No. 18-1469

In the
Supreme Court of the United States

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

v.

CASA DE MARYLAND, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts (including this Court) and administrative bodies, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

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[1] After receiving more than ten days' written notice, the parties consented in writing to the filing of this *amicus curiae* brief in this case. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae,* its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

The decision of the court below depended on the assumption that DACA both is substantively lawful and was implemented in a procedurally lawful manner. If either assumption is untrue, an injunction of DACA's rescission should restore not DACA, but the last lawful regulatory state of affairs—to wit, the *status quo* pre-DACA.

In fact, neither of the above assumptions is true: DACA is both substantively and procedurally invalid. It is substantively invalid because it exceeds agency authority. It is procedurally invalid because it restricts agency discretion but did not go through the requisite notice and comment process. Thus, respondents' requested relief should only result in the restoration of the *status quo* pre-DACA. Since the *status quo* pre-DACA would not benefit respondents, their claims cannot be redressed by an injunction of DACA's rescission. Accordingly, respondents lack standing to maintain this action, and the federal courts lack jurisdiction to hear it.

This Court has an obligation to assure itself of its own jurisdiction, and that of lower courts. This Court should grant review of this case, find DACA both substantively and procedurally invalid, and dismiss the case for lack of jurisdiction.

ARGUMENT

I. Because DACA Was Invalid, The Court Below Could Not Reinstate It, And Respondents Lack Standing.

As explained below, the DACA program is invalid. Courts must hold unlawful, rather than give effect to, invalid regulations. 5 U.S.C. §§ 706(2)(A), (C) ("The reviewing courts shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . . [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . "); *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992) ("Agency actions beyond delegated authority are *ultra vires,* and courts must invalidate them.") (internal citation and quotation marks omitted).

The effect of the invalidation of the rescission of DACA would be to reinstate the rule previously in force—but only if that previous rule were valid. *See, e.g., Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (holding that the effect of invalidating an agency rule is to reinstate the rule previously in force); *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (refusing to reinstate a previous rule under that standard because it was itself invalid). Thus, because DACA is invalid, the invalidation of its rescission cannot revive it.

Indeed, because DACA is invalid, and because the effect of invalidating its rescission would be to reinstate

the last lawful state of applicable regulations, respondents' requested remedy would only result in the restoration of the *status quo* pre-DACA. For this reason, at the minimum, respondents' claimed injuries are non-redressable, and their claims should be dismissed for lack of standing under Federal Rule of Civil Procedure 12(b)(1). *See Lujan v. Defs. of Wildlife,* 504 U.S. 555, 561 (1992).

"The question of standing is not subject to waiver . . . We are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." *United States v. Hays*, 515 U.S. 737, 742 (1995) (internal quotation marks, citations, and brackets omitted). Thus, courts' hesitation to consider arguments raised solely by an *amicus curiae* does not apply to jurisdictional arguments. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 97 n.4 (1991).

This Court should grant the instant petition, and, in the course of assuring itself of its jurisdiction, examine both the substantive and procedural lawfulness of DACA, and, finding it unlawful, hold that respondents' claims should be dismissed for lack of standing.

II. DACA Is Invalid.

DACA is invalid both because it was *ultra vires* and because the Department of Homeland Security ("DHS") failed to follow the notice and comment requirement of the Administrative Procedure Act.

A. The Immigration and Nationality Act does not authorize DACA.

In reviewing an *ultra vires* claim, courts examine statutory language to determine whether Congress intended the agency to have the power that it exercised when it acted. *Univ. of the D.C. Faculty Ass'n/NEA v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 163 F.3d 616, 620 (D.C. Cir. 1998). A reviewing court must reasonably be able to conclude that the regulations issued were contemplated in Congress's grant of authority. *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979).

Analyzing DACA by this standard reveals that it has no statutory foundation, and therefore is *ultra vires* and a nullity. *See Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134 (1936) ("A regulation which . . . operations to create a rule out of harmony with the statute, is a mere nullity").

