No. 14-10049

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Christopher L. CRANE; David A. ENGLE; Anastasia Marie CARROLL; Ricardo DIAZ; Lorenzo GARZA; Felix LUCIANO; Tre REBSTOCK; Fernando SILVA; Samuel MARTIN; James D. DOEBLER; State of MISSISSIPPI, by and through Governor Phil Bryant;

Plaintiffs-Appellants/Cross-Appellees,

v.

Jeh Charles JOHNSON, Secretary, Department of Homeland Security; Thomas S. WINKOWSKI, in his official capacity as Director of Immigration & Customs Enforcement; Lori SCIALABBA, in her official capacity as Acting Director of United States Citizenship & Immigration Services;

Defendants-Appellees/Cross Appellants.

On Appeal from the United States District Court for the Northern District of Texas

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BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

The case is styled *Crane v. Johnson*, case number 14-10049. Under Fifth Circuit Rules 28.2.2 and 29.2, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

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IDENTITY AND INTEREST OF AMICI CURIAE

The *Amici Curiae* are nonprofit organizations concerned with U.S. immigration laws and the legal rights of immigrants, refugees, and asylum seekers. *Amici Curiae* include the American Immigration Lawyers Association (AILA) (an ABA affiliate with over 13,000 members in all 50 states), the Mexican American Legal Defense and Educational Fund (MALDEF), National Immigrant Justice Center (NIJC), the American Immigration Council ("Immigration Council"), the National Immigration Law Center (NILC), the New York Legal Assistance Group, and United We Dream. A full statement of interest for each amici curiae is attached to this document as an addendum. In the interest of efficiency, amici have worked jointly to produce one brief. Amici have also worked to avoid any duplication of the parties' briefs.

All *Amici Curiae* have an interest in maintaining the delicate balance between the accurate, efficient enforcement of immigration laws and the longstanding enforcement discretion of the federal government, and therefore have an interest in the merits issues before the Court.

Amici file this brief with the consent of all parties. Under Federal Rules of Appellate Procedure 29(c)(5), the undersigned counsel certify that no counsel for a party authored this brief in whole or in part, and no person, party, or party's

counsel, other than the amici curiae, their members, and counsel, contributed money to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants advance an incorrect interpretation of a discrete provision in the Immigration and Nationality Act (INA), 8 U.S.C. § 1225, that would bring that statute into conflict with a host of other enforcement and relief provisions in the statute. Appellants' merits argument also threatens to displace the Secretary's longstanding and well-established discretion to decline to initiate removal proceedings.

Immigration law is complex. It involves a careful balancing of competing interests, including the interests of American families and communities, refugees and victims of violence, national interests in securing the border and a compassionate immigration system, and delicate foreign policy interests. If Appellants disagree with the way the federal government is currently balancing those interests, their recourse is through the political process, not through lawsuits filed by employee unions and states asserting their bald disagreement with federal policy decisions.

Finally, Mississippi has wholly failed to establish standing, guising a general grievance against the use of public benefits by unauthorized immigrants as a redressable injury caused by DACA recipients, who have work authorization and

are able to participate in the economy and make meaningful contributions to society.

ARGUMENT

I. Appellants Misapply and Misinterpret Section 1225(b)(2)(A).

Appellants contend that the "interlocking provisions" of 8 U.S.C. §§ 1225(a)(1), (a)(3), and (b)(2)(A) "impose a mandatory duty on the [Appellant] ICE officers to initiate proceedings against DACA Directive-eligible aliens they encounter." Brief for Appellants at 5-6.[1] Amici, who use and interpret the INA in the daily course of their practice, join in the Secretary's arguments as to why this argument represents a fundamental misapplication and misreading of § 1225. It is a misapplication because § 1225, on its face, does not apply to DACA-eligible applicants, including visa overstays,[2] who are not seeking admission. Brief for

[1] Appellants made the same arguments at the trial court - that the statute requires that "[i]f an illegal alien is encountered by DHS, an inspection must occur, and if that illegal alien is not entitled to be admitted to the United States, he or she must be placed in removal proceedings," and that "Congress has expressly limited the discretion of Defendants to not initiate removal proceedings." (ROA.278-79 (Brief in Support of Plaintiffs' Application for Preliminary Injunction at 6; Am. Compl. ¶ 71)).

