No. 15-674

In The Supreme Court of the United States

UNITED STATES, *et al.*,

Petitioners,

v.

TEXAS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR *AMICI CURIAE* THE IMMIGRATION REFORM LAW INSTITUTE AND FEDERATION FOR AMERICAN IMMIGRATION REFORM IN SUPPORT OF RESPONDENTS

DALE L. WILCOX
Executive Director & General Counsel
MICHAEL M. HETHMON*
Senior Counsel
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
(202) 232-5590
litigation@irli.org
**Counsel of Record*

Attorneys for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*[1]

The Federation for American Immigration Reform Inc. ("FAIR") is America's oldest and largest charitable corporation dedicated to controlling illegal immigration and reducing legal immigration to sustainable levels consistent with the national interest. Petitioners' theory of hegemonic discretionary agency power behind the challenged extended deferred action for childhood arrivals ("DACA+") and Deferred Action for Parental Accountability ("DAPA") programs poses a major threat to the welfare and civil rights of FAIR's 300,000 active supporters.

The Immigration Reform Law Institute ("IRLI"), FAIR's public interest legal education and defense affiliate, has defended the statutory framework for true immigration enforcement for more than 25 years.

SUMMARY OF ARGUMENT

Throughout this litigation FAIR and IRLI have argued that the most important question facing the court is, whether the DAPA Memo is arbitrary and capricious or otherwise not in accordance with law. *See* Brief *Amicus Curiae* of IRLI, *Texas v. United States* (S.D. Tex. 2015) (Dkt. No. 513037737); Brief *Amici Curiae* of IRLI, FAIR, et al., *Texas v. United*

[1] The parties have consented to the filing of this brief. No other party has contributed to the writing or costs of this brief.

States (5th Cir. 2015) (Dkt. No. 52-1). Should the Court reach the merits, this case can and should be decided by statutory construction of the unambiguous text of the immigration law framework, applying the *Chevron* Step One test. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-844 (1984).

This brief reviews the statutory framework that restricts Department of Homeland Security ("DHS") authority to exercise deferred action on a categorical basis. Today, no Immigration and Naturalization Act ("INA") provision authorizes extra-statutory deferrals of removal, or deferred action, by any executive agency, including DHS and the Department of Justice ("DOJ"). The law of application for admission displaces informal agency discretion, leaving no interstitial gaps that can accommodate the government's arbitrary and capricious creation of a massive classification of "nonstatus" alien beneficiaries.

Congress has consistently rolled back extra-statutory exercises of "discretion." The legislative history of the INA demonstrates that Congress has progressively restricted – and never delegated or acquiesced to – a general vesting of executive discretion in DHS or its predecessor the Immigration and Naturalization Service ("INS").

ARGUMENT

I. Statutory construction of the INA framework distinguishing between the Secretary's mandatory duties and discretionary powers will resolve this case.

In June 2012, DHS implemented the Deferred Action for Childhood Arrivals program ("DACA"). Pet. App. 3a n.6 (*citing* Janet Napolitano, Secretary of Homeland Security ("Secretary"), *Memorandum to David Aguilar, Acting Commissioner, USCBP, et al*. (June 15, 2012) ("DACA Memo")). At least 1.2 million illegal aliens are eligible for the exercise of prosecutorial discretion under DACA. *Id.* at 4a. In November 2014, DHS expanded DACA and also directed U.S. Citizenship and Immigration Services ("USCIS") to establish a process similar to DACA known as DAPA. *Id.* at 4a n.10. In the DAPA Memo, the Secretary described deferred action to mean that

> for a specified period of time, an individual is permitted to be lawfully present in the United States although without any form of legal status in this country, much less citizenship. . . .

Jeh Johnson, Secretary of Homeland Security, *Memorandum to Leon Rodriguez, Dir., USCIS, et al.* (Nov. 20, 2014) ("DAPA Memo."). Of approximately 11.3 million illegal aliens in the United States, the United States District Court estimated that some 4.3 million would be eligible for lawful presence pursuant to DAPA. *Id.* at 5a, *citing* Dist. Ct. Opn., 86 F. Supp. 3d 591, 612 n.11 (S.D. Tex. 2015). DACA and DAPA

applicants "shall also be eligible to apply for work authorization for the period of deferred action." DAPA Memo at 4.

The Fifth Circuit held that conflict with the INA was "an alternate and additional ground for affirming the injunction . . . " that forbid implementation of DAPA. Pet. App. 69a. "Congress has directly addressed lawful presence and work authorization through the INA's unambiguously specific and intricate provisions. . . ." *Id.* at 79a n.191. DAPA, it concluded, "awards lawful presence to persons who have never had a legal status and may never receive one." *Id.* at 82a. "[E]ven with 'special deference' to the Secretary, the INA flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits including work authorization." *Id.* at 81a. DAPA "was far from interstitial: Congress has repeatedly declined to enact the [DREAM] Act, features of which closely resemble DACA and DAPA." *Id.* at 84a. Addressing the issue of limited agency resources, the Fifth Circuit correctly held that, "adequacy or insufficiency of legislative appropriations is not relevant to whether DHS has statutory authority to implement DAPA." *Id.* at 82a n.197.

Petitioners' view of the statutory framework is in stark conflict:

> Congress has mandated certain actions, such as detention of criminal aliens and aliens apprehended illegally crossing the border . . .

> [and] has also directed the Secretary to prioritize the removal of criminal aliens by the severity of the crime, and has directed U.S. Immigration and Customs Enforcement (ICE) to use at least $1.6 billion to identify and remove criminal aliens. . . . But as relevant here, Congress has otherwise left it to the Secretary's discretion to establish national immigration enforcement policies and priorities.

Pet. Br. at 4. According to Petitioners, "Congress has repeatedly enacted legislation that takes as a given DHS's authority to accord deferred action." Pet. Br. at 6-7. Petitioners argue that the Fifth Circuit did not "identify any express statutory provision barring DHS from exercising its discretion in this manner. Instead the court inferred such a bar from the fact that the INA expressly identifies certain categories of aliens as eligible for deferred action, but does not include children who arrived here as minors or parents of U.S. citizens or [LPRs]" . . . which "is an untenable reading of the INA." Pet. Br. at 61. "[T]he Guidance does not create a new lawful status; it involves an exercise of discretion to forbear from enforcement against an alien who remains removable. . . . That exercise of discretion is perfectly consistent with the INA." *Id.* at 62.