First, the Immigration and Nationality Act ("INA") does not provide a statutory foundation for the DACA program. On the contrary, DACA is a programmatic refusal by DHS to enforce Congress's clear statutory mandate. Under the INA, any alien who entered the country illegally is an applicant for admission. 8 U.S.C. § 1225(a)(1). And 8 U.S.C. § 1225(b)(2)(A) mandates that if an applicant for admission "is not clearly and

beyond a doubt entitled to be admitted, the alien *shall* be detained" for removal proceedings under 8 U.S.C. § 1229a (emphasis added). "Congress did not place the decision as to which applicants for admission are placed in removal proceedings into the discretion of the Attorney General, but created mandatory criteria." *Succar v. Ashcroft*, 394 F.3d 8, 10 (1st Cir. 2005). "[W]hile the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws." *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007).

True, two provisions of the INA provide broad, general grants of authority to DHS: 8 U.S.C. § 1103(a)(3) ("[The Secretary] . . . shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter."); and 6 U.S.C. § 202(5) ("The Secretary . . . shall be responsible for . . . [e]stablishing national immigration enforcement policies and priorities."). The first of these, 8 U.S.C. § 1103(a)(3), clearly fails to authorize DACA, which is not "necessary for carrying out" any part of the INA. In any event, only if the authority of DHS to "deem[]" that an action is so "necessary" were unlimited and unreviewable could these provisions grant authority for DACA, but in that case, they would grant DHS a limitless authority over how it carries out its duties, making the innumerable other provisions of the INA that detail how DHS is to carry out its duties meaningless. *See, e.g.*, 8 U.S.C §§ 1158(d)(5) (providing requirements for asylum procedure), 1228(a)(3) (providing that expedited

proceedings "shall be" initiated for aliens incarcerated for aggravated felonies), 1229a (providing procedural requirements for removal proceedings).

Title 6 U.S.C. § 202(5)'s grant of authority to "[e]stablish[] national immigration enforcement policies and priorities" also fails to authorize DACA. Its authorization to DHS to set "priorities" does not authorize DACA, which, as explained below, goes far beyond making removable aliens that meet its criteria low priorities for removal. Thus, this provision could only authorize DACA based on its apparently open-ended authorization to DHS to establish enforcement "policies." But if the meaning of this language were as open-ended as that, it would allow DHS to establish a policy, for example, of removing only removable aliens who were violent felons, or only those who had been in the country less than two months, or only those who lacked a high school education—and it would be patently unreasonable to suppose that Congress intended DHS to have authority to set policies so at odds with the INA.

Second, DACA is not a valid form of "deferred action." True, faced with limited resources, an agency has discretion to implement the mandate of Congress as best it can, by setting priorities for action. *See City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977) (holding that when a statutory mandate is not fully funded, "the agency administering the statute is required to effectuate the original statutory scheme as much as possible, within the limits of the added constraint.").

With DACA, however, DHS did not "effectuate the original statutory scheme as much as possible" within the limits set by underfunding. DACA was not created because of lack of resources; the aliens protected by it were already rarely removed. Memorandum from Jeh Charles Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who are Parents of U.S. Citizens or Permanent Residents* 3 (Nov. 20, 2014) (explaining that DACA applies to individuals who "are extremely unlikely to be deported given [the] Department's limited enforcement resources").[2] Rather, the program reflects a policy judgment that these aliens should be free to live and work in the United States without fear of deportation. Far from "effectuat[ing] the original statutory scheme as much as possible," this policy judgment is at odds with the INA and congressional intent. Not only has Congress rejected a legislative version of DACA repeatedly, it has found that "immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and illegal aliens do not have the right to remain in the United States undetected and unapprehended." H.R. Rep. No.

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[2] This statement is scarcely consistent with Secretary Napolitano's bald assertion that "additional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities." Memorandum from Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* 1 (June 15, 2012) ("DACA Memo"). Admissions against interest are admissible evidence, but self-serving statements are not. *Woodall v. Commissioner*, 964 F.2d 361, 364-65 (5th Cir. 1992).