[2] Even if Appellants' arguments were correct as to individuals who entered without inspection, up to fifty percent of DACA applicants were admitted into the United States and simply overstayed their period of authorized stay. *See* David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 Yale L.J. Online 167, 171 (2012) (citation omitted). For example, Ms. Carolina Canizales, a DACA recipient who moved to intervene as a defendant in the district court, overstayed a validly-issued visa and was previously inspected by immigration officers. *See* (ROA.1138 (¶ 2)) Mot. to Intervene, Ex. D at ¶ 2. The statute relied upon by Appellants only applies to "applicants for admission," which it defines as "an alien present in the United States who *has not been admitted* or who arrives in the United States." 8 U.S.C. § 1225(a)(1) (emphasis added).

Appellees 82-83. It is a misreading because § 1225 was designed to govern when expedited removal proceedings may be employed, not to eliminate executive branch discretion. Brief for Appellees 86-88.

II. Appellants' Interpretation of § 1225(b)(2)(A) Conflicts With Multiple Statutory Provisions Granting Discretion Over the Enforcement of Immigration Laws.

The harshness of immigration laws is tempered by the substantial discretion provided to the Executive Branch. The misreading of § 1225(b)(2)(A) advanced by Appellants and adopted by the District Court would bring that statute into conflict with a host of other provisions in the statute. That is reason enough to reject Appellants' interpretation.

A statute must be read and interpreted as a whole. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). A plain meaning analysis includes assessment of both the text of the statute and its "textual structure." *White v. I.N.S.*, 75 F.3d 213, 215 (5th Cir. 1996). In addition, the text of a statute must be interpreted consistently, as the words must have the same meaning regardless of context. *See Clark v. Martinez*, 543 U.S. 371, 378 (2005). "To give [the] same words a different meaning for each category would be to invent a statute rather than interpret one." *Id*.

A. Appellants' Interpretation Conflicts With the Longstanding Grant of Parole Authority Under 8 U.S.C. § 1182(d).

First, and most obviously, Appellants' argument does not leave room for the Secretary's broad parole authority under 8 U.S.C. § 1182(d)(5)(A). Appellants interpret § 1225(b)(2)(A), which provides that some noncitizens "shall be detained for a proceeding under section 1229a of this title," not as governing the type of proceedings to be afforded, but rather as a mandate for the immediate initiation of those proceedings.

This proposed interpretation cannot be squared with the parole statute, which gives DHS the discretion to allow the physical entry to a noncitizen. 8 U.S.C. § 1182(d)(5)(A) (The Secretary of DHS can "in his discretion parole into the United States temporarily . . . only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien.").[3]

Paroled noncitizens are covered under § 1225(b)(2). Expedited removal proceedings, § 1225(b)(1)(A)(iii), apply only to noncitizens "who ha[ve] not been admitted or paroled." ROA.940. Memorandum and Order at 13. By contrast, § 1225(b)(2) applies to "applicant[s] for admission" who are not subject to expedited

[3] Under the "entry fiction" doctrine, paroled aliens are physically present inside the U.S. but treated as if they remain at the border asking to come in. *See Gisbert v. U.S. Atty. Gen.*, 988 F.2d 1437, 1441 (5th Cir. 1993); *Garcia-Mir v. Smith*, 766 F.2d 1478, 1484 (11th Cir. 1985); *Leng May Ma v. Barber*, 357 U.S. 185, 189 (1958).

removal proceedings, and contains no exception for individuals paroled under § 1182(d)(5)(A).