This deep conflict between the finding of the Fifth Circuit and Respondents on the one hand, and Petitioners' claims on the other, is a dispute firstly of statutory construction. The statutory framework as a whole is determinative when conducting a *Chevron*

Step One analysis. *Scialabba v. De Osorio*, 134 S. Ct. 2191, 2217 (2014) (Sotomayor, Breyer and Thomas, J.J., dissenting), *citing FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132-133 (2000) ("When deciding whether Congress has 'specifically addressed the question at issue,' thereby leaving no room for an agency to fill a statutory gap, courts must interpret the statute as a coherent regulatory scheme and fit, if possible, all parts into a harmonious whole."). The Secretary's theory of lawful presence as a function of deferred action status defies the law of admission which bars categorical discretionary stays of removal under DACA+ and DAPA for "nonstatus" aliens.

II. The Secretary's theory of lawful presence derived from deferred action designation defies the law of admission which bars categorical discretionary stays of removal under DACA+ and DAPA for "nonstatus" aliens.

The Fifth Circuit correctly concluded that, "at its core, this case is about the Secretary's decision to change the immigration classification of millions of illegal aliens on a class-wide basis." Pet. App. 53a. "Deferred action," the court explained,

> . . . is much more than nonenforcement: It would affirmatively confer "lawful presence" and associated benefits on a class of unlawfully present aliens. Though revocable, that change in designation would trigger . . . eligibility for federal benefits . . . and state

> benefits . . . that would not otherwise be available to illegal aliens.

Id. at 45a. The preliminary injunction was affirmed in part because DACA+ and DAPA are "manifestly contrary" to the statutory scheme of immigration law. *Id.* at 76a. The opinion referenced the November 2014 DAPA Memo, which states that the Secretary's expansion of DACA and establishment of DAPA made these deferred action beneficiaries lawfully present in the United States:

> Although deferred action does not confer any form of legal status in this country, much less citizenship, it does mean that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States.

Id. at 5a (*citing* DAPA Memo, at 3-4) (emphasis in DAPA Memo).

Petitioner, Secretary Johnson has now unequivocally asserted that deferred action "does not change the law in any way or create any new immigration categories." Pet. Br. at 38. According to Petitioners, deferred action

> thus does not confer any form of legal status in this country. . . . The label "lawful presence" does not alter this essential legal distinction between unlawful presence and unlawful status. "Lawful presence" in this sense is the result of every decision to defer action, on any basis.

Id. Petitioners claim that "[t]he court did not . . . identify any express statutory provision barring DHS from exercising its discretion in this manner." Pet. Br. at 61.

Petitioners are dangerously wrong. The INA is a comprehensive federal statutory scheme for regulation of immigration and contains the terms and conditions of admission to the country. *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1973 (2011). Petitioners ignore the comprehensive reforms to the framework of immigration laws enacted by Congress between 1980 and 2005; in particular the Illegal Immigration Reform and Immigrant Relief Act of 1996, Pub. L. No. 104-208 ("IIRIRA"), but also the Immigration Act of 1990, Pub. L. No. 101-649 ("IMMACT 90"), the Anti-Terrorist Effective Death Penalty Act of 1996, Pub. L. No. 104-132 ("AEDPA"), and the REAL ID Act of 2005. These acts progressively restricted agency authority to grant deferred action relief on a categorical basis.

The Court cannot avoid IIRIRA and its historic function in restricting agency discretion in the fields of admission and removal.[2] This framework provides the Court with meaningful standards to review the administration by the agency of its admission and

[2] The intent of IIRIRA §§301-309 was "to make it easier to deny admission to inadmissible aliens and easier to remove deportable aliens from the United States." *Tutu v. Blackman*, 9 F. Supp. 2d 534, 536-537 (E.D. Pa. 1998), *citing* H.R. Rep. No. 104-469 (I), 104th Cong., 2d Sess. 359, 463 (1996).

removal processes – one of the circumstances where judicial review of agency "non-enforcement" actions is authorized. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (stating judicial review of agency actions unavailable only "in those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion").[3]

The most significant IIRIRA reform for the rollback of executive discretion was the replacement of physical entry into the United States as the threshold criteria for lawful presence with the inspection and admission of all previously non-admitted aliens.[4] Today, the INA clarifies that "an alien present in the United States who has not been admitted shall be deemed for purposes of this Act an *applicant*

---

[3] *Perales v. Casilla*, 903 F.2d 1043 (5th Cir. 1990), cited in Pet. Br. at 40, upheld INS non-enforcement discretion based on *former* INA §244. The Fifth Circuit called it a "permissive statute" with "no standards . . . that would provide courts with law to apply." *Id.* at 1048. Congress responded in 1996 through IIRIRA by replacing former §244 with current INA §240B, which imposed stringent restrictions on voluntary departure that are consistent with *Heckler*'s "meaningful" standard, and in no way "permissive."

[4] Per AEDPA §414 and §422 (1996) an alien "found" in the United States but not inspected and admitted was subject to examination and summary exclusion (expedited removal) proceedings, and lost eligibility for Suspension of Deportation. IIRIRA repealed AEDPA §414 and §422. IIRIRA §301 then replaced the definition of entry in INA §101 with a new definition, §101(a)(13), that treats persons present in the United States without authorization as not admitted.

for admission." 8 U.S.C. §1225(a)(1). Admission is defined as "a lawful entry . . . into the United States *after* inspection and authorization by an immigration officer." 8 U.S.C. §1101(a)(13)(A). When IIRIRA made application for admission into the United States the fundamental obligation imposed on aliens, Congress divided aliens present in the United States into two statutory classes: Aliens who have been admitted and aliens who are applicants for admission.

DACA+ and DAPA-eligible aliens are "applicants for admission." Petitioners do not dispute that

> every individual covered by the Guidance is already removable, with or without tolling [under the unlawfully present ground of inadmissibility] . . . [and] virtually all parents under DAPA . . . are adults who stayed in the United States for a year without authorization, and hence face the maximum ten-year barrier if they depart.

Pet. Br. at 41 n.8 (*citing* 8 U.S.C. §1182(a)(9)(B)).

