

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

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**In the Supreme Court of the United States**

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DEPARTMENT OF HOMELAND SECURITY, ET AL.,

*Petitioners,*

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,

*Respondents.*

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

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**BRIEF OF 143 U.S. BUSINESS  
ASSOCIATIONS AND COMPANIES  
AS *AMICI CURIAE*  
IN SUPPORT OF RESPONDENTS**

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

*Petitioners,*

v.

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

*Respondents.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit**

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KEVIN K. MCALEENAN, ACTING SECRETARY OF HOME-  
LAND SECURITY, ET AL.,

*Petitioners,*

v.

MARTIN JONATHAN BATALLA VIDAL, ET AL.,

*Respondents.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Second Circuit**

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## INTEREST OF THE *AMICI CURIAE*<sup>1</sup>

*Amici* include 143 individual companies that collectively contribute trillions of dollars in annual revenue to the American economy and have millions of employees.

Some *amici* are business associations that together represent millions of companies that fuel the American economy—including the National Association of Manufacturers, the National Retail Federation, the Chamber of Commerce of the United States of America, the Retail Industry Leaders Association, the American Hotel & Lodging Association, BSA | The Software Alliance, the Information Technology Industry Council, TechNet, the National Association of State Latino Chambers of Commerce, the Software & Information Industry Association, the Semiconductor Industry Association, and the HR Policy Association.

The list of the *amici* is set forth in Appendix A.

Many *amici* and their members employ individuals who participate in the Deferred Action for Childhood Arrivals (DACA) program—young people who are now able to live and work in the country that has been their home for most of their lives. In addition, *amici*'s customers and end users are DACA recipients; and *amici*'s businesses benefit from DACA recipients' contributions to the overall economy through their tax payments, spending, and investments. Accordingly,

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<sup>1</sup> No party or counsel for a party authored this brief in whole or in part, and no one other than *amici*, their members, or their counsel funded the preparation or submission of this brief. See Sup. Ct. R. 37.6. Counsel for petitioners and respondents have filed blanket consents to the filing of *amicus* briefs.

*amici* have a strong interest in DACA recipients' continued ability to work and participate in our country's economy and in our society generally.

### INTRODUCTION AND SUMMARY OF ARGUMENT

Since its inception, DACA has had an enormous impact on the lives of over 825,000 young people who “were brought to this country as children and know only this country as home.”<sup>2</sup> DACA enabled those young individuals to participate fully for the first time in all aspects of our society without the constant and crippling fear of deportation.<sup>3</sup> And, based on longstanding federal regulations ratified by Congress, the deferral of removal granted to DACA recipients made them eligible to apply for work authorization, thereby enabling them to obtain jobs commensurate with their skills and education.

But the beneficial effects of DACA have not been limited to those individuals. By expanding the opportunities available to DACA recipients, this program has benefitted America's companies, our Nation's economy, and all Americans. Indeed, employment of DACA recipients expands work opportunities for everyone, because employment is not a zero-sum game. DACA recipients are filling vacancies at companies that otherwise would not be able to attract workers for

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<sup>2</sup> Mem. from Janet Napolitano to David V. Aguilar (June 15, 2012), <https://tinyurl.com/zzxfoe>; U.S. Citizenship & Immigration Serv., Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake and Case Status Fiscal Year 2012-2019 (June 30, 2019), <https://tinyurl.com/y5j36gyj>.

<sup>3</sup> Mem. from Janet Napolitano, *supra* n.2.

open positions. They are creating businesses that employ other Americans. And their increased wages lead to higher tax revenues and expansion of our national GDP—producing new jobs and benefits for all Americans.

Eliminating DACA will inflict serious harm on U.S. companies, all workers, and the American economy as a whole. Companies will lose valued employees. Workers will lose employers and co-workers. Our national GDP will lose up to \$460.3 billion, and tax revenues will be reduced by approximately \$90 billion, over the next decade.

Those harms should not occur, however, because the rescission of DACA must be set aside under the Administrative Procedure Act (APA). The Department of Homeland Security (DHS) rescinded DACA based entirely on its legal conclusion that DACA exceeds the agency’s authority. That legal determination is subject to judicial review. Courts consistently review agencies’ broadly-applicable policies that rest on such legal determinations.

And DHS’s legal determination is wrong. DACA closely resembles deferred action programs adopted in the past, and—given Congress’s express recognition of this deferred action authority and the Executive Branch’s substantial authority with respect to immigration matters—it does not exceed the Department’s statutory authority.

## **ARGUMENT**

### **I. RESCINDING DACA WILL HARM U.S. COMPANIES AND THE ENTIRE ECONOMY.**

Immigrants have long been essential to our Nation’s growth and prosperity. They have contributed

to important breakthroughs in science and innovation<sup>4</sup>; they have created businesses—including many Fortune 500 companies—that generate over \$775 billion in sales and provide numerous jobs to others<sup>5</sup>; and they pay over \$300 billion in yearly state, local, and federal taxes.<sup>6</sup>

Even though DACA is relatively new, DACA recipients—often referred to as “Dreamers”—have contributed significantly to America’s prosperity.

DACA enabled more than 825,000 individuals<sup>7</sup> to come out of the shadows, participate in the economy, and contribute to U.S. companies and the economy, which benefits us all. Rescinding DACA will harm not only individual recipients and their families, friends, and co-workers, but also the many U.S. businesses

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<sup>4</sup> Matthew Denhart, George W. Bush Institute, *America’s Advantage: A Handbook on Immigration and Economic Growth* 70, 76 (3d ed., Sept. 2017), <https://tinyurl.com/y4ykkn9>.

<sup>5</sup> P’ship for a New Am. Econ., *Open for Business: How Immigrants Are Driving Business Creation in the United States* 12, 14 (Aug. 2012), <https://goo.gl/3mFkVz>; Denhart, *supra* n.4, at 84-100.

<sup>6</sup> Dan Kosten, Nat’l Immigration Forum, *Immigrants as Economic Contributors: Immigrant Tax Contributions and Spending Power* (Sept. 6, 2018), <https://tinyurl.com/ycohpuvs>.

<sup>7</sup> The number of DACA recipients has declined from over 800,000 in 2017 to approximately 661,000 today because eligible individuals who never had DACA are no longer able to apply for it, and many of those who did have it have either adjusted to permanent resident status or another status or did not renew or otherwise lost their DACA status. Nicole Prchal Svajlenka, *Without Action, More Dreamers Than Ever Before Could See Their DACA Expire in October*, Ctr. for Am. Progress, Aug. 15, 2019, <https://tinyurl.com/y38uvt4s>.

that count on them to help fuel continued innovation and economic growth.

**A. Dreamers Contribute To The Success Of U.S. Companies And The Economy As A Whole.**

Dreamers have become essential contributors to American companies and the American economy. Prior to DACA, these young people—who have obtained at least a high school degree and, in many cases, have finished college and graduate school—would have been unable to obtain work authorization, and therefore unable to put their education and skills to productive use.