Appellants' proposed interpretation of § 1225(b)(2) creates a conflict with the parole provisions of § 1182(d)(5)(A). On the one hand, DHS agents are authorized to parole a noncitizen by the parole statute. However, according to Appellants' proposed interpretation, they must simultaneously detain and initiate removal proceedings for those individuals. A grant of parole, by definition, permits the government to defer a decision on detention and removal. *See Momin v. Gonzales*, 447 F.3d 447, 453 (5th Cir. 2006), vacated on joint rehearing request at 462 F.3d 497 (5th Cir. 2006); *see also Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958). Any interpretation of § 1225(b)(2) that suggests mandatory detention and initiation of removal proceedings for all inadmissible individuals, including parolees, conflicts directly with the INA's parole provisions, to the extent that those provisions permit the agency to defer a decision on detention and removal proceedings. The conflict exists only because of the strained interpretation advanced by Appellants. This conflict can be avoided by properly interpreting § 1225(b)(2) to not mandate detention or removal proceedings.

Such an interpretation is inconsistent with the "textual structure" and plain meaning of the INA. *See White v. I.N.S.*, 75 F.3d 213, 215 (5th Cir. 1996). The rules of statutory construction require the Court to read this provision in light of

the entire relevant statute; § 1225(b)(2)(A) cannot be read consistently with the statute to mandate the initiation of removal proceedings whenever an ICE agent encounters someone inadmissible. Appellants' argument thus fails.

B. Appellants' Interpretation Contravenes the Warrantless Arrest Procedures of 8 U.S.C. § 1357.

Without an arrest warrant, immigration officers have limited authority to arrest and detain noncitizens for removal proceedings. The INA permits a warrantless arrest under specific, limited circumstances.[4] With respect to noncitizens found residing unlawfully in the United States, a DHS agent has the authority to arrest without a warrant only if the agent has reason to believe that the noncitizen committed a felony or any offense in the agent's presence and is likely to escape before a warrant can be obtained. 8 U.S.C. §§ 1357(a)(2); 8 C.F.R. § 287.5(c).

By its very terms, Appellants' proposed interpretation creates an enforcement regime that effectively dispenses with the warrantless arrest

[4] 8 U.S.C. 1357 provides in relevant part:
(a) Powers without warrant
Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant-- * * * *
(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest.

procedures under the INA. Appellants' view of § 1225(b)(2) would provide DHS agents with unfettered authority – indeed, the obligation – to make warrantless arrests of noncitizens who have not been admitted to the U.S., regardless of whether the noncitizen committed an offense or is likely to escape. Such interpretation cannot be read consistently with the provisions of § 1357.

Other detention provisions are likewise inconsistent with Appellants' argument. Detention under warrant is authorized by statute and regulation, but such detention is made discretionary. 8 U.S.C. § 1226(a); 8 C.F.R. § 236.1(b).[5] The INA provides that, "[o]n a warrant issued by the Attorney General, an alien *may* be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a) (emphasis added).[6] These provisions are likewise inconsistent with Appellants' mandatory arrest theory, as the statutory text clearly states that an alien "may" be arrested and detained,

[5] A limited class of DHS officers may execute government Form I-200, Warrant of Arrest. 8 C.F.R. § 236.1(b). After the warrant is issued, DHS may cancel the warrant if the agency determines not to serve it. *Id.*

[6] DHS may subsequently release a detained noncitizen on bond or conditional parole. 8 U.S.C. § 1226(a)(2). Noncitizens with certain criminal convictions, however, are subject to mandatory detention during removal proceedings. *Id.* at § 1226(c).

granting DHS agents discretion to decide whether noncitizens potentially amenable to removal proceedings should be arrested and detained.[7]

Appellants' erroneous interpretation would require ICE agents—without exception—to detain and pursue removal of all unadmitted aliens found in the United States who are not lawfully present. Nothing in the language of § 1226(a) *requires* the detention of such noncitizens and the initiation of removal of proceedings, even where a warrant of arrest has been issued. And 8 U.S.C. §§ 1357(a)(2) limits the authority of DHS to detain noncitizens where no warrant has been issued. Appellants' interpretation thus conflicts directly with the federal statutory scheme that instructs ICE agents that it must arrest and detain noncitizens, where other statutes either bar such arrests or make them discretionary. If Congress wanted to convey the meaning advanced by Appellants, it would have done so explicitly.