IIRIRA also imposed on both DHS and all aliens a nondiscretionary duty to appear in person before an immigration officer, who must conduct an inspection. *Clark v. Suarez Martinez*, 543 U.S. 371, 373 (2005). Prior to 1996, the INA required inspection only for "aliens arriving at ports . . . at the *discretion* of the Attorney General." 8 U.S.C. §1225(a) (1995) (emphasis added). In 1996, Congress amended the INA to mandate that DHS inspect *every* alien applicant for admission as to their eligibility for admission to the

United States: "All aliens . . . who are applicants for admission . . . *shall be inspected* by immigration officers." 8 U.S.C. §1225(a)(3) (emphasis added) (added by IIRIRA §302). The Secretary lacks legal authority to waive or decline to comply with this congressional mandate. *Clark*, 543 U.S. at 373 ("An alien arriving in the United States *must* be inspected by an immigration official.") (emphasis added).

Congress imposed a third nondiscretionary duty, but only on aliens: "Any person who . . . makes application for admission" bears the statutory burden of proof that "he . . . is not inadmissible under any provision of this Act. . . . If such burden of proof is not sustained, such person shall be *presumed to be in the United States in violation of law*." 8 U.S.C. §1361 (emphasis added); *see also Bustos-Torres v. INS*, 898 F.2d 1053, 1057 (5th Cir. 1990) (stating §1361 "imposes a statutory presumption that the alien is in the country illegally").

Three more related INA provisions clarify that "applicant for admission" is the only INA classification authorized for DACA+ and DAPA-eligible aliens. First, the INA imposes a presumption of immigrant intent on "every alien[5] . . . until he establishes to the satisfaction of . . . the immigration officers, *at the time of application for admission*, that he is entitled to a nonimmigrant visa under section 101(a)(15)." 8

[5] By exception, nonimmigrants holding L, V, or H-1B visas may have dual intent.

U.S.C. §1184(b). That presumption applies to DACA+ and DAPA-eligible aliens, triggering an additional statutory restraint on agency discretion: "Except as provided . . . *no immigrant shall be admitted into the United States unless* at the time of application for admission he (1) has a valid unexpired immigrant visa . . . and, (2) presents a valid unexpired passport or other suitable travel document. . . ." 8 U.S.C. §1181(a) (emphasis added). Barred from admission by operation of §1184(b) and §1181(a), the millions of unadmitted DACA+ and DAPA-eligible aliens present in the United States are consequently inadmissible under the Excludable Aliens statute, 8 U.S.C. §1182(a)(7)(A).[6]

Petitioners blithely assert that several "consequences" occur "under longstanding federal law" whenever DHS grants deferred action. Pet. Br. at 7-9. First, it is claimed that beneficiaries "cease accruing time for purposes of 8 U.S.C. §1182(a)(9)(B)" because deferred action "is a period of stay authorized by the Secretary. . . ." *Id.* at 9 n.3. Second, "work authorization has long been tied to the exercise of this kind of discretion." Work authorization is supposedly provided by regulation that "was grounded in" the general vesting authority of Section 1103(a), then "made explicit by Congress" through 8 U.S.C.

[6] As unadmitted applicants for admission, DACA+ and DAPA beneficiaries are also ineligible for INA waivers such as 8 U.S.C. §1182(d)(4), §1182(h) and §1182(k).

§1324a(h)(3). *Id.* at 7.[7] Third, work authorization based on deferred action is claimed to qualify DACA+ and DAPA beneficiaries for "federal earned benefit programs associated with working lawfully in the United States – the Social Security retirement and disability, Medicare, and railroad worker programs, so long as the alien is lawfully present in the United States as determined by the [Secretary]." *Id.* at 8. Fourth, Petitioners argue that States that grant state or local benefits to any alien in a "lawful status as authorized by the Secretary" have necessarily extended eligibility to all categories of deferred action beneficiaries. *Id.* at 8-9. Petitioners assert that its "Guidance does not change the way the law operates" or "the consequences of deferred action." Pet. Br. at 39, 67. But to find these asserted "consequences" valid would require this Court to ignore the statutory framework and ratify the extra-statutory, non-regulatory "nonstatus" of "a period of stay authorized by the Secretary."

Remarkably, Petitioners frivolously cite for authority to a novel law review article that claims to provide "the first description of immigration nonstatus" and to document the "acceleration of the growth of nonstatus following the late 1990's immigration reforms that restricted the means to acquire

[7] FAIR and IRLI concur with the arguments in the brief submitted by *Amici Curiae* Save Jobs USA and Washington Alliance of Technology Workers challenging Petitioners' radically overbroad construction of §1324a(h)(3).

immigration status." Pet. Br. at 38; Geoffrey Heeren, *The Status of Nonstatus*, 64 Am. U. L. Rev. 1115 (2015). As aliens in "immigration nonstatus," Heeren, with the approval of Petitioners, includes every category of alien identified in Petitioners' Brief at 48-60, as having benefitted since 1960 from some form of executive discretionary relief.

However, the seven INA statutes identified above – but ignored by Petitioners – make clear that Congress has classified virtually all aliens eligible for DACA+ or DAPA designation as unadmitted applicants for admission. There is no interstitial gap in the statutory framework governing immigration status wherein the Secretary may exercise such discretion. Petitioners' politicized extra-statutory classifications of "lawfully present deferred action beneficiary" or "nonstatus immigrant" can have no basis in law. In attempting to create a "nonstatus" based on propaganda rather than law, Petitioners are defying the statutory "consequences" imposed by Congress on aliens in applicant for admission status. *See Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (the legislative power of Congress over the admission of aliens is complete).

Congress has imposed statutory liabilities on virtually all DACA+ and DAPA-eligible aliens, as a real consequence of their classification under the INA as applicants for admission. First, in 1996, IIRIRA imposed – on the agency alone – the nondiscretionary duty to detain for removal proceedings all applicants

for admission who are not clearly and beyond a doubt entitled to be admitted:

> [I]n the case of an alien who is an applicant for admission, 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), enacted by IIRIRA §302(a), P.L. 104-208 (1996) (emphasis added).[8]

Section 1229a, enacted by IIRIRA §304(a)(3) as INA §240, further restricts the authority of the Secretary to grant discretionary deferrals or other relief during removal proceedings. Section 1229a(a)(1) mandates that "an immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien." Removal proceedings "shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." 8 U.S.C §1229a(a)(3). Only immigration judges may exercise discretion during removal proceedings. 8 U.S.C. §1229a(c)(4)(A)(ii) (stating alien may only submit evidence that he or

[8] *See Richardson v. Reno*, 162 F.3d 1338, 1348 (11th Cir. 1998) (noting IIRIRA created stringent new custody rules for aliens).

she "merits a favorable exercise of discretion" to an immigration judge).

