No. 18-587

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *ET AL.*,

Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, *ET AL.*,

Respondents.

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

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

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QUESTIONS PRESENTED

This dispute concerns the policy of immigration enforcement discretion known as Deferred Action for Childhood Arrivals ("DACA"). In 2016, this Court affirmed, by an equally divided Court, a decision of the U.S. Court of Appeals for the Fifth Circuit holding that two related Department of Homeland Security (DHS) discretionary enforcement policies, including an expansion of the DACA policy, were likely unlawful and should be enjoined. *See United States v. Texas*, 136 S.Ct. 2271 (per curiam). In September 2017, DHS determined that the original DACA policy was unlawful and would likely be struck down by the courts on the same grounds as the related policies. DHS thus instituted an orderly wind-down of the DACA policy. The questions presented are as follows:

1. Whether DHS's decision to wind down the DACA policy is judicially reviewable.

2. Whether DHS's decision to wind down the DACA policy is lawful.

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute[1] ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI

[1] *Amicus* files this brief with all parties' written consent, with more than 10 days' written notice. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity — other than *amicus* and its counsel — contributed monetarily to preparing or submitting the brief.

staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization.

STATEMENT OF THE CASE

Several states, state universities, and individuals sued federal immigration officials to challenge the rescission of the Deferred Action for Childhood Arrivals ("DACA") policy implemented by the prior administration, after that administration proved unable to convince Congress to enact legislation to address illegal aliens who arrived here as minors. In addition to providing deferred-action status with respect to deportation, the DACA program also provided work authorization.

After a review, the new administration rescinded DACA, with a future effective date to allow Congress — which has plenary power to regulate immigration, U.S. CONST. art. I, §8, cl. 4 — six months to act. A major part of the rationale was that the successful state plaintiffs in *Texas v. United States*, 86 F.Supp.3d 591 (S.D. Tex. 2015), *aff'd* 809 F.3d 134 (5th Cir.), *aff'd by an equally divided Court*, 136 S.Ct. 2271 (2016) ("*Texas*"), announced plans to challenge DACA on the same grounds on that they used to invalidate the expanded DACA and Deferred Action for Parents of Americans ("DAPA") programs in *Texas*.

SUMMARY OF ARGUMENT

The district lacked jurisdiction for a preliminary injunction not only under Article III but also under the waiver of sovereign immunity in the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), and the preclusion-of-review provision, 8

U.S.C. §1252(g), in the Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 ("INA"). As for standing, DACA cannot serve as the basis for a judicially cognizable right because mere agency action cannot create a federal right, and the fact that the prior administration misled beneficiaries into applying for DACA does not support estoppel against the government (Section I.A). In addition, because plaintiffs cannot prevail against DACA's rescission without simultaneously showing that DACA was void *ab initio* when promulgated, plaintiffs' reward for invalidating rescission would be to invalidate DACA, which would not redress anything (Section I.B). Furthermore, neither APA review nor its waiver of sovereign immunity is available under three distinct barriers to APA review: DHS's actions are committed to agency discretion, fall under the INA's special statutory review, and are non-final (Section I.C).

On the merits, the 2012 DACA policy is void *ab initio* because it was issued in violation of APA notice-and-comment requirements by virtue of its creating rights and cabining discretion in a sufficiently binding manner to exceed its mere enforcement-discretion justification (Section II.A). Alternatively, if viewed as a mere statement of policy, DACA did not create any rights or even constitute final agency action because such policies are not final, but become final only on a case-by-case basis when applied (Section II.B). In any event, DACA's unlawfulness under *Texas* and a pause to allow congressional action provided ample justification under *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*MVMA*"), for rescission (Section II.C). Finally,

DACA is substantively inconsistent with INA requirements to commence removal proceedings for illegal aliens (Section II.D).

The lower courts also erred in denying dismissal of two Fifth Amendment claims. First, the "information-sharing" claims under substantive due process fail to meet the test for establishing a substantive due-process right, and any reliance on the informal DACA policies was unreasonable (Section III.A). Second, the equal-protection claims based on race or ethnicity are impermissible disparate-impact claims because the issue here is illegal aliens' immigration status, not race or ethnicity (Section III.B).