III. Appellants' Interpretation of Section 1225(b)(2)(a), if Accepted, Would Eliminate DHS's Authority Over Applications for Affirmative Relief, Creating Conflict and Inconsistency With Other Provisions of the INA.

Appellants contend that § 1225(b)(2)(A) requires that all inadmissible noncitizens be placed into removal proceedings immediately upon detection.

[7] Although DHS may elect to not detain a noncitizen at a particular moment, nothing precludes the agency from detaining the noncitizen at a later time since there is no statute of limitations for initiating removal proceedings.

ROA.114-115. Am. Compl. ¶¶ 67-73. While Appellants only apply this misreading of § 1225(b)(2) to the deferred action policies at issue, their misinterpretation of the statute would have implications far beyond those policies.

Appellants contend that in § 1225(b)(2)(A), "Congress has expressly limited the discretion of Defendants to not initiate removal proceedings." ROA.278-79. They argue that the statute requires that "[i]f an illegal alien is encountered by DHS, an inspection must occur, and if that illegal alien is not entitled to be admitted to the United States, he or she must be placed in removal proceedings. Any subsequent relief, whether it be through asylum, cancellation of removal, or withdrawal of removal, must be authorized by federal statute." Brief in Support of Plaintiffs' Application for Preliminary Injunction at 6 (hereinafter Plaintiff's PI Brief) (emphasis added). ROA.279. They apparently claim that even in situations where Congress provides opportunities to apply affirmatively for relief, such as asylum, DHS is not authorized to grant that relief until a noncitizen has been placed in removal proceedings. The novelty of this reading suggests that it is flawed; and indeed, Appellants' argument cannot be squared with the immigration statute, viewed holistically. *See Robinson*, 519 U.S. at 341.

Congress has authorized DHS to grant numerous forms of affirmative relief notwithstanding a noncitizen's inadmissibility. These include asylum, Temporary Protected Status, protection under the Violence Against Women Act, and

protections for victims of human trafficking and certain other offenses, as explained in greater detail below. These forms of relief are currently, and logically, available before the initiation of removal proceedings. Appellants' proposed interpretation would cripple these programs by eliminating the agencies' ability grant these forms of relief before the initiation of removal proceedings. Because Congress clearly intended to permit DHS to grant relief for the noncitizens whom Congress made eligible to seek it, Appellants' interpretation cannot be squared with the clear meaning of the statute. Appellants' attempt to shoehorn a prohibition on prosecutorial discretion into the text of § 1225(b)(2)(A) is flatly inconsistent with the statute in multiple ways, and is demonstrably incorrect.

A. Appellants' Interpretation Contravenes the INA and the Regulations by Requiring the Government to Place Certain Affirmative Asylum Applicants Into Removal Proceedings Before Adjudicating Their Applications.

Congress allows, with very limited exceptions, every noncitizen "who is physically present in the United States . . . [to] apply for asylum." 8 U.S.C. § 1158(a)(1).[8] Congress has exercised its authority to govern who is eligible for asylum. Congress has not barred people from applying for asylum simply because

[8] The exceptions, found at 8 U.S.C. §§ 1158(a)(2) and (b)(2), include applicants who are time-barred, who can be removed to a safe third country, who have filed prior applications, or who have persecuted others, committed a particularly serious crime, or supported terrorism.

they are inadmissible, or because they are, in Appellants' lexicon, "illegal aliens." *See, e.g., Amrollah v. Napolitano*, 710 F.3d 568 (5th Cir. 2013) (non-citizen granted asylum despite illegal entry).

Congress permits both the Immigration Courts (which represent the Attorney General) and DHS to grant asylum, "in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General." 8 U.S.C. § 1158(b)(1)(A). By regulation, DHS has jurisdiction over asylum applications before the initiation of removal proceedings and the Immigration Courts have it after removal proceedings have commenced. 8 C.F.R. §§ 208.2(a) and (b). Congress specifically authorized the DHS component agency U.S. Citizenship and Immigration Services ("USCIS") to adjudicate asylum and refugee matters. 6 U.S.C. § 271(b)(3).