In *Crane v. Napolitano*, the Northern District of Texas was the first court to construe the mandatory nature of Section 240. 2013 U.S. Dist. LEXIS 57788 (N.D. Tex. April 23, 2013). Then-Secretary Janet Napolitano argued that the word "shall" in §1225(b)(2)(A) does not always mean "shall." Napolitano claimed to possess inherent prosecutorial discretion to instruct her officers to ignore the provision's command to initiate removal proceedings for aliens not *clearly and beyond a doubt* entitled to be admitted. The court demurred: "Given the use of the mandatory term 'shall,' the structure of Section 1225(b) as a whole, and the defined exceptions to the initiation of removal proceedings located in Sections 1225(b)(2)(B) and (C). . . . Section 1225(b)(2)(A) imposes a mandatory duty on immigration officers to initiate removal proceedings whenever they encounter an 'applicant for admission' who 'is not clearly and beyond a doubt entitled to be admitted.'" *Id.* at *39.[9]

IIRIRA also shifted the burden of proof of eligibility for relief from the executive branch to the alien, mandating that aliens in removal proceedings individually establish their eligibility for admission or

[9] *See also Succar v. Ashcroft*, 394 F.3d 8, 10 (1st Cir. 2005); *Roach v. Dep't of Homeland Sec.*, 2007 U.S. Dist. LEXIS 96731,*13 (D. Ariz. 2007) (stating per §1225(b)(2)(A) an "inadmissible alien must be detained during the pendency of their removal proceedings").

relief. 8 U.S.C. §1229a(c)(2) ("[I]n the proceeding the alien has the burden of establishing – (A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under [INA] section 212; or (B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission."). "Beyond doubt" is a higher standard of proof than that required for even the most serious criminal convictions, which typically require "beyond a reasonable doubt." Gordon, et al., *Immigration Law & Practice*, rel. 133, §64.03[2][b] (2011). The burden of proof mandated by these interwoven INA provisions is a required precondition for admission, and cannot be categorically waived by an extra-statutory agency exercise of prosecutorial authority or deferred action, as proposed by Petitioners.

Section 1229a is but one of multiple rollbacks of executive discretion to provide relief from removal enacted under IIRIRA. For example, IIRIRA §306(a) repealed the authority of the Attorney General in former 8 U.S.C. §1252(b) to authorize determinations other than deportation. IIRIRA §304(b) (repealing INA §212(c)) and §308 (repealing INA §244(a)) further circumscribed the pre-1996 discretion of immigration judges to grant relief from removal.

In 2005, Congress further restricted DHS authority to independently determine removability or "any form of relief granted in the exercise of discretion." The REAL ID Act clarified that the alien – not the government – has the burden of proof to establish –

during removal proceedings – that for "*any form of relief that is granted in the exercise of discretion*, that the alien merits a favorable exercise of discretion." 8 U.S.C. §1229a(c)(4)(A) (enacted by REAL ID Act §101(d), P.L. 109-13) (emphasis added).

For aliens in federal custody whose status awaits final adjudication in a removal proceeding, IIRIRA restricted the exercise of discretion by DHS to three options: (1) continue to detain the alien, (2) release the alien on bond with security and conditions approved by the Secretary, or (3) release the alien under the very restricted terms of a "conditional parole." 8 U.S.C. §1226(a).[10]

Not until the ultimate stage of a removal proceeding, after the immigration judge has issued a final order of removal, has Congress delegated any significant discretion to DHS.[11] IIRIRA shifted authority over the detention and release of aliens with final removal orders back to DHS. "When an alien is [finally] ordered removed, the [Secretary] shall

---

[10] Conditional parole is "a voluntary stay of the agency's [removal] mandate *pendente lite* . . . " and does not defer removal proceedings. *Velasco-Gutierrez v. Crossland*, 732 F.2d 792, 795 (10th Cir. 1984). Similarly, deferred *inspection*, a regulatory variant of conditional parole, merely allows the applicant for admission who is not a flight risk to complete his inspection before a different ICE office or Customs and Border Protection ("CBP") port-of-entry. 8 C.F.R. §1235.2.

[11] For a criminal alien within one of the categories described in INA §236(c), detention during removal proceedings is mandatory and not discretionary. 8 U.S.C. §1226.

remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period')." 8 U.S.C. §1231(a)(1)(A). During the 90 day removal period, although continued detention is presumptively mandatory, *see* 8 U.S.C. §1231(a)(2), DHS has discretion to select the combination of fines, detention, and suspension of such detention that will most efficiently effect the removal or voluntary departure of such aliens. *See*, *e.g.*, 8 U.S.C. §1253(a) (Penalty for failure to depart), 8 U.S.C. §1253(b) (Willful failure to comply with terms of release under supervision), and 8 U.S.C. §1229c (Voluntary departure). DHS may permit most DACA+ and DAPA-eligible aliens to voluntarily depart the United States at the alien's own expense in lieu of removal proceedings, but after IIRIRA can only delay voluntary departure for 120 days. 8 U.S.C. §1229c. Congress also delegated extended discretion over aliens with final removal orders in two circumstances: To release certain aliens detained beyond the statutory removal period under an order of supervision, 8 U.S.C. §1231(a)(6), and to stay the removal order if immediate removal is "not practical" for an alien detained upon arrival at a port of entry. 8 U.S.C. §1231(c)(2).

IIRIRA did not change the existing discretionary authority of the immigration courts to manage removal caseloads, in accordance with the immigration judge's perceived need to conserve resources and to provide procedural flexibility to aliens for humanitarian reasons. Consistent with the retention of jurisdiction by the immigration courts over aliens in removal

proceedings, the immigration judge – not DHS – has discretion by regulation to manage removal adjudications through motions for a continuance. *See* 8 C.F.R. §1003.2a (stating "the Immigration Judge may grant a continuance for good reason shown"); 8 C.F.R. §1240.6 (2008) (providing that an Immigration Judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or DHS); *In re Hashmi*, 24 I. & N. Dec. 785, 788 (BIA 2009).