104-725, at 383 (1996) (Conf. Rep.). Congress has also passed laws designed to reduce the incentives for illegal entry, and to incentivize self-deportation where enforcement is lacking. *Texas v. United States*, 86 F. Supp. 3d 591, 634-35 (S.D. Tex. 2015), *aff'd Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (arguing that the Deferred Action for Parents of Americans program ("DAPA") would disincentivize illegal aliens from self-deporting); Michael X. Marinelli, *INS Enforcement of the Immigration Reform and Control Act of 1986: Employer Sanctions During the Citation Period*, 37 Cath. U. L.R. 829, 833-34 (1988) ("Marinelli") ("Congress postulated that unauthorized aliens currently in the United States would be encouraged to depart") (citing H.R. Rep. No. 99-682, at 46 (1986)).

In any event, the deferred-action justification, even if accepted for a portion of DACA, cannot help plaintiffs in this case. DACA is not *only* deferred action; as part of the DACA program, DHS has granted work authorization to its beneficiaries. DACA Memo 3. And it is not reasonable to conclude that Congress intended DHS to have the unrestricted power to grant work authorization to removable aliens, even "low-priority" ones. Congress, in making it illegal for illegal aliens to work, wished to discourage illegal entry and to encourage removable aliens to remove themselves, even if enforcement by removal is underfunded and slow to reach low-priority cases. *See Arizona v. United States*, 567 U.S. 387, 404 (2012) ("Congress enacted [the Immigration Reform and Control Act of 1986] as a comprehensive framework for combating the employment of illegal aliens.") (citation and quotation

marks omitted); *Texas v. United States*, 86 F. Supp. 3d at 634-35 (arguing that DAPA would disincentivize illegal aliens from self-deporting); Marinelli at 833-34.

8 U.S.C. § 1324a(h)(3) (defining an "unauthorized alien," that is, an alien ineligible for employment, as an "alien [that] is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General") certainly does not grant DHS the needed authority. That provision, which does not address deferred action at all, is an "exceedingly unlikely" grant of power from Congress to authorize work, because what the provision does address is the *unlawful* employment of aliens. *Texas v. United States,* 809 F.3d 134, 172-73 (5th Cir. 2015). Indeed, as the Ninth Circuit has held, "[8 U.S.C. § 1324a] merely allows an employer to legally hire an alien (whether admitted or not) while his application [for adjustment of status] is pending." *Guevara v. Holder*, 649 F.3d 1086, 1095 (9th Cir. 2011). And if § 1324a(h)(3) permitted DHS to give work authorization to DACA beneficiaries, it could only be because that provision allowed DHS to authorize work for any class of alien it chose; the provision contains no limiting language. If Congress had granted the executive branch such vast discretion, it would have done so clearly, not through "vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes." *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001). It is not reasonable to suppose that Congress, without any clear statement that it was doing so, granted to DHS the unrestricted power to overthrow Congress's own grants of work protection to American workers. *See, e.g.,*

8 U.S.C. §§ 1182(n), 1184(g), 1188 (protecting American workers from competition from aliens); *Sure-Tan, Inc. v. Nat'l Labor Relations Bd.,* 467 U.S. 883, 893 (1984) ("A primary purpose in restricting immigration is to preserve jobs for American workers."). Indeed, because any interpretation of § 1324a(h)(3) that is broad enough to permit DACA's work authorizations would make that provision a glaring violation of the nondelegation doctrine, which requires "an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform," *Mistretta v. United States*, 488 U.S. 361, 372 (1989), such an interpretation should be avoided if possible. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2258-59 (2013).

B. The DACA program is a substantive rule that did not go through the procedural requirements of 5 U.S.C. § 553.

Even if this Court determines that DACA is not *ultra vires* on its face, it did not go through the proper procedural requirements for enacting a substantive rule. Substantive rules issued by an agency that did not go through the notice and comment process are invalid. *NRDC v. United States Forest Serv.*, 421 F.3d 797, 810 n.27 (9th Cir. 2005); *Nat'l Ass'n of Mfrs. v. United States Dep't of Labor*, no. 95-0715, 1996 U.S. Dist. LEXIS 10478, *55 (D.D.C. July 22, 1996) ("Under section 706(2), this court must hold unlawful and set aside regulations promulgated without adequate notice and comment.") (citation and internal quotation marks omitted).