Appellants' proposed interpretation would prevent a USCIS Asylum Officer from deciding an asylum application filed by an inadmissible applicant. Rather, Appellants interpret § 1225(b) to require DHS officer to immediately place asylum applicants into removal proceedings, if inadmissible. ROA.280. Plaintiffs' PI Brief at 7. Under Appellants' reading of the statute, the overburdened immigration court system[9] would have exclusive authority to grant asylum for those individuals.

[9]As of the end of fiscal year 2013, the Immigration Courts had a backlog of 344,230 cases. *See* TRAC, Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration

(continued…)

This would waste the resources of the Immigration Court, leave meritorious applicants in limbo, and fail to protect family members in danger of persecution.[10] There is not one shred of evidence in the statute that Congress intended this result; Congress' grant of authority to USCIS shows the contrary intention.

B. Appellants' Interpretation Conflicts With Laws and Regulations That Protect Victims of Human Trafficking.

Victims of severe forms of human trafficking and other specified crimes, including domestic violence, kidnapping, peonage, and slave trade offenses, may obtain temporary protection from removal to facilitate testimony against the malefactors and to protect the victims. *See* 22 U.S.C. § 7105(c)(3). Congress authorizes such individuals to apply for, *inter alia*, deferred action. *See* 8 U.S.C. § 1227(d)(2). Such individuals are eligible to obtain temporary stays in the United States, and, occasionally, permanent resident status, under provisions that permit waiver of most forms of inadmissibility. *See* 22 U.S.C. § 7105(c)(3); 8 C.F.R. §§ 214.11, 214.14.

Courts (2014), available at http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php. On average, noncitizens now wait over 18 months for adjudication of their cases. *Id*. This delay negatively impacts legitimate asylum-seekers and other noncitizens with valid claims; it also negatively impacts the government's ability to enforce the immigration statutes, in cases of individuals whose claims are weak.

[10] Congress permits asylees to seek derivative asylee status for their spouses and minor children living abroad, where they may face persecution by oppressive regimes. 8 U.S.C. § 1158(b)(3)(A); 8 C.F.R. § 208.21(d).

Appellants' obtuse statutory interpretation would require DHS agents who encounter victims of severe human trafficking or the other statutorily designated crimes to detain the victim and place her into removal proceedings, if the victim is inadmissible. Appellants argue that their oath requires them to detain these victims. ROA.101 (¶ 4)), Brief for Appellants at 3. Appellants argue that because § 1225(b)(2)(A) is clear, any contrary instructions from their supervisors would require them to violate their oaths. In the trafficking context, there are regulations to the contrary, *cf.*, *e.g.*, 8 C.F.R. § 214.11(j)(4), (m)(2), and Congress has enacted express statutory authorization for deferred action. 8 U.S.C. § 1227(d)(2). Again, Appellants give no reason why they think Congress would have desired § 1225(b)(2) to be interpreted so as to interfere so squarely with the humanitarian goals of the trafficking statute.

C. Appellants' Interpretation Prevents DHS From Granting Parole or Deferred Action to Victims of Domestic Violence, As Authorized by Statute.

Under the Violence Against Women Act ("VAWA"), a noncitizen spouse[11] subjected to battery or extreme mental cruelty by a U.S. citizen or lawful permanent resident spouse is authorized to seek legal status through a "self-petition" without the support of their abusive spouse. VAWA self-petitions are

[11] The statute also authorizes eligibility for individuals whose marriages were not legally binding due to bigamy of the abusive spouse. 8 U.S.C. § 1154(a)(1)(A)(i)(iii)(II)(aa)(BB).

handled by a specially-trained unit within DHS. *See* 8 C.F.R. § 204.1(e); Id. § 204.2(c)(1); *Toro v. Secretary, U.S. Dept. of Homeland Sec.*, 707 F.3d 1224 (11th Cir. 2013). A similar process exists for children abused by a U.S. citizen or a permanent resident parent. *See* 8 C.F.R. § 204.2(e). Individuals granted benefits under VAWA also are considered for deferred action. Cronin, Acting Executive Associate Commissioner, Office of Programs, INS Mem. HQ/ADN/70/6.1P (Sept. 8, 2000), reprinted in 77 Int. Rel. 1432–33 (Oct. 2, 2000).