DACA changed that and, as a result, over 90 percent of Dreamers are employed in virtually every sector of the economy—from construction workers to nurses to cooks to computer scientists.<sup>8</sup> Their employment supports the growth of U.S. companies and the economy in a number of ways.

*1. Dreamers Are Valued Employees.*

*First*, Dreamers contribute directly to the success of U.S. companies, including many *amici*. At least 72 percent of the top 25 Fortune 500 companies employ DACA recipients—including IBM, Walmart, Apple, General Motors, Amazon, JPMorgan Chase, Home Depot, and Wells Fargo, among others—as do many others, including Uber and Lyft.<sup>9</sup> Those companies

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<sup>8</sup> New Am. Economy, *Spotlight on the DACA-Eligible Population* (Feb. 8, 2018), <https://tinyurl.com/y2fyhf9a>.

<sup>9</sup> Tom K. Wong et al., Ctr. for Am. Progress, *DACA Recipients' Economic and Educational Gains Continue to Grow* (Aug. 28, 2017), <https://tinyurl.com/y7dqqwd4>.



represent every major sector of the U.S. economy and generate almost \$3 trillion in annual revenue.

Dreamers' contributions are not limited to their work product alone. Immigrants like Dreamers bring diverse backgrounds and experiences to their workplaces, which bolster their colleagues' creativity and innovation.<sup>10</sup> People with different backgrounds offer different perspectives when confronted with a problem, and their different opinions and perspectives enable colleagues to anticipate alternative possibilities and work harder to evaluate those possibilities.<sup>11</sup>

## 2. *Dreamers Are Business Owners.*

*Second*, many Dreamers are entrepreneurs, who have created companies themselves. Six percent of Dreamers (and nearly nine percent of Dreamers 25 years and older) started their own businesses after receiving DACA.<sup>12</sup> Those businesses create jobs for other U.S. residents: Each DACA business owner with full-time employees employs on average 4.5 other workers.<sup>13</sup> That is nearly 86,000 additional jobs that otherwise would not exist.

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<sup>10</sup> See Katherine W. Phillips, *How Diversity Makes Us Smarter*, *Scientific American*, Oct. 1, 2014, <https://tinyurl.com/y4vrn8q2>.

<sup>11</sup> *Ibid.*; see also Deloitte, *Waiter, Is That Inclusion in My Soup? A New Recipe to Improve Business Performance* 8 (2013), <https://tinyurl.com/jnnszk4>.

<sup>12</sup> Tom K. Wong, et al., Ctr. for Am. Progress, *DACA Recipients' Livelihoods, Families, and Sense of Security Are at Stake This November* (Sept. 19, 2019), <https://tinyurl.com/y3c742re>; see also New Am. Economy, *Spotlight*, *supra* n.8 (4.5 percent of DACA-eligible individuals are entrepreneurs).

<sup>13</sup> Wong, *Livelihoods*, *supra* n.12.

The businesses started by Dreamers also generate revenue: In 2015, DACA-eligible entrepreneurs had a total business income of \$658.7 million.<sup>14</sup> Those funds are spent on wages, or goods and services from other companies, or reinvested, producing more overall growth.

This entrepreneurial activity is particularly focused on the local, small business level. Immigrants make up an outsized proportion of Main Street business owners.<sup>15</sup> Those businesses attract others in the community, which often helps to revitalize declining neighborhoods and reverse declining population trends.<sup>16</sup> Immigrant-owned businesses have revived communities from Philadelphia to Lexington, Nebraska to Minneapolis-St. Paul to Nashville.<sup>17</sup>

### 3. *Dreamers Are Consumers.*

*Third*, Dreamers also consume the goods produced and services provided by U.S. companies—contributing to the growth of those companies and the economy as a whole.

Not surprisingly, receiving a grant of deferred action under DACA—and the resulting eligibility to ap-

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<sup>14</sup> New Am. Economy, *Spotlight*, *supra* n. 8.

<sup>15</sup> David Dyssegaard Kalick, Americas Soc’y/Council of the Americas, *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* at 2, 5, 8-9, Jan. 2015, <https://tinyurl.com/lzuglue>.

<sup>16</sup> *Id.* at 12.

<sup>17</sup> *Id.* at 14-34; Sara McElmurry, Ctr. for Am. Progress, *Proactive and Patient: Managing Immigration and Demographic Change in 2 Rural Nebraska Communities*, Nov. 14, 2018, <https://tinyurl.com/y4lu3etx>.

ply for work authorization—increases Dreamers’ incomes. Fifty-eight percent of recently-surveyed Dreamers were able to obtain better-paying jobs; 53 percent were able to move to a job that “better fits [their] education and training.”<sup>18</sup> That, in turn, resulted in average wage increases for Dreamers of 86 percent—128 percent for those 25 years and older—after receiving DACA.<sup>19</sup> In total, Dreamers and their households exercise \$24.1 billion in spending power (income remaining after paying taxes) each year.<sup>20</sup>

This increased purchasing power—combined with the increased stability and security resulting from receiving a grant of deferred action—has enabled Dreamers to make purchases and investments that grow our Nation’s economy.

Consumer spending accounts for nearly 70 percent of all economic growth.<sup>21</sup> Sixty percent of Dreamers reported buying their first car after receiving DACA; fourteen percent reported purchasing their first home.<sup>22</sup> Dreamers are responsible for \$613.8 million in annual mortgage payments, on top of \$2.3 billion in rental payments to landlords.<sup>23</sup>

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<sup>18</sup> Wong, *Livelihoods*, *supra* n.12.

<sup>19</sup> *Id.*

<sup>20</sup> Nicole Prchal Svajlenka, Ctr. for Am. Progress, *What We Know About DACA Recipients in the United States* (Sept. 5, 2019), <https://tinyurl.com/y4xc6sf4>.

<sup>21</sup> Martin Crutsinger, *Thanks to Consumers, the US Economy Is Still Rising Steadily*, USA Today (Aug. 29, 2019), <https://tinyurl.com/y2ngbkch>.

<sup>22</sup> Wong, *Livelihoods*, *supra* n.12.

<sup>23</sup> Svajlenka, *supra* n.20.

Dreamers' higher wages also result in increased fiscal contributions in the form of taxes. Dreamers and their households pay \$5.7 billion in federal taxes and \$3.1 billion in state and local taxes annually.<sup>24</sup> In 41 states and the District of Columbia, the state and local tax contributions of Dreamers' households total more than \$1 million annually; in 35 states, their contributions are more than \$10 million; and in 12 states, they are more than \$50 million.<sup>25</sup> These taxes support American communities and the people and companies in those communities—funding local schools, infrastructure investments, and services and programs like police, fire protection, and economic development. DACA recipients' payroll taxes also support Social Security and Medicare.

Through these myriad contributions, Dreamers post-DACA have supported the growth and success of the U.S. economy.

