, it is an area—like many other areas—in which Congress and this Court have recognized the power of the executive branch to decide how to best use the limited resources allocated for enforcement of federal law.

Nor does Congress's failure to legislate a permanent pathway to citizenship for DACA recipients (via so-called DREAM Acts) foreclose DHS from making DACA recipients a lower removal priority. Surely, DHS does not mean to indicate that, in failing to overcome legislative gridlock on possible pathways to permanent citizenship, Congress affirmatively signaled *affirmative opposition* to placing at the back of the removal line children who were brought to the United States as minors, who obtained an education and/or served in the armed forces, and who do not present a risk to national security or public safety. In any event, regardless of what inferences one might attempt to draw from Congress's failure to fully pass DREAM Act legislation, DHS, not Congress, is responsible for strategically employing limited resources to enforce the immigration laws.

2.

DHS concedes that it has limited resources to devote to removal, and therefore must make choices regarding which immigrants to prioritize in its enforcement efforts. It argues, however, that its discretion is limited to "strategically directing the agency's resources to the highest priority violators." DHS Br. at 45. It then contends that DACA goes too far by "informing roughly 1.7 million aliens that they may continue violating federal law without fear of enforcement—while establishing a procedure to make them eligible for additional benefits." *Id.* Elsewhere, DHS describes DACA as "affirmatively assisting lower-priority offenders to persist in ongoing illegal activity." *Id.* at 46.

This argument rests on false premises that find no support in the law governing deferred action or the historical circumstances in which the practice has been used. Indeed, accepting several of DHS's pronouncements as true would cast doubt on the validity of *every* past or future use of deferred action—notwithstanding the fact that both Congress and this Court have for decades acknowledged and approved of prosecutorial discretion in enforcing the immigration laws (including through deferred action).

a.

Because DHS recognizes that deferred action has been used by previous administrations and appears to concede this use was lawful (or at least does not challenge these previous uses), it must establish here that DACA is fundamentally different from those previous policies and that any such

differences are doctrinally significant. DHS fails on both counts—nearly all of the differences to which it draws the Court's attention are not supported by the record, and any factually supportable differences do not justify the conclusion that DACA is unlawful.

In referring repeatedly to the number of potential DACA beneficiaries (1.7 million) and implicitly comparing the smaller populations that were the subject of certain prior deferred action initiatives, DHS appears to assume that the INA somehow caps the number of immigrants who may be identified as lower priority for removal in an exercise of prosecutorial discretion. There is no legal basis for holding that DHS may only enact policies that apply to a small class of otherwise removable immigrants. Although category-based deferred action has typically been used for groups comprised of fewer immigrants than the 1.7 million who were estimated to meet DACA's threshold eligibility requirements, this does not mean that DHS acted unlawfully in promulgating a policy that temporarily defers removal of a larger class of immigrants who are each deemed worthy recipients of prosecutorial discretion.[34]DHS does not

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[34] Although there is no legal or historical support for DHS's argument that it may not exercise discretion with respect to a group that exceeds a certain number of immigrants, *amici* note that the actual number of immigrants granted deferred action under DACA is far less than 1.7 million. As of June 2019, the Center for American Progress estimated that there are 660,880 DACA recipients living in the United States. *See* Nicole Prchal Svajlenka, Center for American Progress, *What We Know About DACA*

dispute that its resources historically permit removal of only about 400,000 immigrants per year. Thus, even if immigrants who meet the criteria for DACA (1.7 million) were taken out of the pool of immigrants eligible for removal (historically about 11 million), the number of removable immigrants still vastly exceeds those DHS could realistically remove at current and historic funding levels.