The underlying flaw in Petitioners' theory of hegemonic agency discretion goes unmentioned in Petitioners' brief, but is joined to its deferred action "authority" like a Siamese twin: DHS has asserted that the executive branch also possesses extra-regulatory discretion to *not commence* INA §240 removal proceedings, by failing to file the required paperwork with the immigration court. *See*, *e.g.*, *Matter of Avetisyan*, 25 I. & N. Dec. 698, 690-91 (BIA 2012); *Matter of Bahta*, 22 I. & N. Dec. 1381, 1391-92 (BIA 2000) (*citing* the jurisdiction-stripping provision 8 U.S.C. §1252(g), and *American-Arab Anti-Discrimination Comm. v. Reno*, 525 U.S. 471, 484 (1999). Like DACA+ and DAPA, the claim that prosecutorial discretion empowers DHS to circumvent at will the congressional mandate is foreclosed by the plain language of the INA, properly construed under *Chevron* Step One. The INA provides three statutory outcomes for applicants for admission: lawful admission, parole, or placement in removal proceedings. 8 U.S.C. §1225(b)(2)(A) contains a double mandate. The unadmitted applicant "shall be detained," and such detention shall be "for a

[section 240] proceeding." Service of a Notice to Appear ("NTA") under 8 U.S.C. §1229(a)(1) is framed in mandatory language. It cannot be construed to countenance NTA service on an alien without commencing removal proceedings. No legislative history or interstitial gap in the statutory scheme exists to support the view that Congress ever contemplated that the filing of an NTA with the immigration court could become an independent discretionary agency action, distinct from the clear mandates in §1225(b)(2)(A) and §1229(a)(1).

Within the immigration law framework, the phrase "deferred action" appears in just two subsections of the INA and in one other uncodified provision.[12] None of these narrow provisions supports the exercise of deferred action as agency prosecutorial discretion, implemented by the 2012 DACA Memo and the 2014 DAPA Memo. The specificity of these three provisions, when contrasted with the absence of the term "deferred action" from the rest of the INA and uncodified federal immigration law, instead supports application of the statutory construction

[12] 8 U.S.C. §1154(a)(1)(D)(i)(IV) ("[a]ny [victim of domestic violence] described in subclause (III) and any derivative child of a petition described in clause (ii) is eligible for deferred action and work authorization"); 8 U.S.C. §1227(d)(2) (denial of a request for an administrative stay of a final removal order does not preclude application for deferred action or certain other temporary relief); 8 U.S.C. §1151 note, P.L. 108-136 §1703 (extending posthumous benefits to certain surviving spouses, children, and parents).

canon, *expressio unius est exclusio alterius* – that the one is exclusion of the other. The canon applies to immigration law. *See Nken v. Holder*, 556 U.S. 418, 430 (2009), *citing INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987): "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

III. Congress never vested general discretionary authority over admissions and removals in the Secretary of Homeland Security.

The Obama administration has proffered shifting explanations of its claimed authority to defer removal in the exercise of prosecutorial discretion. For example, DOJ until recently publicly argued that the central feature of the practice of granting deferred action is that it "developed *without* express statutory authorization." *See* Karl R. Thompson, Principal Deputy Assist. Attorney General, Office of Legal Counsel, Memorandum Opinion for the Secretary of Homeland Security ("Secretary"), *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* (Nov. 19, 2014) at 13 (*citing Reno*, 525 U.S. at 484).

Now, Petitioners state definitively:

> Deferred action and similar discretionary practices that DHS and the INS before it

> have repeatedly followed do not have their source in pinpoint grants of authority by Congress. They have always been, and have always been understood to be, exercises of *the general vesting power that Congress bestowed in Section 1103*. . . .

Pet. Br. at 61 (emphasis added).

The agency's reliance on 8 U.S.C. §1103 as a source for such plenipotentiary power is dangerously misplaced. This unexceptional text cannot by its own terms stand as the primary source of the categorical exercise of civil prosecutorial discretion by DHS through such "programs" as DACA, DACA+ and DAPA.

Section 1103 identifies sixteen discrete discretionary "powers" and mandatory "duties" delegated by Congress to the Secretary. 8 U.S.C. §1103(a). Applying traditional tools of statutory construction, the plain text of §1103(a) is unambiguous as to which of the authorities delegated by Congress to the Secretary are mandates for action, and which are discretionary powers.

In clauses (1), (3) and (5) of §1103(a), Congress delegated three mandatory statutory responsibilities ("duties") to the Secretary. The provisions contradict the agency's core argument that the court must look beyond "pinpoint grants of authority by Congress" and treat §1103 as vesting "general" interpretive power in the person of the Secretary.

First, the Secretary "shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens. . . ." 8 U.S.C. §1103(a)(1). This plain language distinguishes between the "administration" and "enforcement" of the immigration laws. The "shall be charged" language in clause (a)(1) clarifies that "enforcement" of immigration laws is delegated to DHS unless otherwise "conferred by Congress" on the President, the Attorney General, the Secretary of State, or certain diplomatic officers.

Second, the Secretary "shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens. . . ." 8 U.S.C. §1103(a)(5). Of the enforcement functions delegated by §1103, this is the most unambiguous mandatory enforcement "duty." *See Blackies House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1222 (D.C. Cir. 1981) (stating since enactment of the INA the primary statutory enforcement function of federal immigration officers has always been "to seek out, question, and detain suspected illegal aliens"). Until 1996, the Attorney General could authorize the immigration courts to make determinations other than deportation orders, which would arguably include discretionary deferrals of removal. *See* former 8 U.S.C. §1252(b) (1995). But that authority was never exercised by the Attorney General, was repealed by IIRIRA in 1996, and thus could not have been transferred to DHS in 2002.

Third, the Secretary of DHS "shall establish such regulations; . . . issue such instructions; and perform such other acts . . . necessary for carrying out his authority under the provisions of this Act." 8 U.S.C. §1103(a)(3). Congress makes clear that the Secretary is to exercise discretion only to the extent "necessary for" exercising "his authority under the provisions of this Act." §1103(a)(3).

In §1103(a), Congress did delegate carefully-defined discretionary powers that provide the Secretary limited flexibility in the implementation of these otherwise mandatory duties:

First, the Secretary may limit the issuance of regulations, instructions and "other such acts" to those he "deems necessary" for "carrying out his authority." 8 U.S.C. §1103(a)(3). In the INA, the term "deems" is used by Congress with a modifier indicating whether the discretion thereby exercised is unreviewable, or reviewable as an abuse of discretion.[13] By use of the term "deems" in §1103, Congress clarified that the Secretary is to exercise discretionary regulatory authority "under the provisions of [the INA]." The "deemed" administrative authority under §1103(a)(3) is delegated only in order to "carry out[ ]"

[13] *See*, *e.g.*, 8 U.S.C. §1102(1) ("such rules and regulations as the President may deem to be necessary"); §1104(a) ("such other acts as he deems necessary for carrying out such provisions"); §1153(b)(2)(B)(i) ("when the [Secretary] deems it to be in the national interest"); §1182(a)(9)(B)(ii) ("deemed to be unlawfully present in the United States if the alien is . . . ").

other statutory authority. It is not absolute or unreviewable, but subject to judicial review, as in this case, for abuse of discretion.