**B. Dreamers Help Grow The Economy By Filling Jobs That Otherwise Would Remain Vacant Due To An Insufficient Supply Of Workers.**

These benefits to the U.S. economy do not come at the expense of U.S.-born workers. Studies have consistently found that immigrants do not displace U.S.-born workers. They instead help grow the economy and create more opportunities for U.S.-born workers by filling positions that otherwise would remain vacant because of a shortage of qualified workers.

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<sup>24</sup> Svajlenka, *supra* n.20.

<sup>25</sup> Nicole Prchal Svajlenka, Ctr. for Am. Progress, *What We Know About DACA Recipients, By State* (Sept. 12, 2019), <https://tinyurl.com/yxttwcm9>.

1. *DACA Recipients' Participation In The Workforce Expands The Number Of Jobs Available To Everyone.*

“[O]ne of the best-known fallacies in economics” is the “lump of labor fallacy.”<sup>26</sup> Economists from across the policy and political spectrum have discredited the notion that “there is a fixed amount of work to be done—a lump of labour”—such that an increase in the number of workers reduces the number of available jobs.<sup>27</sup> Rather, the indisputable reality is that jobs beget more jobs. “When people work for a living, they earn money. They spend that money on goods and services that are produced by other people.”<sup>28</sup> That greater demand for goods and services in turn creates more jobs.

That has long been America’s experience. “From 1970 to 2017, the U.S. labor force doubled. Rather than ending up with a 50 percent unemployment rate, U.S. employment doubled.”<sup>29</sup> Studies demonstrate

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<sup>26</sup> *Economics A-Z Terms Beginning with L*, The Economist, <https://goo.gl/BvRwKU>.

<sup>27</sup> *Id.*; see also Paul Krugman, Opinion, *Lumps of Labor*, N.Y. Times (Oct. 7, 2003), <https://goo.gl/GyYTG5>.

<sup>28</sup> Buttonwood, *Keep on Trucking*, The Economist (Feb. 11, 2012), <https://goo.gl/x8vqaL>; see also Kenneth Megan, Bipartisan Policy Ctr., *Immigration and the Labor Force* (Aug. 25, 2015), <https://goo.gl/8p3SP8> (“[A] breadth of research indicates that immigration can be complementary to native born employment, as it spurs demand for goods and services”); Giovanni Peri, *The Effect of Immigrants on U.S. Employment and Productivity*, Fed. Reserve Bank of San Francisco Econ. Letter (Aug. 30, 2010), <https://goo.gl/jK17fc>.

<sup>29</sup> David Bier, Cato Inst., *Five Myths About DACA* (Sept. 7, 2017), <https://tinyurl.com/ydy2qx3q>.

that increased immigration levels into the U.S. have had largely *positive* impacts on the employment levels and incomes of U.S.-born workers.<sup>30</sup>

These findings hold true today. The unemployment rate has more than halved since 2012, when DACA was first implemented.<sup>31</sup> The number of total job openings has increased.<sup>32</sup> And studies have found that DACA has not had any significant effect on the wages of U.S.-born workers.<sup>33</sup>

## 2. *Dreamers Fill Critical Labor Shortages.*

Studies repeatedly show that immigrants complement, rather than compete with, U.S.-born workers in the workforce.<sup>34</sup> The same holds true for Dreamers,

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<sup>30</sup> See Jacqueline Varas, Am. Action Forum, *How Immigration Helps U.S. Workers and the Economy* (Mar. 20, 2017), <https://goo.gl/ovHQEh>; U.S. Chamber of Commerce, *Immigration Myths and Facts* (Apr. 14, 2016), <https://tinyurl.com/yay4xjm9>.

<sup>31</sup> U.S. Dep't of Labor, Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, <https://tinyurl.com/zyq5xlx> (last visited Oct. 2, 2019).

<sup>32</sup> U.S. Dep't of Labor, Bureau of Labor Statistics, *Job Openings and Labor Turnover Survey* (Sept. 10, 2019) <https://tinyurl.com/y57pxqrb>.

<sup>33</sup> Francesc Ortega et al., *The Economic Effects of Providing Legal Status to DREAMers* 18, IZA Discussion Paper No. 11281 (Jan. 2018), <https://tinyurl.com/y9kx52bz>.

<sup>34</sup> Denhart, *supra* n.4, at 118; Gretchen Frazee, *4 Myths About How Immigrants Affect the U.S. Economy*, PBS NewsHour (Nov. 2, 2018), <https://tinyurl.com/yxlwzkth>; Maria E. Enchautegui, *Immigrant and Native Workers Compete for Different Low-Skilled Jobs*, The Urban Institute: Urban Wire (Oct. 13, 2015), <https://tinyurl.com/ycayp6ky>; U.S. Chamber of Commerce, *supra* n.30.

who are helping to fill holes in the workforce that are *not* being filled by U.S.-born workers.

U.S. job creation has been outpacing supply. As a result, the U.S. unemployment rate is currently quite low, and the number of job openings is high. In June 2019, the U.S. had 7.4 million job openings, but only 6 million people looking for work.<sup>35</sup> Sixty-four percent of small business owners reported hiring or trying to hire workers, but of those, 89 percent reported having “few or no ‘qualified’ applicants.”<sup>36</sup> This gap in demand and supply has led commentators to state that “[i]f the widely discussed slowdown occurs, a significant contributor will be the unavailability of labor.”<sup>37</sup> Moreover, that gap is likely to be exacerbated as the “baby boom” generation retires.<sup>38</sup>

U.S. employers have reported particular difficulty filling skilled labor positions, such as teachers, accounting and finance staff, nurses, and engineers.<sup>39</sup>

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<sup>35</sup> U.S. Dep’t of Labor, *supra* n.32..

<sup>36</sup> Nat’l Fed’n of Indep. Bus., *Small Business Optimism Index* (Aug. 2019), <https://tinyurl.com/y72v3t69>.

<sup>37</sup> Nat’l Fed’n of Indep. Bus., *supra* n.36.

<sup>38</sup> Denhart, *supra* n.4, at 60.

<sup>39</sup> Nat’l Fed’n of Indep. Bus., *Small Business Jobs Report: Small Business Owners’ Difficulty Finding Qualified Workers Reaches Survey High in August* (Aug. 2019), <https://tinyurl.com/y4l4kn9w> (Thirty-three percent of small business owners have job openings for skilled workers); See ManpowerGroup, *2018 Talent Shortage Survey: Solving the Talent Shortage* (ManpowerGroup 2018), <https://tinyurl.com/y8vxvxf7>; see also Rachel Unruh & Amanda Bergson-Shilcock, Nat’l Skills Coalition, *Missing in Action 3-4* (Feb. 2015), <https://goo.gl/gokfJW>.