Under Appellants' interpretation of § 1225(b)(2)(A), however, a DHS officer adjudicating a self-petition filed by a VAWA self-petitioner would be obligated to initiate removal proceedings whenever the self-petitioner is found to be inadmissible. Thus, DHS could not grant deferred action to VAWA self-petitioners prior to the initiation of removal proceedings, which contravenes Congressional intent to grant deferred action to individuals fleeing abusive relationships. *Cf.* 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (making any battered spouse or child "eligible for deferred action and work authorization").[12]

Again, Appellants' interpretation of § 1225(b)(2)(A) is inconsistent with the statute and longstanding agency practice. Appellants would read the statute to eliminate the discretion granted to DHS to adjudicate VAWA applications, and the

[12] This provision ratified the longstanding Agency practice of granting deferred action to these women fleeing abusive relationships.

discretion to decline to initiate removal proceedings against victims of domestic violence.

D. Appellants' Interpretation Would Effectively Prevent DHS From Adjudicating Adjustment of Status Applications Under 8 U.S.C. § 1255(i), Which Congress Specifically Authorized After the Enactment of § 1225(b)(1).

In 1994, Congress enacted 8 U.S.C. § 1255(i), which permits certain individuals unlawfully present in the United States to apply for lawful permanent resident status without leaving the United States. Pub. L. No. 103–317, § 506(b), 108 Stat 1724 (Aug. 26, 1994). Congress originally included a three-year sunset provision in that statute. *Id*. at § 506(c). When Congress enacted § 1225(b)(2)(A), it took note of § 1255(i), raising the fee for those applications and specifying a use for the money. Pub. L. No. 104–208, § 376, 110 Stat. 3009 (Sept. 30, 1996). Congress thereafter extended the sunset date, Pub. L. No. 105–46, § 123, 111 Stat. 1153 (Sept. 30, 1997), and then replaced it with a grandfather provision (adding a second grandfather provision some years later). Pub. L. No. 105–119, § 111, 111 Stat, 2440 (Nov. 26, 1997); Pub. L. No. 106–554, § 1502(a), 114 Stat 2763 (Dec. 21, 2000). Under the current version of § 1255(i), certain individuals who are the beneficiaries of visa petitions filed before April 30, 2001, may seek adjustment of status upon payment of a penalty fee, even if they entered the United States without inspection.

Notwithstanding Congress' multiple renewals of § 1255(i) after the enactment of § 1225(b)(1)(A), and its subsequent adoption of permanent grandfathering provisions, it is apparently Appellants' contention that DHS has no ability to adjudicate an application under § 1255(i).

DHS and its predecessor agency have a long, unchallenged history of adjudicating applications for adjustment of status. Upon the formation of USCIS in 2002, Congress authorized that agency to continue adjudicating cases as its predecessor agency had done. 6 U.S.C. § 271(b)(5). The applicable regulations governing DHS and the Immigration Courts give DHS the authority to adjudicate adjustment of status applications for individuals who are not in removal proceedings, while the Immigration Courts have authority to adjudicate applications for most of those subject to removal proceedings. 8 C.F.R. §§ 245.2(a)(1); 1245.1(a)(1).[13]

Appellants' proposed interpretation would effectively bar DHS from adjudicating adjustment of status applications under § 1255(i) for individuals who have entered the United States without inspection, by requiring DHS to place those individuals into removal proceedings rather than granting them the relief

[13]By regulation, DHS maintains exclusive jurisdiction to adjudicate adjustment of status applications for arriving aliens – but not other applicants for admission – who are placed into removal proceedings, with some limited exceptions. 8 C.F.R. § 1245.2(a)(1)(ii). The term "arriving alien" is defined by longstanding regulation to include individuals apprehended at a port of entry, but not those individuals who enter the United States without inspection. 8 C.F.R. § 1001.1(q).

authorized by Congress. This shows, again, how Appellants' reading of § 1225(b)(2)(A) is incompatible with the rest of the INA.