ARGUMENT

I. THIS COURT SHOULD VACATE THE INJUNCTION BECAUSE PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE.

A federal court must have jurisdiction to issue a preliminary injunction, *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983), and this Court has the duty to examine jurisdiction, even if the parties concede the issue. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 105 (1998). If jurisdiction is lacking, this Court should remand with an order to dismiss.

Either DACA created no rights or — *if it did* — DACA required an upfront APA rulemaking and is thus void *ab initio* for lacking that rulemaking. Even in the latter case, plaintiffs lack a judicially cognizable right to enforce in this litigation, since the unlawfulness of DACA on the merits deprives them of

standing.[2] The preliminary injunction violates both the separation of powers and principles of democratic self-government, *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 311-12 (2014), and must be vacated.

A. All plaintiffs lack standing because DACA could not and did not create any rights.

Article III poses a tripartite test for standing: judicially cognizable injury to the plaintiff, causation by the challenged conduct, and redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). For several reasons, plaintiffs here lack a bare threshold injury that is judicially cognizable. But even if they had cognizable rights under DACA, the cost to redeem those rights would be DACA's invalidation because the process of challenging DACA's *rescission* calls into question DACA's *promulgation*. Since DACA was procedurally and substantively unlawful when adopted, a reviewing court's injunction must reinstate the pre-DACA status quo *ante litem*, leaving plaintiffs in the same place as rescission.

Agency officers like petitioners — as well as their predecessors from the prior Administration — cannot create rights. Of course, "Congress may create a statutory right … the alleged deprivation of which can confer standing," *Warth v. Seldin,* 422 U.S. 490, 514 (1975), but mere agencies cannot create rights. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577

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[2] When standing and the merits "intertwine," federal courts must resolve the jurisdictional and merits issues together. *Land v. Dollar,* 330 U.S. 731, 735 (1947).

n.18 (1979). As Justice Scalia colorfully explained, "Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001). If the prior administration had wanted to create rights, it needed either to work with Congress to enact new legislation or, at least, to act using the APA rulemaking authority that Congress has delegated for agencies to create regulatory rights in furtherance of rights that Congress already created by statute. Since neither of these two acceptable routes was taken in DACA, it did not create any rights that plaintiffs can enforce in court.[3]

Relatedly, to the extent that plaintiffs and the lower courts complain about unfairness, they are complaining to the wrong branch of government:

> SIPC and the Trustee contend that the result we reach sanctions injustice. But even if that were the case, the argument is made in the wrong forum, for we are not at liberty to legislate.

Touche Ross, 442 U.S. at 579. Neither this Court nor the district court has the power to alter plaintiffs' immigration status by enjoining Executive Branch officers. Instead, as the prior administration and

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[3] Failure to follow APA requirements renders the resulting agency action both void *ab initio* and unconstitutional. *Chrysler Corp. v. Brown,* 441 U.S. 281, 303 (1979); *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374 (1986) ("an agency literally has no power to act … unless and until Congress confers power upon it"); *see* Section II.A, *infra*. The missing procedure provides at least some of the unconstitutionality that puzzled the Ninth Circuit. *See* Suppl. Pet. App. 48a-49a.

current administration both have recognized, the only lawful solution here is action by Congress.

Even the district court admits that DACA represents an "expectation of (though not a right to) continued deferred action," Pet. App. 29a, and that is not enough. Nor does the district court's repeated invocation of five years of reliance by 689,800 DACA beneficiaries, *see*, *e.g.*, *id.* 28a, affect the analysis. Most obviously, something that is "not a right" is also not a judicially cognizable right. Moreover, reliance is no basis to estop the federal government. *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 419-20 (1990) ("equitable estoppel will not lie against the Government"). What plaintiffs call an "expectation" was simply misplaced reliance on the administration that issued DACA:

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.

Fed'l Crop. Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947). Insofar as DACA beneficiaries were misled, it was the prior administration that misled them. But under *Merrill* and its progeny, having been misled does not provide any rights to redress.