And the U.S. faces a shortfall of *millions* of professionals in the science, technology, engineering, and mathematics (STEM) fields in the next few years.<sup>40</sup>

Dreamers help to fill these unfilled positions. Dreamers have at least a high school degree or equivalent—and 46 percent have obtained a bachelor’s degree or higher.<sup>41</sup> Twenty percent have received professional licenses since receiving DACA.<sup>42</sup> In other words, they are qualified for the skilled labor jobs for which there is a severe shortage of workers.

Reality reflects Dreamers’ paper qualifications. A significant number of Dreamers are employed in the education and health services industries, as well as in management and business occupations.<sup>43</sup> Many others work in technology, science, and finance.<sup>44</sup>

*Amici’s* experiences are illustrative. For example, IBM has at least 31 Dreamers within the company who work in areas such as software development and

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<sup>40</sup> New Am. Economy, *Sizing Up the Gap in our Supply of STEM Workers: Data & Analysis* (Mar. 29, 2017), <https://tinyurl.com/y6275mgb>; see also President’s Council of Advisors on Science and Technology, *Report to the President: Engage to Excel: Producing One Million Additional College Graduates with Degrees in Science, Technology, Engineering, and Mathematics* 1 (Feb. 2012), <https://goo.gl/v2YRVD>.

<sup>41</sup> Wong, *Livelihoods*, *supra* n.12.

<sup>42</sup> Wong, *Livelihoods*, *supra* n.12.

<sup>43</sup> Svajlenka, *supra* n.20; Ctr. for Am. Progress, *Results of Tom K. Wong, United We Dream, National Immigration Law Center, and Center for American Progress National Survey 4* (2016), <https://goo.gl/pe2i17>.

<sup>44</sup> Ctr. for Am. Progress, *Results*, *supra* n.43.



client support.<sup>45</sup> One IBM Dreamer provided critical remote technical support to ensure continuity of IBM’s Cloud services when Hurricane Harvey flooded Houston.<sup>46</sup> Lyft employs at least one Dreamer as a software engineer, who serves as one of the tech leads of the team driving critical data projects.<sup>47</sup>

And Dreamers’ contributions to these fields will likely only increase. By making it possible for Dreamers to apply for work authorization, DACA has made pursuing higher education both possible and worthwhile for Dreamers. Forty percent are currently in school—almost all of whom are working toward a bachelor’s or post-graduate degree.<sup>48</sup> And a substantial portion of those individuals are pursuing studies in STEM fields—acquiring the knowledge and skills that U.S. companies so desperately need to continue to innovate and stay competitive.<sup>49</sup>

Dreamers in occupations that do not require advanced degrees are similarly filling under-met labor needs. Sixty-eight percent of small business owners

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<sup>45</sup> See Tony Romm, *IBM CEO Ginni Rometty Is in D.C. Urging Congress to Save DACA*, Recode.net (Sept. 19, 2017), <https://goo.gl/NQeJUc>; *My American Dream, Minus the Paperwork*, THINKPolicy Blog (Oct. 3, 2017), <https://goo.gl/876JDm>; *I Felt Like a Normal American Kid . . . Then Everything Changed*, THINKPolicy Blog (Oct. 9, 2017), <https://goo.gl/oV9P7h>.

<sup>46</sup> See David Kenny, *Kenny: One Dreamer, Weathering Two Storms*, Houston Chronicle (Dec. 3, 2017), <https://goo.gl/562Pme>.

<sup>47</sup> See Decl. of Emily Nishi ¶ 4, JA1099, Doc. 54, *Batalla Vidal v. Nielsen*, No. 18-485 (2d Cir. Mar. 7, 2018).

<sup>48</sup> Wong, *Livelihoods*, *supra* n.12.

<sup>49</sup> The UndocuScholars Project, *In the Shadows of the Ivory Tower: Undocumented Undergraduates and the Liminal State of Immigration Reform* 8 (2015), <https://tinyurl.com/y7svqsxr>.

reported having “few or no qualified applicants” for construction jobs.<sup>50</sup> Construction, meanwhile, is the second largest industry employing DACA-eligible individuals.<sup>51</sup> Additionally, there are significant labor shortages in food preparation and serving-related occupations and personal care and services occupations.<sup>52</sup> But “[a]mong less-educated workers, those born in the United States tend to have jobs in manufacturing or mining, while immigrants tend to have jobs in personal services and agriculture.”<sup>53</sup> And a substantial proportion of Dreamers have jobs in food preparation.<sup>54</sup>

In sum, DACA has enabled thousands of young people who grew up in the United States to obtain jobs that fill critical gaps in the economy and that produce benefits for United States’ workers, companies, and economy.

### **C. Rescinding DACA Will Inflict Enormous Harm On Individuals, Companies, And The Economy.**

All of the above benefits—and more—will be lost if DACA’s rescission is permitted to stand. Over the next decade, our country’s GDP would lose between \$215 and \$460.3 billion; and federal tax revenue will

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<sup>50</sup> Nat’l Fed’n of Indep. Bus., *supra* n.39.

<sup>51</sup> New Am. Economy, *Spotlight*, *supra* n.8; cf. Ryan Nunn, et al., *A Dozen Facts about Immigration* (Oct. 2018), <https://tinyurl.com/y5ra3r8l>.

<sup>52</sup> U.S. Dep’t of Labor, Bureau of Labor Statistics, *Employment Projections*, <https://tinyurl.com/y4lzn72u>.

<sup>53</sup> Peri, *supra* n.28.

<sup>54</sup> Svajlenka, *supra* n.20.

drop by approximately \$60 to 90 billion.<sup>55</sup> Texas alone would lose \$6.3 billion in GDP; California would experience a \$11.6 billion decline in GDP.<sup>56</sup> And Social Security and Medicare contributions would lose out on \$40.9 billion over 10 years.<sup>57</sup>

This economic contraction would result directly from Dreamers' loss of work authorization. Under federal law, employers are prohibited from employing individuals who do not have a valid work authorization document. Accordingly, all of the hundreds of thousands of employed Dreamers would lose their jobs. In addition to the obvious harm to Dreamers themselves, the loss of so many workers will have severe repercussions for U.S. companies and workers.

Already, the possibility that DACA's rescission might go into effect is impacting Dreamers and, by extension, the companies for which they work. Dream-

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<sup>55</sup> See Decl. of Ike Brannon & Logan Albright ¶ 11, Doc. 45-3 at 359, *Regents of the Univ. of Calif. v. U.S. Dep't of Homeland Sec'y*, No. 18-18056 (9th Cir. Mar. 13, 2018); Nicole Prchal Svajlenka et al., Ctr. for Am. Progress, *A New Threat to DACA Could Cost States Billions of Dollars* (July 21, 2017), <https://goo.gl/7udtFu>; Jose Magaña-Salgado, Immigrant Legal Res. Ctr., *Money on the Table: The Economic Cost of Ending DACA* 4, 6-7 (2016), <https://goo.gl/3ZwGVJ>; see also Ike Brannon & Logan Albright, The Cato Inst., *The Economic and Fiscal Impact of Repealing DACA* 1 (Jan. 18, 2017), <https://goo.gl/jFXw4g>; Jacqueline Varas, Am. Action Forum, *The Fiscal Implications of the DACA Program* (Jan. 18, 2018), <https://tinyurl.com/y36tlgh9>.