Moreover, in terms of overall anticipated effect, DACA was slated to impact a smaller proportion of removable immigrants than original estimates for the Family Fairness policy in effect during the administrations of Presidents Ronald Reagan and George H.W. Bush. The Family Fairness policy was expected to defer the deportations of approximately 1.5 million non-citizen spouses and children of immigrants—i.e., about forty percent of the removable population at the time.[35] Although there is some evidence that INS's estimates regarding program participation exceeded the number of immigrants who ultimately took part in Family Fairness, the fact remains that there were no challenges to the legality of using prosecutorial discretion to afford temporary relief from deportation to a significant portion of the

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Recipients in the United States (Sept. 5, 2019), https://www.americanprogress.org/issues/immigration/news/2019/09/05/474177/know-daca-recipients-united-states/ (summarizing data filed in this litigation).

35 *See* Memorandum from Gene McNary, Comm'r of INS, Family Fairness: Guidelines for Voluntary Departure Under 8 C.F.R. 242.5 for Ineligible Spouses and Children of Legalized Aliens at 1-2 (Feb. 2, 1990); *see also* Legomsky Written Testimony at 83-85.

removable population.

DHS is also incorrect when arguing that the Family Fairness program had a "plausible basis in the INA" because it used the mechanism of extended voluntary departure as opposed to deferred action. DHS Br. at 48-49. The power to grant or deny extended voluntary departure finds its basis in the same sources as the power to grant deferred action—the Attorney General's "broad latitude" in enforcing the immigration laws implicit in statutes such as 8 U.S.C. § 1103(a), as well as the President's general obligations to "take Care" that the laws be faithfully executed. *See Hotel & Rest. Emps. Union, Local 25 v. Smith*, 846 F.2d 1499, 1510, 1519 (D.C. Cir. 1988) (en banc) (per curiam) (Mem.) (opinions of Mikva, J. and Silberman, J.).

In addition to arguing that the number of recipients somehow renders DACA unlawful, DHS attempts to distinguish DACA from instances in which previous administrations have used deferred action, noting that many of the previous uses were stop-gap measures to forestall deportation while the immigrants pursued statutory remedies. DHS also argues that many initiatives singled out groups who are afforded "special solicitude" by the INA. DHS Br. at 46-48.[36] To the extent this is a correct description of

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[36] Although the INA does not currently afford special treatment to DACA recipients, there is broad-based, bi-partisan public support for passing some version of the DREAM Act. Moreover, Congress's repeated (albeit unsuccessful) attempts to provide a legislative remedy is,

at least some of the previous exercises of deferred action, neither DHS, Congress, nor this Court has ever indicated that DHS lacks discretion to de-prioritize the removal of groups who do not meet either criteria.

b.

It is highly misleading for DHS to suggest that DACA is somehow "different" from prior policies because it "affirmatively assist[s] lower-priority offenders to persist in ongoing illegal activity." DHS Br. at 46. In making this statement, DHS is presumably referencing the fact that DACA recipients are temporarily treated as "lawfully present" and are eligible to apply for work authorization upon a showing of economic need, which, if granted, will lead to the issuance of a Social Security card. But this would be the case for *any* recipient of deferred action—it is not unique to DACA. Under 8 U.S.C. § 1182(a)(9)(B)(ii) and related regulations, DHS treats recipients of deferred action as "lawfully present" during the temporary "period of stay" in which their status is in effect.[37] Further, as DHS itself admits, immigrants who are granted deferred action *on any basis* may be authorized to work if they establish economic necessity. *See* DHS Br. at 5. The regulation governing work authorization for recipients of deferred action (8 C.F.R. § 274a.12(c)(14)) has been in

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at the very least, evidence of Congress's concern for children and young adults who were brought to the United States as children and who are productive members of their communities.

[37] *See* 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2).

place since 1981, and implements a similar statutory directive. *See* 8 U.S.C. § 1324a(h)(3) (noting that a person is 'authoriz[ed] to work in this country if he or she is permitted to work "by [the INA] or by the Attorney General"). Thousands of deferred action recipients have applied for and received employment authorization pursuant to this regulation.[38] Moreover, obtaining work authorization permits recipients of deferred action to obtain temporary social security cards under Section 205(c)(2)(B)(ii)(I) of the Social Security Act, not under the INA.[39] DHS fails to explain how the application of these statutes and regulations renders DACA unlawful while other deferred action policies are allowed to proceed.