By contrast, Congress has delegated largely unrestrained discretionary authority to the President – not the Secretary – to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. §1182(f), *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, at 172, 187 (1993). The failure of Congress to enact a corresponding grant to *approve* entry in the exercise of discretion, after explicitly delegating sweeping discretion over suspension of entries, cannot be dismissed as evidence of legislative acquiescence or an interstitial gap wherein the Secretary by design operates at will. Section 1182(f) directly undercuts Petitioners' theory that Congress vested general agency discretion through §1103 to grant lawful presence.[14]

Second, Congress delegated to the Secretary discretion to appoint the "number" of DHS employees needed to "control and guard . . . against the illegal entry of aliens" that "shall appear necessary and proper." 8 U.S.C. §1103(a)(5). When Congress used

[14] Dissenting in *Sale*, Justice Blackmun argued that §1182(f) should not apply to illegal aliens because the former INS could not "suspend" an illegal entry that had already occurred. 509 U.S. at 201. IIRIRA's replacement of "entry" with "admission" as the criterion for lawful status has eliminated that objection.

the modifier "shall appear necessary and proper," it cannot have delegated a "general vesting power" over enforcement manpower that trumps the "pinpoint grants of authority" in other INA provisions. That construction, asserted by Petitioners, would make other immigration provisions surplusage, most obviously clause (f), which mandates that a minimum number of "full-time active duty agents" be stationed in each state "in order to ensure efficient enforcement of this Act." 8 U.S.C. §1103(f). This limiting construction is the most reasonable one and is supported by case precedent. *See*, *e.g.*, *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (stating "an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes . . . "); *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013); *City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977) (stating when a statutory mandate is not fully funded, "the agency administering the statute is required to effectuate the original statutory scheme as much as possible, within the limits of the added constraint").[15]

The remaining eleven discretionary authorities delegated to the Secretary in §§1103(a) and (b) are unambiguously limited in scope and facially rebut

[15] None of the three DHS appropriations acts, cited in Pet. Br. at 4 and 60, are "lump-sum" appropriations, whose expenditure this court held in *Lincoln* to be committed to agency discretion. 508 U.S. at 192.

Petitioners' claim that Congress delegated a general non-reviewable Secretarial authority to defer removals under §1103. *See* 8 U.S.C. §§1103(a)(4) and (a)(6) (discretion to delegate within DHS the powers or duties of an immigration officer, or with the consent of a Department head, upon any other federal employee); 8 U.S.C. §1103(a)(10) (enter into cooperative agreements); 8 U.S.C. §1103(a)(11)(A) (pay local jurisdictions from appropriated funds for the expenses of confinement of detainees); 8 U.S.C. §1103(a)(11)(B) (deputize law enforcement officers to serve as immigration officers during a mass influx of aliens); 8 U.S.C. §§1103(a)(7)-(9) (after consultation with the Secretary of State, station U.S. immigration officers overseas and authorize their foreign counterparts to function within the United States); 8 U.S.C. §1103(b) (discretionary land use powers including acquisition, condemnation, and acceptance of interests in land as gifts).

These clauses do not represent examples from which the agency – or the courts – may deduce a general agency power of such great discretion that the actual statutory texts become mere "pinpoints" of law. When the terms of a statute are clear and unambiguous, that language is controlling absent rare and exceptional circumstances. *Howe v. Smith*, 452 U.S. 473, 483 (1981). The Secretary, like the courts, must defer to the supremacy of Congress's legislative enactments. "There is a basic difference between filling a gap left by Congress'[s] silence and rewriting rules that Congress has affirmatively and specifically

enacted." *Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004); *see also Railway Labor Executives Ass'n v. Nat'l Mediation Board*, 29 F.3d 655, 659 (D.C. Cir. 1994) (presuming a delegation from Congress absent an express withholding of such power was an "incredible" suggestion). Section 1103 thus meets the *Chevron* Step One test for adjudicating agency action.

Petitioners misleadingly evoke the Homeland Security Act as additional evidence that Congress vested general discretionary power in the Secretary. Pet. Br. at 2, 4 (*citing* 6 U.S.C. §202(3) and (5)). Section 202 does no such thing.[16] It distinguishes eight Secretarial "responsibilities," to be administered through the newly-created Under Secretary for Border and Transportation Security, from former INS responsibilities retained by other agencies, for example DOJ, *see* 6 U.S.C. §§521-522, or transferred to the Director of USCIS, *see* 6 U.S.C. §271. Clause (3) mandates that the Secretary "carry[ ] out the immigration enforcement functions vested by statute in, or performed by, the former [INS]." But the Secretarial memoranda establishing the DACA, DACA+, and DAPA "policies and priorities" are neither statutes nor regulations, and were never even contemplated

[16] For example, opinions affirming convictions for illegal reentry under 8 U.S.C. §1326 use the formula, "unlawful reentry in violation of 8 U.S.C. §1326 *and* 6 U.S.C. §§202 and 557" to invoke §202 as a reorganizational statute, not an activation code for previously unexercised agency authority. *See*, *e.g.*, *United States v. Mondragon-Santiago*, 564 F.3d 357 (5th Cir. 2009), *cert. denied*, 558 U.S. 871 (2009).

by the former INS. While clause (5) makes the Secretary responsible for "establishing national immigration enforcement policies and priorities," 6 U.S.C. §271(a)(3)(D) delegates the same responsibility for "national immigration *services* policies and priorities" not to the Secretary, but to the Director of USCIS, the bureau that adjudicates DACA and DAPA applications.

IV. Congress has progressively rolled back executive discretion over the removal process.

Petitioners claim that a "tradition" of informal immigration agency programs is evidence of congressional acquiescence to the challenged deferred action practices. Pet. Br. at 48-50, 55-60. However, the historical record shows Congress consistently restraining extra-statutory discretionary relief from removal.