<sup>56</sup> Svajlenka et al., *supra* n.55.

<sup>57</sup> Jose Magaña-Salgado & Tom K. Wong, Immigration Legal Res. Cntr., *Draining the Trust Funds* (Oct. 2017), <https://tinyurl.com/y6y65jvy>.

ers now live with the constant threat of job loss, withdrawal from society, and forced removal from the only country they have ever known.

Seventy-six percent of Dreamers reported living with the daily worry of being separated from their children.<sup>58</sup> The fear for the future that is now a daily part of life for Dreamers and their families affects both physical and mental health.<sup>59</sup> That, in turn, negatively affects employee productivity and performance, illness and absenteeism, accidents, and turnover.<sup>60</sup>

If this Court permits the DACA rescission to take effect and thereby end Dreamers' work authorization, companies will face an estimated \$6.3 billion in costs to replace Dreamers—if they can even find new employees to fill the empty positions.<sup>61</sup> Companies will forfeit the funds invested in training Dreamers, and will incur costs recruiting and training new employees, who will be less experienced and therefore less

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<sup>58</sup> Tom K. Wong et al., United We Dream, *Ending DACA Would Have Wide-Ranging Effects but Immigrant Youth are Fired Up and Politically Engaged* (Aug. 23, 2018), <https://tinyurl.com/y49stg87>.

<sup>59</sup> See Tiziana Rinaldi & Angilee Shah, *Immigration Limbo Is a 'Tug of Emotions.' It's Also a Mental Health Issue*, PRI's The World (Aug. 22, 2017), <https://goo.gl/WLXMZ4>; Sarah Elizabeth Richards, *How Fear of Deportation Puts Stress on Families*, The Atlantic (Mar. 22, 2017), <https://goo.gl/qDgeRf>.

<sup>60</sup> See World Health Org. & Int'l Labour Org., *Mental Health And Work: Impact, Issues and Good Practices* 1 (2000), <https://goo.gl/ecH1Ut>; Ortega, *supra* n.33, at 9-10.

<sup>61</sup> See David Bier, *Ending DACA Will Impose Billions in Employer Compliance Costs*, Cato Institute (Sept. 1, 2017), <https://goo.gl/1FMidk>; *see also* Magaña-Salgado, *supra* n.55, at 4.

productive.<sup>62</sup> These costs are particularly burdensome for small businesses.

But numbers alone do not come close to capturing Dreamers' contributions and the tremendous harm that will result from their loss. People are the heart of every business; and every company's goal is to create teams that work seamlessly together—teams in which colleagues support one another both within and outside the workplace. Ripping Dreamers out of their jobs hurts not only Dreamers, but other employees who lose friends and colleagues, and companies that lose trusted members of their teams.

History confirms that forcing Dreamers out of the workforce will reduce job growth and harm the U.S. economy. After Arizona passed the Legal Arizona Workers Act (LAWA) in 2007, which targeted the use of unauthorized workers, economic growth fell, reducing job opportunities. The State's total employment was 2.5 percent less than what it would have been without the law, and its GDP was reduced by an average of 2 percent a year between 2008 and 2015.<sup>63</sup>

Similarly, in 1964, the U.S. expelled Mexican *braceros*, who were previously permitted to work temporarily in the U.S., mostly on farms. One study revealed that excluding the Mexican *braceros* “did not

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<sup>62</sup> Heather Boushey & Sarah Jane Glynn, Ctr. for Am. Progress, *There Are Significant Business Costs to Replacing Employees* (Nov. 16, 2012), <https://goo.gl/ZSmRLq>.

<sup>63</sup> See Bob Davis, *The Thorny Economics of Illegal Immigration*, Wall St. J. (Feb. 9, 2016), <https://goo.gl/j4dd7J>; see also Sarah Bohn et al., *Do E-Verify Mandates Improve Labor Market Outcomes of Low-Skilled Native and Legal Immigrant Workers?* 17-18, 21, 24-25 (May 2014), <https://goo.gl/7UihSE> (finding that employment rates of U.S.-born men dropped post-LAWA).

affect the wages or employment of U.S. farmworkers.”<sup>64</sup> Instead, farms responded by *eliminating* the jobs—often by moving production abroad or going out of business.<sup>65</sup>

Removing Dreamers from the workforce is likely to have the very same negative effect on U.S. employment. As documented above, companies are already struggling to fill job openings; additional labor shortages will further hamper productivity and growth. The resulting drag on the economy will be exacerbated as Dreamers are forced to shutter businesses—putting the jobs of nearly 86,000 other U.S. workers at risk—and companies lose the income from Dreamers and Dreamers’ employees that has helped drive demand and production of goods and services provided by U.S.-born workers.<sup>66</sup>

More fundamentally, just as DACA sent a powerful message of inclusion, its rescission tells the immigrants who have been integral to the growth and development of our society and economy for decades that they are no longer welcome here. As a result, DACA’s

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<sup>64</sup> Michael A. Clemens, *Does Kicking Out Mexicans Create Jobs?*, Politico Magazine (Feb. 15, 2017), <https://goo.gl/XwLj1x>.

<sup>65</sup> *Id.*

<sup>66</sup> Cf. Ben Gitis & Jacqueline Varas, Am. Action Forum, *The Labor and Output Declines From Removing All Undocumented Immigrants* (May 5, 2016), <https://goo.gl/UAt3dJ> (concluding that removing undocumented immigrants from the workforce would cause private sector employment to decline by 4 to 6.8 million workers, would reduce real private sector output by \$381.5 to \$623.2 billion, and would have further negative economic impacts through the loss of consumption, investments, and entrepreneurship).

rescission will reduce the future ability of U.S. companies to attract individuals from around the world to support America's continued economic growth and prosperity.

## II. THE DACA RECISSION IS INVALID.

DHS's decision to rescind DACA did not rest on a change in immigration enforcement priorities, or a reassessment of the policy's costs and benefits, or the financial cost to the federal government of administering DACA. Rather, as the Ninth Circuit and the District Courts for the District of Columbia and Eastern District of New York correctly recognized,<sup>67</sup> DHS rested its decision on the legal conclusion that DACA "was effectuated \* \* \* without proper statutory authority" and therefore "was an unconstitutional exercise of authority by the Executive Branch."<sup>68</sup>

Because of the across-the-board nature of the rescission determination and the particular justification given by DHS, that decision is subject to judicial review. And because of the Executive Branch's broad authority with respect to the relevant immigration matters, the long history of administrative grants of deferred action and work authorization, and Congress's

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<sup>67</sup> 18-587 Pet. Supp. Br. App. 35a-43a; 18-588 Pet. App. 39a-42a, 97a; 18-589 Pet. App. 26a-27a, 94a.