Moreover, DHS's references to the receipt of "benefits," the "deploy[ment] [of] limited resources in a manner that *facilitates* ongoing violation of federal law," and "affirmative[] assist[ance]" are themselves misleading, to the extent that this rhetoric suggests DACA impermissibly directs scarce enforcement resources directly into the pockets of recipients. Work authorization is not a "benefit" as that term is typically understood under public law—although it permits recipients to earn money, the wages are paid by an employer rather than the taxpayer, and the recipient in turn pays taxes to the United States. To

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[38] *See, e.g.*, Legomsky Written Testimony at 76-78; Shoba Sivaprasad Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. RACE & LAW 1 (2016).

[39] *See* Legomsky Written Testimony at 67.

the extent DHS intended to refer here to the costs of administering DACA, there is no evidence of these costs in the record, much less evidence that DHS relied on the initiative's costs as a ground to rescind. To the contrary, there is forceful evidence that DACA recipients, on a net basis, contribute healthily to (rather than burden) the federal tax base.[40]

DHS's references to DACA recipients' "ongoing violation" of federal law are similarly misleading. Although prosecutorial discretion cannot be used to grant "lawful status," recipients of deferred action are treated as "lawfully present" while deferred action is in effect,[41] and, thus, cannot be said to be violating statutes governing removal on an "ongoing" basis. Again, lawful presence is the result of a generally applicable statute, rather than a feature of DACA in particular. Moreover, it cannot be the case that DHS believes rationally that DACA recipients are violating the law in other ways, given that immigrants who have committed felonies, "significant" misdemeanors,

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40 *See* Nicole Prchal Svajlenka, Center for American Progress, *What We Know About DACA Recipients in the United States* (Sept. 5, 2019), https://www.americanprogress.org/issues/immigration/news/2019/09/05/474177/know-daca-recipients-united-states/ (summarizing evidence of financial contributions of DACA recipients based on 2017 1-year American Community Survey microdata).

41 *See* U.S. Citizenship & Imm. Servs., DHS DACA FAQs Q1 ("An individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect."); *see also* 8 U.S.C. § 1182(a)(9)(B)(ii); 8 C.F.R. § 214.14(d)(3); 28 C.F.R. 1100.35(b)(2).

or multiple misdemeanors are categorically ineligible for DACA. The DACA policy also requires recipients to apply for renewal every two years, thereby assuring that criminal activity, if any, can be taken into account.

c.

Finally, to the extent DHS believes DACA is unlawful on grounds that it is a "categorical deferred-action policy" (DHS Br. at 43), this broad objection does not align with the long-standing practice of adopting prosecutorial discretion strategies that identify categories of immigrants who may warrant temporary relief rather than exercising discretion on a purely case-by-case basis.

Indeed, DHS does not raise a meaningful challenge to its own ability to identify a category of immigrants eligible to receive individualized consideration for deferred action. Instead, DHS posits that DACA's high acceptance rate "plainly creates an implicit presumption that requestors who meet its eligibility criteria will be granted deferred action," and then offers the previously unstated view that the current administration prefers to exercise its discretion to grant requests for deferred action only on a "truly individualized, case-by-case basis. DHS Br. at 39. While DHS's ability to rely on *post-hoc* policy preferences is beyond the scope of this brief, *amici* seek to clarify the extent to which DACA already requires case-by-case enforcement.

DACA expressly mandates that DHS make individualized, case-by-case, discretionary evaluations as to applicants who meet the threshold

criteria for eligibility. Then-Secretary Napolitano drafted the DACA policy to explicitly require DHS adjudicators to exercise individualized discretion consistent with the administration's stated view that there were not "whole categories that we will, by executive fiat, exempt from the current immigration system, as sympathetic as we feel towards them."[42] Under DACA, if young people meet certain criteria relating to their residence in the United States, such as age at arrival, education, and good behavior, they are eligible for an individualized assessment, but the discretionary grant of temporary relief is only a *possible* outcome—it is not guaranteed.[43]

DACA's initial eligibility criteria also explicitly preclude approval of applicants who pose a threat to national security or public safety, which itself requires an exercise of individualized discretion. Whether an applicant endangers the public safety is not simply a box-checking exercise. Assessing the extent to which an individual may pose a threat to national security or public safety requires officials to exercise subjective judgment.