E. Appellants' Interpretation Would Require the Detention of Individuals Granted Temporary Protected Status, Though Congress Explicitly Forbids Such Detention.

Temporary Protected Status ("TPS") may be granted to nationals of particular countries where an ongoing armed conflict or environmental disaster poses a serious threat to such individuals. 8 U.S.C. § 1254a(b)(1). Eligibility for TPS does not require admissibility; rather, most grounds of inadmissibility may be waived. 8 U.S.C. § 1254a(c)(2)(A). Additionally, TPS may be extended year after year. *Id*. § 1254a(d)(2). Congress forbids individuals granted TPS from being detained or removed from the United States. *Id.* §§ 1254a(d)(4); 1254a(a)(1)(A). Individuals granted TPS may also be granted work authorization. *Id.* § 1254a(a)(1)(B).

Prior to the creation of the DHS, the regulations delegated authority to adjudicate TPS applications to the INS. 8 C.F.R. § 244.6 (2001). In 2002, Congress ratified the adjudication of TPS applications by USCIS when it authorized the newly formed USCIS to continue the functions of its predecessor agency. 6 U.S.C. § 271(b)(5). The current regulations delegate the authority to adjudicate TPS applications to USCIS. 8 C.F.R. § 244.6. Individuals placed into removal proceedings may renew their TPS applications with the Immigration

Court or the Board of Immigration Appeals. *Id.* § 244.11; *see also Castillo-Enriquez v. Holder*, 690 F.3d 667, 668 (5th Cir. 2012).

Appellants' proposed interpretation of § 1225(b)(2)(A) would require immigration officers to detain TPS applicants who entered without being admitted, notwithstanding the statutory authority allowing DHS to waive that inadmissibility. 8 U.S.C. § 1254a(c)(2)(A). Furthermore, under Appellants' argument, DHS agents would be obligated to place TPS applicants into removal proceedings, even though the statute prohibits the removal of individuals who have been granted, or even those who have shown *prima facie* eligibility for, TPS. 8 U.S.C. §§ 1254a(a)(1)(A); 1254a(a)(4). Under Appellants' view of § 1225(b)(2)(A), DHS agents would be obligated to detain individuals who have been granted TPS status, though Congress forbids that detention. 8 U.S.C. § 1254a(d)(4). This is clearly wrong.

* * *

Whatever ambiguity exists in § 1225(b)(2)(A), it cannot mean what Appellants say that it means. Appellants dislike the ways in which the federal government has elected to exercise discretion. In order to undo one policy, Appellants would read all discretion out of an immigration system which has long relied on federal agents' discretion for the fair and sensible administration of the immigration laws. *See U.S. v. Arizona*, 132 S.Ct. 2492, 2499 (2012) ("A principal

feature of the removal system is the broad discretion exercised by immigration officials."). This is to throw out the baby with the bath water. Whatever the merits of Appellants' view of the DACA program, their view that § 1225(b)(2)(A) forbids prosecutorial discretion simply does not withstand scrutiny.

IV. Appellants Lack Standing Because They Are not Harmed by the DACA Program.

Any evidence and analyses shown by Appellants regarding the alleged "fiscal harms" imposed by immigrants on the State of Mississippi and beyond do not apply to DACA beneficiaries. Brief of Appellants at 11-18. Appellants have failed to show that DACA recipients, in Mississippi or anywhere else, are low-skilled, rely on public welfare, or impose costs on jail facilities or any other U.S. institutions. Instead, as shown by national surveys, studies, and the stories presented by *amici*, these young people have work authorization and many are students who provide substantial fiscal and social benefits to the communities where they live and work. Because Appellant State of Mississippi cannot demonstrate any injury, much less a redressable injury traceable to DACA, they do not have standing to pursue their claims in this case. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992).