Finally, third parties such as the institutional and state plaintiffs "lack[] a judicially cognizable interest in the prosecution *or nonprosecution* of another," which "applies no less to prosecution for civil [matters] … than to prosecution for criminal [matters]." *Friends*

of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 204 (2000) (emphasis added, internal quotations omitted). Similarly, it is a "fundamental restriction on [judicial] authority" that "a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties," *Hollingsworth v. Perry*, 570 U.S. 693, 708 (2013) (interior quotation marks omitted). Thus, the third-party institutional and state plaintiffs lack standing.

B. Rescission would not redress plaintiffs' injuries because DACA's invalidity would require reinstating the pre-DACA status quo *ante litem*.

Plaintiffs also have a redressability problem: the very act of voiding DACA's rescission would show that DACA was void *ab initio* the day it was promulgated. If DACA cannot be rescinded at will as discretionary, it could not have been adopted in the first place as an exercise of discretion, without a rulemaking.

Procedurally, an action that succeeds in voiding a rescission or amendment reinstates the prior rule, *Nat. Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency*, 725 F.2d 761, 772 (D.C. Cir. 1984) ("*NRDC v. EPA*"); *Organized Vill. of Kake v. United States Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015); *cf. In re GWI PCS 1, Inc.*, 230 F.3d 788, 796 n.14 (5th Cir. 2000) ("[r]escission unwinds the transaction and restores the status quo ante"). But that does nothing to protect the underlying rule from procedural or substantive challenges. Indeed, judicially revoking an agency's rescission sometimes "casts a cloud over the very

regulations it implicitly reinstates" because the rationale for vacating the agency's revocation also affects the underlying rule, *NRDC v. EPA*, 725 F.2d at 772; *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).

Such a cloud would be cast by any judgment that revokes the federal defendants' rescission of DACA. Specifically, plaintiffs' prevailing here and in similar cases would make clear that DACA was procedurally invalid on the day that the federal defendants' predecessors promulgated DACA. *See* Section II.A, *infra*. If DACA either created judicially cognizable rights that support a federal court's enjoining DACA's repeal or so bound the federal defendants that they could not repeal DACA at will, then DACA required notice-and-comment rulemaking. *Texas*, 809 F.3d at 171. Because no rulemaking occurred, DACA would become procedurally invalid *ab initio* the instant a court held its rescission impermissible.

C. The amendment or rescission of mere enforcement policies — as distinct from rules or regulations — is unreviewable generally, and especially so in the immigration context at issue here.

In the 1976 APA amendments to 5 U.S.C. §702, Congress "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (*quoting* S. Rep. No. 996, 94th Cong., 2d Sess. 8 (1976); H.R. Rep. No. 1656,

94th Cong., 2d Sess. 9 (1976), 1976 U.S. Code Cong. & Admin. News 6121, 6129) (R.B. Ginsburg, J.). But that waiver has several restrictions that preclude review.

First, as the Government explains, Pet. at 17-21, APA exempts actions committed to agency discretion from APA review. 5 U.S.C. §701(a)(2). In addition to the arguments that the Government makes, *amicus* IRLI respectfully submits that this issue includes a "Catch-22" element. If DACA so cabined agency discretion as to lie beyond discretionary rescission, DACA required a rulemaking in the first place and thus is void *ab initio*. *See* Section II.A, *infra*.

Second, APA excludes APA review for "statutes [that] preclude judicial review" and ones with "special statutory review." 5 U.S.C. §§701(a)(1), 703. When a statute provides special statutory review, APA review is not available. *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 469 (1984). As the Government explains, 8 U.S.C. §1252(g)'s focus on removal proceedings is not an invitation for aliens to file pre-enforcement APA actions preemptively, before removal proceedings commence. Pet. at 22. Only when preclusion-of-review statutes provide no opportunity whatsoever for review has the Court used equity to provide review. *Leedom v. Kyne,* 358 U.S. 184, 188-90 (1958). But that extraordinary relief is not available where — as here — Congress precludes pre-enforcement review, but allows review in enforcement proceedings. *Board of Governors of the Federal Reserve System v. MCorp Financial,* 502 U.S. 32, 43-44 (1991). *Amicus* IRLI respectfully submits that INA review is exactly the type of statutory review that precludes APA review.