First, "[t]he various acts of Congress since 1916 evince a progressive policy of restricting immigration." *Karnuth v. U.S.*, 279 U.S. 231, 242 (1929). "Prior to 1940, the Attorney General had no discretion with respect to the deportation of an alien who came within the defined category of deportable persons. The expulsion of such a person was mandatory; his only avenue of relief in a hardship case was by a private bill in Congress." *Foti v. INS*, 375 U.S. 217, 222 (1963).

Nonetheless, until 1951, agency bureaucrats repeatedly attempted to circumvent congressional intent to restrict relief, under the general rubric of "pre-examination." In 1952, enactment of the INA ended these informal practices. *Matter of B*, 5 I. & N. Dec. 542 (1953). The Senate criticized pre-examination practices as abusive for providing extra-statutory relief for excludable or deportable aliens. *See* S. Rep. No. 81-1515, at 384 (1950). In its place, Congress enacted more restrictive statutory options for relief, notably INA §212(c) (waiver of deportability), INA §244(a) (suspension of deportation), INA §244(b) (voluntary departure), and INA §245 (adjustment of status).

Second, in the late 1950s, the Attorney General developed an *ad hoc* variant of deferred action, Extended Voluntary Departure ("EVD"), to provide non-statutory relief from removal to groups of aliens present in the United States, on the basis of nationality. EVD was granted administratively to at least fifteen nationalities over a period of more than twenty years, until enactment of Temporary Protected Status ("TPS") in 1990. *See* 8 U.S.C. §1254a. Although EVD beneficiaries were deportable, they were designated for categorical relief on the basis of nationality, rather than individual evaluations of the risk of harm from dangerous conditions within the designated foreign state.[17] No statute or regulation explicitly authorized

[17] Gordon, et al., *Immigration Law & Practice*, Vol. 1A, §5.3e(6a) (1981).

blanket grants of EVD. While former 8 U.S.C. §1252(b) arguably gave the Attorney General authority to authorize individual administrative grants of EVD or other discretionary relief, that authority was repealed by IIRIRA in 1996. Repeal of §1252(d) also displaced the "Family Fairness" program and other post-IRCA informal relief programs cited in Pet. Br. at 55-57.

By enacting TPS, Congress created a statutory means for the executive to address the problem of foreign nationals who are not refugees but whose repatriation would "pose a serious threat to their personal safety" due to "ongoing armed conflict," or constitute a "substantial, but temporary disruption of living conditions in the area affected" due to an "environmental disaster in the state," or which would occur when "there exist extraordinary and temporary conditions in the foreign state that prevent aliens of the state from returning to the state in safety. . . ." 8 U.S.C. §1254a.[18] Today, TPS is the "*exclusive authority* of the [Secretary] under law to permit aliens who are or may become otherwise deportable or have been paroled into the United States to remain in the United States temporarily because of their particular nationality or region of foreign state of nationality[,]" displacing any other similar discretion. 8 U.S.C. §1254a(g) (emphasis added).

---

[18] Former 8 U.S.C. §1254a, INA §244A (1952), redesignated as INA §244 by IIRIRA §308.

Third, in 1979, the former INS rescinded its informal exercise of extra-statutory prosecutorial discretion practices in *individual* civil deportation proceedings, first disclosed in 1975 under the rubric of a "non-priority program," *see Lennon v. INS*, 527 F.2d 187, 189 (2d Cir. 1975); *Lennon v. U.S.*, 378 F. Supp. 39, 42 n.11 (S.D.N.Y. 1974), after the Ninth Circuit held that it established a humanitarian right and was subject to due process protections. *Akhbari v. INS*, 678 F.2d 575, 576 (5th Cir. 1982). In 1981, INS issued a revised deferred action Operations Instruction ("O.I.") advising that grants of deferred action status were an administrative choice by the agency, and did not constitute a humanitarian "entitlement" to the noncitizen.[19] But, in 1997, INS rescinded its 1981 O.I. due to its conflict with AEDPA and IIRIRA.[20] Rescission of the O.I. is important evidence that the Clinton administration recognized that IIRIRA restricted federal discretion to defer removal proceedings for illegal entrants.

Administrative deferrals of departure for favored nationalities continued, but only in contravention of TPS. The first Bush administration revived the practice in 1990 as Deferred Enforced Departure ("DED"). But when the Clinton, Bush II, and Obama

---

[19] INS Operations Instructions, O.I. §103.1(a)(1)(ii) (1981).

[20] Memorandum from Paul W. Virtue, Acting INS Executive Associate Commissioner, *INS Cancellation of Operations Instructions* (June 27, 1997), available at 2 Bender's Immigr. Bull. 867.

administrations implemented DED group deferrals, they mischaracterized agency action as a "grant" under authority asserted to be the president's "constitutional authority to conduct the foreign relations of the United States."[21]

Although the president has "the lead role . . . in foreign policy," that role "do[es] not allow [the judiciary] to set aside first principles [of separation of powers]." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003). "[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). The president's authority to act "must stem either from an act of Congress or from the Constitution itself." *Medellin v. Texas*, 552 U.S. 491, 523 (2008). Authority over immigration admissions and removals delegated to the president by Congress "in the international realm cannot be said to invite" domestic agency action concerning aliens. *Id.* at 529. This limitation applies to DACA+ and DAPA beneficiaries because they have been physically residing in the United States for years, and thus fall under the domestic administrative jurisdiction of the Departments of Homeland Security and Justice.

As the language of the statutes and the DACA+/DAPA memoranda conflict, the third or "lowest ebb"

---

[21] *See*, *e.g.*, President Obama, Memorandum Extending Deferred Enforced Departure for Liberians (Aug. 6, 2011).

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), analysis requires the Secretary to show that DACA+/DAPA was created through *exclusive* executive branch authority. Where the question is whether Congress or the Executive is "aggrandizing its power at the expense of another branch," the proper approach is to determine whether federal statutes "impermissibly intrude[ ] on the President's exclusive power." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1426-28 (2012). But the Supreme Court has never held that the scope of the president's lead foreign policy role includes an exclusive executive power to grant extra-statutory relief from removal. To the contrary, IIRIRA provided a specific way for DHS to "avoid removals that are likely to ruffle diplomatic feathers." *Jama v. ICE*, 543 U.S. 335, 348 (2005). IIRIRA also directly restricted executive branch foreign policy discretion in the sensitive area of non-cooperation by the home nations of aliens with final orders of removal. The executive branch must act on the basis of comity, by restricting the issuance of U.S. visas to nationals of non-cooperating nations. 8 U.S.C. §1253(d).