The record developed in *Texas II*—the only case DHS emphasized in its revocation decision—reflects

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42 *See* Elise Foley, *Officials Refuse to Budge on Deportation of Students, Families*, THE HUFFINGTON POST (updated June 1, 2011), http://www.huffingtonpost.com\2011\04\01\obama–administration–refu_1_in_843729.html.

43 *See* Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENVER L. R. 709, 727 (2015).

that the agency in fact exercises its discretion when reviewing DACA applications.[44] The evidence established that as of December 5, 2014, 36,860 requests for deferred action under DACA had been denied on the merits (in addition to those that were rejected for other reasons, such as lack of the required fee and failure to sign the application).[45] Moreover, the government provided a number of examples of applications denied on discretionary grounds, even though the applicants met all of the threshold criteria. These examples were in addition to denials based on the discretion inherent in some of the threshold criteria themselves, such as not posing a threat to public safety.[46]

The U.S. District Court for the District of Columbia specifically considered and rejected the current administration's claim that DHS personnel are not evaluating the facts of each individual case when applying DACA. *See Arpaio*, 27 F. Supp. 3d 185. After considerable factual analysis, the court found not only that DACA "retain[s] provisions for meaningful case-by-case review," but also that "[s]tatistics provided by the defendants reflect that such case-by-case review is in operation." *Id.* at 209. The court specifically noted the unrebutted fact that

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44 For a thorough discussion of the evidence developed in *Texas II*, *see* Brief for Texas v. United States Defendant-Intervenors DACA Recipients and State of New Jersey in Support of Respondents (filed Sept. 26, 2019).

45 *See* Decl. of Donald W. Neufeld ¶ 23, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. B-14-254), ECF No. 130 att. 11.

46 *Id.* ¶ 18.

through 2014, more than 38,000 DACA applications had been denied on the merits as the result of case-by-case decision making. *See id.* at 209 n.13.

The fact that DACA has a relatively high rate of acceptance—91%, according to DHS's brief, which is down from the 95% rate that pertained at the time of *Texas II*—does not mean that agents are "rubber-stamping" applications. To the contrary, a high acceptance rate is the natural result of self-selected candidates—young people willing to spend the time needed to complete the detailed application, gather the necessary documentation, and pay the relatively high application fee ($495) because, based on the published eligibility criteria and discretionary factors, they could judge before-hand whether they were likely to be approved. *See* JA 713-14.

The published eligibility criteria also caused potential applicants not to file an application at all, because they knew ahead of time that their less-than-perfect backgrounds might diminish their chances, whether fairly or unfairly. Among their reasons for not applying was the risk—despite contrary representations by DHS—that if their applications were rejected, they would be immediately detained and removed because they would have disclosed all of their personal information during the application process. As a result of these candidates absenting themselves from the application process altogether (even though they might have been successful), the group of well-informed children and young adults who elected to submit applications was comprised of individuals who, on the whole, presented strong cases for temporary relief from removal. As one immigration

scholar succinctly concludes: "A denial rate of 5%, therefore, provides no legitimate basis for the belief that DACA requests are being rubber-stamped; to the contrary, it shows that thousands of denials occur even among this highly self-selected group."[47]

CONCLUSION

DACA is a lawful exercise of prosecutorial discretion in a field in which the Executive Branch is granted broad latitude to set and carry out removal priorities. Although the current administration may now seek to offer after-the-fact reasons to exercise its discretion differently, there is no legal or historical basis for its officially-stated conclusion that DACA is unconstitutional or otherwise unlawful. *Amici* respectfully urge the Court to affirm the judgments below.

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[47] Legomsky Written Testimony at 72 n.10.

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