Third, and finally, APA review applies only to agency action made reviewable by statute and *final agency action* for which no adequate remedy is available. 5 U.S.C. §704. To the extent that an enforcement policy like DACA does not bind agency actors, the enforcement policy is not final agency action. *See* Section II.B, *infra*; *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Instead, the final agency action lies in the agency action to apply the policy in a specific case. *See* Section II.B, *infra*. Thus, on the one hand, assuming *arguendo* that DACA's issuance did not impermissibly bind agency discretion without APA rulemaking, neither DACA's issuance nor its rescission is final agency action, *id.*, and both are outside APA review. 5 U.S.C. §704. On the other hand, if DACA's issuance *did* bind agency discretion so that its rescission now would qualify as final agency action, then DACA is void *ab initio* for failure to follow required APA rulemaking procedures in the first place. *See* Section II.A, *infra*.

II. RESCISSION WAS LAWFUL BECAUSE DACA WAS UNLAWFUL.

Plaintiffs must show a likelihood of prevailing on the merits to establish entitlement to a preliminary injunction. *Winter v. Natural Resources Def. Council, Inc.,* 555 U.S. 7, 20 (2008). Because plaintiffs cannot make that showing for DACA's rescission, this Court should grant review in this important case.

A. As a legislative rule adopted without an APA rulemaking, DACA is void *ab initio*.

As the Fifth Circuit held and an equally divided panel of this Court affirmed, a procedurally identical

form of DACA-like relief violated APA's notice-and-comment rulemaking procedures. *Texas*, 809 F.3d at 165-78, *aff'd by an equally divided Court*, 136 S.Ct. 2271 (2016). So too with DACA, which is void *ab initio* on the merits.

Specifically, DACA's issuance violated APA's rule-making requirements as a legislative rule issued without complying with APA's notice-and-comment requirements, 5 U.S.C. §553(b), without eligibility for any exceptions to the requirement. *Id.* §553(b)(A)-(B). The exemption for policy statements and interpretive rules:

- Does not apply when agency action narrows the discretion otherwise available to agency staff, *Texas Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd.,* 201 F.3d 551, 556 (5th Cir. 2001); *General Elec. Co. v. EPA,* 290 F.3d 377, 380 (D.C. Cir. 2002);
- Cannot be used to promulgate the regulatory basis on which to confer benefits, *Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 908 (5th Cir. 1983); *Chrysler,* 441 U.S. at 302; and
- Cannot be used to promulgate new rules that effectively amend existing rules. *Am. Mining Congress v. Mine Safety & Health Admin.,* 995 F.2d 1106, 1112 (D.C. Cir. 1993); 5 U.S.C. §551(5) (defining "rule making" as the "agency process for formulating, *amending,* or repealing a rule") (emphasis added); *Shell Offshore Inc. v. Babbitt,* 238 F.3d 622, 629 (5th Cir. 2001).

DACA cannot meet these tests.

Under APA, DACA plainly required notice-and-comment rulemaking. For example, employment

authorization is a benefit that is "granted" to beneficiary aliens, 8 C.F.R. §274a.12(c)(14), under sixteen specific circumstances, 8 C.F.R. §274a.12(a)(1)-(16), none of which apply to the across-the-board DACA program. *Cf. United States v. Picciotto,* 875 F.2d 345, 346-49 (D.C. Cir. 1989) (agency cannot add new, specific, across-the-board conditions under general, case-by-case authority to consider changes). Under the foregoing APA criteria, DACA qualifies as a legislative rule, which agencies cannot issue by memoranda or interpretation.

Procedurally infirm rules are a nullity, *Avoyelles Sportsmen's League,* 715 F.2d 897, 909-10; *McLouth Steel Products Corp. v. Thomas,* 838 F.2d 1317, 1322-23 (D.C. Cir. 1988); *State of Ohio Dep't of Human Serv. v. U.S. Dept. of Health & Human Serv., Health Care Financing Admin.,* 862 F.2d 1228, 1237 (6th Cir. 1988); *North Am. Coal Corp. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor,* 854 F.2d 386, 388 (10th Cir. 1988), even if they would have been *substantively* valid if promulgated via notice-and-comment rulemaking. Thus, DACA is a nullity.