Fourth, prior to 1996, the INA contained no limitation on the time period when an alien subject to deportation orders could remain in the United States pending voluntary departure. 8 U.S.C. §1252(b) (1995) ("In the discretion of the Attorney General and under such regulations as he may prescribe, deportation proceedings . . . need not be required in the case of any alien who admits to [being] deportable . . . if such alien voluntarily departs. . . ."). But IIRIRA

repealed former §1252, replaced it with tight restrictions on the Attorney General's discretion to extend voluntary departure orders, and imposed sweeping sanctions on aliens who failed to voluntarily depart. *See* IIRIRA §308 (repealing §244), and §304(a)(3) (enacting INA §240B, 8 U.S.C. §1299c). Permission to depart voluntarily in lieu of removal proceedings is now restricted to a maximum of 120 days, and limited to 60 days upon the conclusion of a proceeding. 8 U.S.C. §1229c(a)(2)(A). Aliens not physically present in the United States for at least one year prior to service of an NTA are now ineligible for relief. §1229c(b)(1)(A), (2). IIRIRA also stripped discretion to grant "any further relief" for a period of ten years, for any alien who fails to depart within the time restrictions. §1229c(d)(1)(B). Petitioners no longer have discretion to extend eligibility for voluntary departure, or to create discretionary administrative substitutes.

Fifth, DACA was justified – in part – as discretionary relief for aliens who had remained in the United States for long periods of time. But Congress has repeatedly rejected the Development, Relief, and Education for Alien Minors Act ("the DREAM Act"), legislation nearly identical to DACA. *See*, *e.g.*, Pet. App. at 84a; Pet. Br. at 59. Congress had addressed which longtime residents merit favorable treatment under the "registry" statute, and never included DACA+ or DAPA beneficiaries. 8 U.S.C. §1259. Section 1259 restricts the categorical grant of discretionary relief from removal on the basis of extended

physical presence only to aliens who have continuously resided in the United States since January 1, 1972. Immigration Reform and Control Act ("IRCA"), Pub. L. No. 99-603, §203 (Nov. 6, 1986). In 1996, Congress amended the registry statute, but did not change the 1972 eligibility date. IIRIRA §308(g)(10)(C), §413(e).

Sixth, IIRIRA also repealed the suspension of deportation statute, former INA §212(c), which granted relief from deportation without numerical limits to certain continuously present aliens, and replaced it with cancellation of removal ("COR"). *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2015 (2012). Through COR, Congress legislated the procedure whereby aliens who have eluded inspection in the interior for many years must request discretionary relief from removal. COR discretionary relief is far more circumscribed than under the pre-1996 suspension of deportation statutes. An alien must have been continuously present in the United States for not less than ten years, 8 U.S.C. §1229b(b)(1)(A), concede inadmissibility or deportability and, with few exceptions, is subject to an annual quota of 4,000 beneficiaries. 8 U.S.C. §1229b(e)(1).

Seventh, Petitioners' assertion that IIRIRA court-stripping provisions are evidence of congressional acquiescence to deferred action programs is incorrect. *See* Pet. Br. at 41. The INA does not place the mandates of Congress restricting prosecutorial discretion during removals beyond judicial review. It only limits the authority of federal courts to hear appeals of agency decisions for "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 executive removal orders. . . ." 8 U.S.C. §1252(g) (emphasis added). IIRIRA's "zipper clause" restriction similarly applies only to "any action taken or proceeding brought *to remove an alien* from the United States." 8 U.S.C. §1252(b)(9) (emphasis added). In *Reno*, this Court held that the §1252(g) bar is construed narrowly. 525 U.S. at 487. The Fifth Circuit correctly observed that the IIRIRA court-stripping provision "is not a general jurisdictional limitation." Pet. App. 48a. Read together, the plain language of the two clauses only restricts judicial review for claims brought *by aliens*, and actions brought *to remove an alien*. Neither applies to the deferred action amnesty programs at issue.

Finally, the record of Congressional action in the area of parole authority follows the same restrictive pattern. Prior to the Refugee Act of 1980, the INA authorized the parole of aliens into the United States without a grant of admission, but only for emergency reasons or reasons deemed strictly in the public interest. 8 U.S.C. §1182(d)(5)(A) (1979). Even in that era, congressional intent was unambiguous that the parole provisions "authorize[d] the Attorney General to act only in emergent, individual, and isolated situations . . . and not for the immigration of classes or groups outside of the limit of the law." S. Rep. No. 89-748, at 17 (1965); *accord* H.R. Rep. No. 89-745, at 15-16 (1965).

Regrettably, INS bureaucracy continued to exploit the absence of express statutory restrictions on

categorical grants of parole. Between 1959 and 1961, for example, more than 20,000 Cubans were paroled into the United States, as opposed to being admitted as refugees fleeing political persecution. The 1980 Refugee Act was Congress's response, reflecting public disapproval of this institutionalized abuse of discretion. The Act prohibited the discretionary exercise of parole for any "alien who is a refugee," unless the Attorney General made an individualized determination that "compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207." 8 U.S.C. §1182(d)(5)(B) (1980).[22] In 1996, IIRIRA section 602 further extended the prohibition on categorical parole to all aliens, limiting §1182(d)(5)(A) to authorize parole "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." Congress mandated this prohibition out of "concern that parole under §1182(d)(5)(A) was being used by the executive to circumvent congressionally established immigration policy." *Cruz-Miguel v. Holder*, 650 F.3d 189, 198-200 (2d Cir. 2011) (*citing* H.R. Rep. No. 104-169, 140-41 (1996)).

[22] Refugee Act of 1980, Pub. L. No. 96-212, §203(f). For favored ethnic groups who do not qualify as refugees Congress also provides a "public interest parole." *See* Lautenberg Amendment, Pub. L. No. 101-167, 103 Stat. 1263 (1990).

CONCLUSION

The Court should affirm the decision of the Fifth Circuit on the ground that the law of application for admission displaced the exercise of categorical discretionary relief from removal under the DACA+ and DAPA programs, making the Secretary's actions *ultra vires*.

Respectfully submitted,

DALE L. WILCOX
Executive Director & General Counsel

MICHAEL M. HETHMON*
Senior Counsel

IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
(202) 232-5590
litigation@irli.org
**Counsel of Record*

Attorneys for Amici Curiae