The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings. A properly adopted substantive rule establishes a standard of conduct that has the force of law. In subsequent administrative proceedings involving a substantive rule, the issues are whether the adjudicated facts conform to the rule and whether the rule should be waived or applied in that particular instance. The underlying policy embodied in the rule is not generally subject to challenge before the agency. *Pacific Gas & Electric Co. v. Federal Power Com.*, 506 F.2d 33, 38 (D.C. Cir. 1974) (internal citation omitted). Thus, "[t[he critical factor to determine whether a directive announcing a new policy constitutes a rule . . . is the extent to which the challenged directive leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the announced policy in an individual case." *Mada-Luna v. Fitzpatrick,* 813 F.2d 1006, 1013 (9th Cir. 1987) (internal citations and quotation marks omitted) (emphasis in original) (finding that an agency directive concerning the application of a deferred action policy in the immigration context left ample discretion to agency officials and thus did not constitute a substantive rule).

By this standard, DACA is clearly a substantive rule. The memorandum establishing DACA directs U.S. Immigration and Customs Enforcement agents to "exercise prosecutorial discretion, on an individual basis," to grant deferred action for two years, subject to renewal, to aliens who meet the criteria set forth in the memo, for the purpose of "preventing low priority

individuals from being placed into removal proceedings or removed from the United States," and to accept work authorization applications from those granted deferred action. DACA Memo 2, 3. It is difficult to see how any agent so charged would feel free *not* to grant deferred action in any given case, especially since the only purpose the agents are supposed to be fulfilling in implementing the memo is to prevent the removal of those meeting the criteria. *Compare Mada-Luna,* 813 F.2d at 1017 (finding discretion where officials were permitted to grant deferred action based on "appealing humanitarian factors"). Thus, though couched in terms of agents' discretion, the memo actually removes that discretion. Indeed, the form of words chosen verges on the comical; to order agents to "exercise their discretion" *only in a particular way,* as the DACA memo does, is to deny them the very discretion the order presupposes.

Indeed, based on a thorough evidentiary hearing, the U.S. Court of Appeals for the Fifth Circuit held that DACA was a substantive rule because it withdrew discretion from agents:

> [T]he DACA Memo instructed agencies to review applications on a case-by-case basis and exercise discretion, but the district court found that those statements were "merely pretext" because only about 5% of the 723,000 applications accepted for evaluation had been denied, and "[d]espite a request by the [district] [c]ourt, the [g]overnment's counsel did not provide the number, if any, of requests that were denied [for discretionary reasons] even though the applicant

> met the DACA criteria . . . ." The finding of pretext was also based on a declaration by Kenneth Palinkas, the president of the union representing the USCIS employees processing the DACA applications, that "DHS management has taken multiple steps to ensure that DACA applications are simply rubberstamped if the applicants meet the necessary criteria"; [and on] DACA's Operating Procedures, which "contain[] nearly 150 pages of specific instructions for granting or denying deferred action . . . ."

Texas v. United States, 809 F.3d at 172-73. Surveying the above and other evidence relied on by the district court in that case, the Fifth Circuit roundly held that the district court's finding that DACA "severely restricts" agency discretion, "[f]ar from being clear error, . . . was no error whatsoever." *Id.* at n.133 (internal quotation marks and brackets omitted).

As a substantive rule, DACA was required to go through notice and comment; it never did. It therefore is an invalid rule; at most, a court, exercising its equitable powers, could allow it to remain in effect while notice and comment was accomplished. But DACA will not, now, go through the notice and comment process, so there would be no occasion for a court to allow it to remain in effect for that purpose.

* * *

Because DACA is invalid, an injunction of its rescission can avail respondents nothing. Respondents'

claimed injuries, therefore, are not redressable, and this case should be dismissed for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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