B. If DACA did not bind agency discretion, rescission would be a lawful exercise of the same discretion used to issue DACA.

Alternatively, assuming *arguendo* that DACA did not impermissibly bind agency discretion or confer benefits without a rulemaking, an "agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general

statement of policy." *Pacific Gas & Elec. Co. v. F.P.C.,* 506 F.2d 33, 38-39 (D.C. Cir. 1974). Accordingly, such statements are not entitled to deference when an agency relies on them to resolve a *future* substantive question because, logically, the future action (not the initial statement) is the final agency action. *Id.*; *accord Texaco, Inc. v. F.P.C.,* 412 F.2d 740, 744 (3d Cir. 1969); *Amrep Corp. v. FTC,* 768 F.2d 1171, 1178 (10th Cir. 1985); *Mada-Luna v. Fitzpatrick,* 813 F.2d 1006, 1013-14 (9th Cir. 1987). Thus, as an alternative to considering the APA notice-and-comment issue, this Court could simply find that DACA was a mere "general statement of policy" that the petitioners could change at any time without APA compliance.

C. Assuming *arguendo* that *MVMA* review is available, DACA's rescission meets that narrow test.

The lower courts found that DHS failed adequately to explain DACA's rescission. Pet. App. at 58a; *see also MVMA*, 463 U.S. at 43. Similarly, the Ninth Circuit held DACA lawful, but did so by relying on the *Texas* dissent and Ninth Circuit authority, Suppl. Pet. App. 48a-56a, neither of which is controlling in the Fifth Circuit. *Hyder v. Keisler*, 506 F.3d 388, 393 (5th Cir. 2007) (Ninth Circuit precedent "is not binding precedent in this circuit"). The credible litigation risk that prompted DACA's rescission was the *threatened Texas litigation* under Fifth Circuit precedent, not an action in the Ninth Circuit under Ninth Circuit precedent.

The lower courts are wrong for several reasons, not only because DACA is illegal, as the *Texas* litigation demonstrated, but also because — even if

DACA were lawful — it would have been supportable under *MVMA* for petitioners to prefer that Congress address the issue in the first instance. *See*, *e.g.*, *Schuette*, 572 U.S. at 311-12 (legislated solutions are preferable to imposed solutions in matters of public policy). Quite simply, the lower courts overstate the degree of judicial second-guessing that the *MVMA* line of cases requires in this context.

Federal courts lack authority to set procedural hurdles for agencies, beyond the APA requirements that Congress imposed. *Perez v. Mortg. Bankers Ass'n*, 135 S.Ct. 1199, 1207 (2015). Accordingly, *MVMA* "neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance," and the APA "makes no distinction … between initial agency action and subsequent agency action undoing or revising that action." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009). All that *MVMA* required was "a reasoned analysis for the change beyond that which may be required when an agency *does not act* in the first instance." *Id.* at 514 (internal quotations omitted, emphasis in *Fox*). Insofar as no one — yet — has argued that petitioners and their predecessors were *compelled* to issue DACA, the *MVMA* threshold for an analysis over and above inaction is low indeed.

As indicated, DACA's unlawfulness under *Texas* and petitioners' desire for Congress — not federal bureaucrats — to set immigration policy easily meet the need for reasoned analysis, *see* Section II.A, *supra*; *Schuette*, 572 U.S. at 311-12, even assuming *arguendo* that *MVMA* applies when an agency withdraws a

purportedly non-binding enforcement policy, while leaving in place all of the underlying authority to issue the same type of relief in an appropriate removal proceeding.

D. DACA violated the INA.

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

Procedurally, through DACA, DHS purports to channel aliens into deferred action under prosecutorial discretion, without initiating the statutorily mandated removal proceeding. Specifically, under 8 U.S.C. §1225(a)(1), "an alien present in the United States who has not been admitted … shall be deemed for purposes of this chapter an applicant for admission." That designation triggers 8 U.S.C. §1225(a)(3), which requires that all applicants for admission "shall be inspected by immigration officers," which triggers 8 U.S.C. §1225(b)(2)(A)'s mandate that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall* be detained for a [removal] proceeding under section 1229a of this

title." 8 U.S.C. §1225(b)(2)(A) (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). In essence, DACA jumps illegal aliens to a favorable result of the removal process, without any of the statutorily required process that must precede that outcome.