<sup>68</sup> Mem. from Elaine C. Duke, Acting Secretary, Dep't of Homeland Security, on Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children" (Sept. 5, 2017).

express recognition of that authority, the agency’s rescission decision must be vacated.<sup>69</sup>

**A. The Rescission Decision Is Subject To Judicial Review Under The APA.**

The rescission of DACA—like all agency action—is subject to review under the APA unless it falls within one of two narrow exceptions: “(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a).

Pointing to this Court’s decision in *Heckler v. Chaney*, 470 U.S. 821 (1985), the government argues that its rescission of DACA is a “decision not to prosecute or enforce” that is “generally committed to an agency’s absolute discretion” and “unsuitab[le] for judicial review.” U.S. Br. at 18 (quoting *Chaney*, 470 U.S. at 831).

*Chaney* stated that an agency’s decision not to enforce the law is “generally” unreviewable, but carefully refrained from holding that *all* refusals to enforce are unreviewable. And the Court expressly *declined* to hold unreviewable a refusal to enforce based on the belief that the agency lacked jurisdiction, observing that such decisions might not be “committed to agency discretion.” 470 U.S. at 833 n.4.

Judicial review is available here, because three aspects of the agency decision combine to render the general *Chaney* rule inapplicable.

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<sup>69</sup> For the reasons explained by Judge Bates (see 18-588 Pet. App. 103a-108a), the June 2018 memorandum issued by Secretary of Homeland Security Nielsen did not provide a justification for the rescission decision other than that set forth in the initial rescission memorandum—that the DACA program is unlawful because it exceeds the Department’s authority.



*First*, the decision to rescind DACA is a broad policy determination, not an individualized exercise of enforcement discretion. And that policy determination directly affects the lives of close to two million people—current DACA recipients and individuals who would be entitled to apply for DACA status.<sup>70</sup> It is therefore fundamentally different from the archetypal decision not to prosecute an individual or not to enforce a statute with respect to a particular set of facts.

*Second*, the rescission decision rested on a purely legal determination. There accordingly is no risk that judicial review would require assessment of the policy considerations or fact-based exercises of discretion that frequently underlie such decisions.

Courts are fully qualified to review an agency's interpretation of a statute or the Constitution. See, *e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629-30 (2018). Indeed, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

A long line of lower court decisions apply this principle, holding that agency actions that are generally unreviewable—if based on the agency's evaluation of factual and policy factors—nonetheless are reviewable when based on a legal interpretation, including a legal determination regarding the agency's jurisdiction or authority.<sup>71</sup>

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<sup>70</sup> See Julia Gelatt, Migration Pol'y Inst., *All Eyes Turn to Congress, Following Trump Decision to Terminate DACA Program* (Sept. 2017), <https://tinyurl.com/yyv89mjb>.

<sup>71</sup> See, *e.g.*, *Bonilla v. Lynch*, 840 F.3d 575, 587 (9th Cir. 2016) (holding reviewable BIA's decision not to exercise its sua sponte

The government is wrong in asserting (U.S. Br. 23-25) that *I.C.C. v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), supports its contention that the DACA rescission is not reviewable. That case involved a decision *not to reconsider* a prior decision interpreting a statute. The legal question resolved in the initial determination “could have been brought [before the court] by appeal from the original order.” *Id.* at 279. In that very different context, the fact that the Commission based its refusal to reconsider the un-

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authority to open the petitioner’s motion to reopen his order of removal where the BIA did not deny the motion “as an exercise of discretion,” but rather based on the “conclu[sion] that it lacked the authority to reopen”); *Montana Air Chapter No. 29 v. Fed. Labor Relations Auth.*, 898 F.2d 753, 756 (9th Cir. 1990) (holding that *Chaney* does not apply to decisions “based on a belief that the agency lacks jurisdiction” or “an agency’s statutory interpretations made in the course of nonenforcement decisions”); *Sharkey v. Quarantillo*, 541 F.3d 75, 85, 91 (2d Cir. 2008) (holding reviewable USCIS’s rescission of plaintiffs’ lawful permanent resident (LPR) status where decision was based on agency’s “*nondiscretionary decision*” that plaintiff did not have LPR status within meaning of rescission statute and regulation); *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993) (“[I]nterpretation [of] the substantive requirements of the law \* \* \* is not the type of discretionary judgment concerning the allocation of enforcement resources that [*Chaney*] shields from review.”); *Nat’l Wildlife Fed’n v. EPA*, 980 F.2d 765, 773 (D.C. Cir. 1992) (holding reviewable EPA’s nonenforcement decision where plaintiff challenged agency’s “statutory interpretation embodied in [the regulation], \* \* \* and does not contest a particular enforcement decision”); see also *Chaney*, 470 U.S. at 833 n.4 (suggesting exception would not apply if case involved “a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction”); *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996) (interpreting *Chaney* as applying “to individual, case-by-case determinations of when to enforce existing regulations rather than permanent policies or standards”).

derlying order on a legal interpretation did not provide a cogent reason for making the refusal to reconsider reviewable. *Ibid.*

Judicial review of agency decisions based entirely on legal determinations also serves the important purpose of promoting accountability. When an agency rests a broad non-enforcement decision on policy-based discretion, citizens who support or oppose the decision know that the agency bears responsibility for the determination. That makes clear that any efforts to either overturn or support the decision should be directed to agency decisionmakers.

Allowing an agency to rest its decision on purely legal grounds and yet avoid judicial review has the opposite effect: insulating the agency decisionmaker from accountability—and responsibility. Even if the agency’s legal justification is patently incorrect, the agency would be able to shift responsibility to Congress by asserting a lack of legal authority. And citizens who oppose the decision would blame Congress for failing to act rather than the agency decisionmakers.

*Third*, a statute relating to judicial review in the immigration context provides additional support for this conclusion.

That provision, 8 U.S.C. § 1252(g), states that, subject to certain exceptions, “no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.”

The government contended below that Section 1252(g) precluded judicial review here—but it has

abandoned that argument. U.S. Br. 20. In fact, the provision bolsters the argument in favor of judicial review.

This Court explained in *Reno v. American Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (AAADC), that Section 1252(g) “applies only to three discrete actions that the Attorney General may take: her ‘decision or action’ to ‘commence proceedings, adjudicate cases, or execute removal orders.’” *Id.* at 482; see also *id.* at 485 (stating that § 1252(g) was “designed to give some measure of protection to ‘no deferred action’ decisions and similar discretionary determinations” (emphasis added)); *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (plurality op.).