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

Indeed, DACA was not created because of lack of resources. DACA beneficiaries 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"). [4] 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. 104-725, at 383 (1996) (Conference Report). Congress has also passed laws designed to reduce the incentives for illegal entry, and to incentivize self-deportation where enforcement is lacking. *Texas*, 86

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[4] 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). Admissions against interest are admissible evidence, but self-serving statements are not. *Compare Lutwak v. United States*, 344 U.S. 604, 617-18 (1953) ("admissions … are admissible … under a standard exception to the hearsay rule applicable to the statements of a party") *with Woodall v. Commissioner*, 964 F.2d 361, 364-65 (5th Cir. 1992).

F.Supp.3d at 634-35 (arguing that 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)). Thus, DACA is not meant to implement the INA but rather to amend or soften the INA's treatment of DACA beneficiaries.

Furthermore, DACA is not limited to deferred action; DACA also grants work authorization to its beneficiaries. Memorandum from Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* 3 (June 15, 2012). The INA cannot be credibly read to delegate to DHS 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 IRCA as a comprehensive framework for combating the employment of illegal aliens") (citations and interior quotation marks omitted); *Texas*, 86 F.Supp.3d at 634-35 (arguing that DAPA would disincentivize illegal aliens from self-deporting); Marinelli, at 833-34. DACA thus exceeds the authority that the INA delegates to DHS.

Although the Ninth Circuit viewed 8 U.S.C. §1324a(h)(3) as authorizing DACA, Suppl. Pet. App. 15a, that subsection provides no substantive authority. Indeed, the subsection is merely a definition, which provides as follows:

> Definition of unauthorized alien. As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien 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.

8 U.S.C. §1324a(h)(3). As the Fifth Circuit held, this provision is an "exceedingly unlikely" grant of power from Congress to authorize work, because that provision addresses *unlawful* employment of aliens. *Texas*, 809 F.3d at 182-83. 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). As explained below, this provision does not delegate any authority, and it would violate the constitutional nondelegation doctrine if it did.

First, this pre-1996 definition may imply that the Attorney General has — or at one time had — authority to authorize the employment of certain aliens, but the definition does not *itself* delegate any authority. It would be entirely consistent with this pre-1996 definition for a later-enacted INA amendment to have repealed the Attorney General's employment-authorizing powers, without impacting

the status of any aliens affected before Congress began to crack down on the employment of illegal aliens.

Furthermore, assuming *arguendo* that §1324a(h)(3) permitted DHS to give work authorization to DACA beneficiaries, that could only be because §1324a(h)(3) allowed DHS to authorize work for *any class* of alien that DHS choses: the provision contains no limiting language. It is simply unreasonable to suppose that Congress, without any clear statement that it was doing so, granted 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"). If Congress intended to grant 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).

Finally, if this definition itself delegated *carte blanche* authority to authorize employment, it would violate the nondelegation doctrine, which requires "an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *United States v. Mistretta,* 488 U.S. 361, 372 (1989). The doctrine of constitutional avoidance suggests that this Court should avoid the constitutional nondelegation issue by reading the

statutory definition not to delegate any authority. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17-18 (2013). Either way, DACA is unlawful.[5]

Although the Ninth Circuit viewed 6 U.S.C. §202(5) as authorizing DACA, Suppl. Pet. App. 49a, that section fails to provide the broad authority that DACA would require. Under §202(5), "[t]he Secretary … shall be responsible for … [e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. §202(5). That grant of authority cannot authorize DACA. Section §202(5)'s authorization to set "priorities" does not authorize DACA, which goes far beyond setting enforcement priorities (*e.g.*, by providing work authorization). Indeed, as the DACA-promulgating record itself *admits*, DACA beneficiaries were already extremely low priorities for removal. *See* note 4, *supra*, and accompanying text. Thus, §202(5) could only authorize DACA based on an open-ended authorization to DHS to establish enforcement "policies." But if 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

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[5] The Ninth Circuit correctly ignored 8 U.S.C. §1103(a)(3), which the prior administration also relied on as authorizing DACA. That section merely authorized necessary rulemakings, without authorizing DHS to violate other INA provisions. Only if DHS's authority to "deem[]" that an action is so "necessary" were unlimited and unreviewable could this provision grant authority for DACA, but that would create a nondelegation problem and thus should be rejected under the doctrine of constitutional avoidance.

patently unreasonable to suppose that Congress intended DHS to have authority to set policies so at odds with the INA.