Section 1252(g) thus reflects the distinction between fact-specific exercises of discretion in the context of an individual proceeding and other types of decisions, as this Court and the lower courts have recognized.<sup>72</sup> Congress focused specifically on enforcement-related exercises of discretion in the immigration context and specifically did not exclude from judicial review broad policy pronouncements based entirely on

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<sup>72</sup> See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 293 & 311 n.34 (2001) (§ 1252(g) did not apply to challenge to “Attorney General[’s] interpret[ation]” of statutes); *Texas v. United States*, 809 F.3d 134, 165 (5th Cir. 2015) (§ 1252(g) did not apply to challenge to DAPA); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1118-19 (9th Cir. 2001) (§ 1252(g) did not apply to challenge to directives issued by the BIA Chairman and the Chief Immigration Judge that were based on legal interpretations); *Bowrin v. INS*, 194 F.3d 483, 488 (4th Cir. 1999) (“§ 1252(g) does not apply to agency interpretations of statutes”); *Fornalik v. Perryman*, 223 F.3d 523, 532 (7th Cir. 2000) (habeas petition filed before INS filed initial filing in removal case was not request for “relief from a decision to commence proceedings”).

an agency's legal determination. That congressional determination supports review here.

In sum, the particular characteristics of this decision combine to place it clearly within the category of agency actions subject to judicial review.

In this unusual context, there is no basis for disregarding the “strong” and “well-settled” presumption favoring review of executive determinations. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015); *Kucana v. Holder*, 558 U.S. 233, 241 (2010).

### **B. The Rescission Decision Must Be Set Aside.**

The decision to rescind DACA rested on a legal determination: DHS's conclusion that the program exceeded the agency's statutory authority. Because that conclusion constituted a change in position—the government had previously stated that DACA was lawful—DHS was required to provide “a reasoned explanation for the change” in position. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Failure to explain a change in agency policy “is a reason for holding an interpretation to be an arbitrary and capricious change.” *Id.* at 2126 (citation omitted).

Even if the explanation were adequate, the rescission must be set aside if the agency's legal analysis is wrong. *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (“[I]f the [agency] action is based upon a determination of law \* \* \*, an order may not stand if the agency has misconceived the law.”); *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 86 (2d Cir. 2006); *Safe Air For Everyone v. EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007); *Transitional Hosps. Corp. of La. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000).

The rescission decision must be vacated for both reasons: DHS failed to provide an adequate explanation for its change in policy and it erred in determining that DACA is beyond the Executive Branch’s legal authority.

To begin with, as Judge Bates explained in detail in two opinions (see 18-588 Pet. App 1a-74a & 80a-109a), the “scant legal reasoning” set forth by DHS “was insufficient to satisfy the Department’s obligation to explain its departure from its prior stated view that DACA was lawful.” *Id.* at 51a.

Moreover, “[t]he Department’s failure to give an adequate explanation \* \* \* was particularly egregious here in light of the reliance interests involved”—because the program had been in place for five years “and had engendered the reliance of hundreds of thousands of beneficiaries, many of whom had structured their education, employment, and other life activities on the assumption that they would be able to renew their DACA benefits.” *Id.* at 54a. Citing *Encino Motorcars*, Judge Bates stated that “[t]he Supreme Court has set aside changes in agency policy for failure to consider reliance interests that pale in comparison to the ones at stake here.” *Id.* at 54a-55a.

Even if DHS’s explanation could be deemed adequate, the Department’s legal analysis is wrong: the DACA program falls well within the Executive Branch’s particular legal authority with respect to immigration for several related reasons.

*First*, Congress has broadly authorized the Department of Homeland Security to exercise discretion, including to “[e]stablish[] national immigration enforcement policies and priorities”—which is precisely what the DACA program does. 6 U.S.C. § 202(5); see

also 8 U.S.C. § 1103(a)(1) (charging the Secretary with the “administration and enforcement” of the immigration laws); *id.* § 1103(a)(3) (authority to “perform such other acts as he deems necessary for carrying out his authority” under the immigration laws); H.R. Rep. No. 111-157, at 8 (2009) (“rather than simply rounding up as many illegal immigrants as possible, which is sometimes achieved by targeting the easiest and least threatening among the undocumented population, DHS must ensure that the government’s huge investments in immigration enforcement are producing the maximum return in actually making our country safer”).

*Second*, granting “deferred action” is a long-established administrative practice expressly recognized by this Court and by Congress.

The government recognizes that “[a]s a practical matter, \* \* \* the Executive Branch lacks the resources to remove every removable alien,” and “[f]or any alien subject to removal, DHS officials must first ‘decide whether it makes sense to pursue removal at all.’” U.S. Br. 4 (quoting *Arizona v. United States*, 567 U.S. 387, 396 (2012)). For that reason, Presidents since 1956 have implemented formal programs deferring government action to remove individuals present in the United States—thereby enabling over two million otherwise-removable aliens to remain temporarily in the country.

In the 1950s, President Eisenhower authorized the admission of (“paroled”) almost 1,000 foreign-born children into the United States; and he and Presi-

dents Kennedy, Johnson, and Nixon later paroled another 600,000 Cubans.<sup>73</sup> In the 1970s and 1980s, the Ford and Carter Administrations granted “extended voluntary departure,” which “temporarily suspend[ed] enforcement” of deportation, to “particular group[s]” of immigrants.<sup>74</sup>

The Reagan Administration introduced the “Family Fairness” program, which deferred removal actions against minor children whose parents were in the process of obtaining legal status but who did not themselves qualify for legal status.<sup>75</sup> President George H.W. Bush then extended the program in 1990 to cover qualified spouses.<sup>76</sup> And on at least four additional occasions, immigration officials have extended deferred action to specified classes of individuals.<sup>77</sup>

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<sup>73</sup> See President Dwight Eisenhower, *Statement Concerning the Entry Into the United States of Adopted Foreign-Born Orphans* (Oct. 26, 1956), <https://goo.gl/BkztnZ>; American Immigration Council, *Executive Grants of Temporary Immigration Relief, 1956-Present* (Oct. 2014), <https://goo.gl/Q87gqn>.

<sup>74</sup> *Hotel & Rest. Emps. Union, Local 25 v. Smith*, 846 F.2d 1499, 1510 (D.C. Cir. 1988) (en banc); Andorra Bruno et al., CRS, *Analysis of June 15, 2012 DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* App’x (July 13, 2012), <https://goo.gl/deiGYz>.

<sup>75</sup> Alan Nelson, *Legalization and Family Fairness: An Analysis* (Oct. 21, 1987), in 64 No. 41 Interpreter Releases 1191 app. I.

<sup>76</sup> Mem. from Gene McNary, Comm’r, INS, to Reg’l Comm’rs, *Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990), in 67 No. 6 Interpreter Releases 153, app. I, at 164-65 (Feb. 5, 1990).

<sup>77</sup> See, e.g., Mem. from Paul Virtue, INS, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* at



In view of that long history, it is not surprising that this Court itself has recognized the “regular practice” of “deferred action.” *AAADC*, 525 U.S. at 483-85.

Most importantly, Congress has enacted statutes expressly recognizing that authority. As the government itself recognizes (U.S. Br. 43), Congress has on several occasions recognized the legal authority to grant deferred action by expressly expanding deferred action to certain categories of individuals and by authorizing States to issue driver’s licenses to immigrants with “approved deferred action status.” 49 U.S.C. § 30301 note.

Given this long historical practice and express congressional recognition, it is plain that the Executive Branch has broad authority to grant deferred action.

*Third*, permitting deferred action recipients to obtain work authorization has a similarly lengthy pedigree.

A regulation promulgated in the 1980s provides that individuals who receive deferred action are eligible to apply for work authorization. See 8 C.F.R. § 274a.12(c)(14). That regulation codified the already-

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3 (May 6, 1997), 74 No. 41 Interpreter Releases 962 app. I; U.S. Citizenship & Immigration Servs. (USCIS), *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ)* 1, 7 (Nov. 25, 2005), <https://tinyurl.com/y68s86cy>; Mem. from Michael D. Croning, INS, for Michael A. Pearson, INS, *VTVPA Policy Memorandum #2—“T” and “U” Nonimmigrant Visas* (Aug. 30, 2001), <https://tinyurl.com/yxpztydf>; Mem. from Donald Neufeld, USCIS, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* (June 15, 2009), <https://goo.gl/SHaCVZ>.

existing practice and procedure of granting employment authorization to such individuals. See Proposed Rules for Employment Authorization for Certain Aliens, 44 Fed. Reg. 43,480 (July 25, 1979). And in the almost forty years since, Congress has declined to limit this practice in any way.

To the contrary, in the face of a challenge to the Attorney General's authority to grant work authorizations to individuals who have been granted deferred action (see Employment Authorization, 51 Fed. Reg. 39,385 (Oct. 28, 1986)), Congress ratified the Attorney General's authority, enacting a law prohibiting employers from hiring unauthorized aliens, but expressly excluded from that category individuals "authorized to be so employed by \* \* \* the Attorney General." 8 U.S.C. § 1324a(h)(3).

In sum, the broad discretionary authority conferred on the Executive Branch in this immigration context, the long history of administrative grants of both deferred action and work authorization, and Congress's express recognition of that practice establish that DACA falls within the legal authority available to the Executive Branch.

### CONCLUSION

The judgments of the Court of Appeals for the Ninth Circuit and the District Court for the District of

Columbia, and orders of the District Court for the Eastern District of New York should be affirmed.

Respectfully submitted.

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OCTOBER 2019

**APPENDIX A**

**LIST OF *AMICI CURIAE***

**Business Associations**

1. American Hotel & Lodging Association
2. BSA | The Software Alliance
3. Chamber of Commerce of the United  
States of America
4. HR Policy Association
5. Information Technology Industry  
Council
6. National Association of Manufacturers
7. National Association of State Latino  
Chambers of Commerce
8. National Retail Federation
9. North Texas Commission
10. Philadelphia Area Cooperative Alliance

11. Retail Industry Leaders Association
12. Semiconductor Industry Association
13. Software and Information Industry  
Association
14. Sustainable Business Network of  
Greater Philadelphia
15. Tech:NYC
16. TechNet
17. Texas Association of Business
18. Vail Valley Partnership

**Individual Companies**

1. A Medium Corporation
2. Adobe Systems Incorporated
3. Affirm, Inc.
4. Airbnb, Inc.
5. Akamai Technologies, Inc.
6. Amazon.com, Inc.
7. Ampush LLC
8. Asana, Inc.
9. Aspen Skiing Company, LLC
10. Atlassian Corp. Plc
11. Autodesk, Inc.
12. Azavea Inc.
13. Ben & Jerry's Homemade, Inc.
14. Berry Appleman & Leiden LLP

15. Best Buy, Inc.
16. Box, Inc.
17. Braze, Inc.
18. Brightcove Inc.
19. CareZone Inc.
20. Checkr, Inc.
21. Chegg, Inc.
22. Chobani, LLC
23. Cisco Systems Inc.
24. Citrix Systems, Inc.
25. Civis Analytics, Inc.
26. Cloudera, Inc.
27. Cloudflare, Inc.
28. Codecademy
29. Color Genomics, Inc.

30. Columbia Group LLP
31. Cummins Inc.
32. DoorDash
33. Driscoll's
34. Dropbox, Inc.
35. eBay Inc.
36. Ernst & Young LLP
37. Exelon Corp.
38. Facebook, Inc.
39. Fastly, Inc.
40. Foossa
41. Foursquare Labs, Inc.
42. Gap Inc.
43. General Assembly Space, Inc. DBA  
General Assembly



44. Golden Door Scholars
45. Google LLC
46. Graham Holdings Company
47. Greenough Consulting Group
48. Hewlett Packard Enterprise
49. Hilton Worldwide Holdings Inc.
50. HMS Holdings Corp.
51. Host Hotels and Resorts, Inc.
52. HP Inc.
53. IBC Bank
54. IBM Corporation
55. IKEA North American Services, LLC
56. Imgur, Inc.
57. Indiegogo, Inc.
58. Intel Corporation

59. JAND, Inc. d/b/a Warby Parker
60. Kickstarter, PBC
61. Knotel
62. Lam Research Corporation
63. Levi Strauss & Co.
64. Linden Research, Inc. d/b/a Linden Lab
65. Lydecker Diaz
66. Lyft, Inc.
67. Mapbox
68. Marriott International, Inc.
69. Medidata Solutions, Inc.
70. Molecule Software, Inc.
71. MongoDB, Inc.
72. MPOWERD Inc.
73. Netflix, Inc.

74. NETGEAR, Inc.
75. NewsCred, Inc.
76. Niskanen Center
77. Okta, Inc.
78. OpenAI, LLC
79. Patreon, Inc.
80. PayPal Holdings, Inc.
81. Pinterest, Inc.
82. Planet Labs Inc.
83. Postmates
84. RealNetworks, Inc.
85. Red Ventures
86. Rippling
87. Salesforce.com, Inc.
88. Scopely, Inc.

89. ServiceNow
90. Shutterstock, Inc.
91. Space Exploration Technologies Corp.
92. Spokeo, Inc.
93. SpotHero, Inc.
94. Spotify USA Inc.
95. Square, Inc.
96. Squarespace, Inc.
97. Starbucks Coffee Company
98. Strava, Inc.
99. SurveyMonkey Inc.
100. Tampa Bay Tech
101. Target
102. TaskRabbit, Inc.
103. Tesla, Inc.

104. The Nielsen Company
105. Thumbtack, Inc.
106. TNTP, Inc.
107. TPG Capital
108. TransferWise Inc.
109. TripAdvisor LLC
110. Turner Morris, Inc.
111. Turo Inc.
112. Twitter Inc.
113. Uber Technologies, Inc.
114. Univision Communications Inc.
115. Upwork Inc.
116. Verizon Communications Inc.
117. Via Transportation, Inc.
118. Western Union

119. Work & Co.
120. Workday, Inc.
121. Y Combinator Management, LLC
122. Year Up
123. Yelp Inc.
124. Zendesk, Inc.
125. ZenPayroll, Inc. d/b/a Gusto