III. PLAINTIFFS' FIFTH AMENDMENT CLAIMS SHOULD BE DISMISSED.

The Ninth Circuit not only affirmed the district court's preliminary injunction, but also affirmed the denial of the Government's motion to dismiss two types of claims under the Fifth Amendment's Due Process Clause: substantive due-process claims for information sharing contrary to DACA beneficiaries' understanding of how their DACA applications would be used, and equal-protection claims[6] for race- or ethnicity-based discrimination. This Court should reverse the denial of the Government's motion to dismiss these claims.

A. The "information-sharing" due-process claims fail to state a claim.

The Ninth Circuit affirmed the denial of the motion to dismiss plaintiffs' information-sharing claims on a theory of substantive due-process based on Ninth Circuit precedent under a shock-the-conscience and community-standards test. Suppl. Pet. App. 73a. While basing a claim against the *federal* government on community standards in California would raise federalism issues, this Court need not reach that issue. Creating rights based on substantive due-process requires a more rigorous and more

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[6] Although the Fourteenth Amendment's Equal Protection Clause does not apply to the Federal Government, this Court has found an equivalent equal-protection component in the Fifth Amendment's Due Process Clause. *Buckley v. Valeo,* 424 U.S. 1, 93 (1976); *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954).

national approach under *Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997). Plaintiffs' information-sharing claims cannot meet that test and should be dismissed.

Given "[t]he tendency of a principle to expand itself to the limit of its logic," *id.* at 733 n.23 (interior quotation marks omitted), *Glucksberg* held that courts must tread cautiously when expounding substantive due-process rights outside the "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Id.* at 720-21. "[E]xtending constitutional protection to an asserted right or liberty interest" thus requires "the utmost care … lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [federal judiciary]." *Id.* at 720. A fundamental right must be both "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 720-21. Plaintiffs cannot meet either test, *Richmond*, 496 U.S. at 419-20 (quoted *supra*); *Merrill*, 332 U.S. at 384 (quoted *supra*), so DACA-based "information-sharing" claims fail to state a claim on which relief can be granted.

B. The equal-protection claims fail to state a claim.

The Ninth Circuit credited plaintiffs' allegations that 93% of DACA beneficiaries are Mexicans or Latinos and inferred discriminatory intent from statements of the President, both as candidate and as President. Suppl. Pet. App. 74a-75a. Equal protection applies to action taken "at least in part *because of,* not merely *in spite of,* its adverse effects" on a protected class. *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979)

(emphasis added); *Plyler v. Doe,* 457 U.S. 202, 223 (1982) ("[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy'"). Actions or statements targeted against illegal aliens permissibly "discriminate" based on illegality, not on race or ethnicity.

Assuming *arguendo* that the Ninth Circuit's data were accurate, those data would also be irrelevant. In *Feeney,* the passed-over female civil servant alleged that Massachusetts' veteran-preference law for civil-service promotions and hiring constituted sex-based discrimination. Although women then represented less than two percent of veterans, *Feeney,* 442 U.S. at 270 n.21, Massachusetts did not discriminate *because of sex* when it acted because of another, permissible criterion (veteran status). *Id.* at 272. With women then constituting two percent of all veterans, men were *fifty times* more likely (50:1) to benefit from the state law challenged in *Feeney*. The 93% alleged here is even lower. Similarly, the President's tweets about illegal aliens, Suppl. Pet. App. 74a-75a n.30, concern illegality, not race or ethnicity. This Court should reverse the denial of dismissal of these disparate-impact claims.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*.

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Respectfully submitted,

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