Since DACA was initiated, over 553,000 young people have been approved for deferred action under the program.[14] According to a national study and survey conducted by the American Immigration Council ("Immigration Council"), as a result of DACA, more young adult immigrants found gainful employment and increased their earnings as a result of having work authorization. *See Two Years and Counting*, *supra* note 14, at 3. Of the thousands of DACA recipients surveyed by the Immigration Council, 59% obtained a new job, 45% increased job earnings, and 49% opened their first bank account. *Id*. Almost 90% of the survey participants reported "ever having worked for pay," and 34% reported that they were working more than one job. *Id*. In short, DACA created greater levels of contribution to the workforce by highly motivated individuals who previously had limited employment opportunities. Similarly, other studies have shown that extending work authorization to immigrants allows them to earn more, and consequently, spend more, which, in turn, expands the economy. *The Economic Effects of Granting Legal Status and Citizenship to Undocumented Immigrants,* Center for Am. Progress (March 20, 2013),

[14] As of March 2014, there were 673,417 applications for DACA, and 553,197 were approved. *See* Roberto Gonzales and Angie Bautista-Chavez, *Two Years and Counting: Assessing the Growing Power of DACA*, SPECIAL REP., Am. Immig. Council at 2 (June 2014), http://www.immigrationpolicy.org/sites/default/files/docs/two_years_and_counting_assessing_the_growing_power_of_daca_final.pdf.

https://docs.google.com/viewer?url=http://cdn.americanprogress.org/wp-content/uploads/2013/03/EconomicEffectsCitizenship-1.pdf.[15]

By contrast, Appellants cite to various studies that do not focus on or account for immigrants who, like DACA recipients, have work permits and lawful presence in the United States. The Mississippi Auditor's report referenced by Appellants to show the cost of "illegal aliens" was issued before the implementation of DACA. Brief of Appellants at 11; ROA.113. Appellants similarly point to studies on welfare use by "illegal alien-headed households" and the "fiscal cost of low-skill immigrants," without providing any link or relationship between those groups and DACA recipients. Brief of Appellants at 12.[16]

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[15] For example, a U.S. Department of Labor study, based on longitudinal data of nearly three million unauthorized immigrants who were granted legal status in 1986, found that the group experienced a 15.1% increase in their average inflation-adjusted within five years of gaining legal status. U.S. Department of Labor, *Characteristics and Labor Market Behavior of the Legalized Population Five Years Following Legalization* (1996).

[16] Ironically, Appellants' arguments regarding low-skilled immigrants and unauthorized immigrants would seem to favor government efforts to focus resources on individuals who have been convicted of crimes and do not contribute meaningfully to the economy, given massive national immigration court backlogs. *See, e.g.*, Suzy Khimm, *How long is the immigration 'line'? As long as 24 years*, Wash. Post (Jan. 31, 2013), available at http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/31/how-long-is-the-immigration-line-as-long-as-24-years/. Granting standing to Appellants to challenge the policy choices of federal officials would undermine the authority of DHS to set and implement nationwide policy choices and to employ effectively scarce agency resources. *See, e.g., Arizona v. U.S.*, 132 S. Ct. 2492 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials. . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all."); David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 Yale L.J. Online 176, 184-89 (2012), *available at* http://yalelawjournal.org/2012/12/20/martin.html. The U.S. Supreme Court has already rejected judicial review of selective enforcement challenges brought by those who were the subject of enforcement. *See, e.g., Reno v. American–Arab Anti–*

(continued…)

Appellants give no reason to believe that DACA applicants – young people who frequently live with their parents while studying – are frequently the heads of households. Appellants give no reason for their *ad hominem* suggestion that DACA applicants are low-skilled.

The actual record in this case demonstrates otherwise. Proposed Defendant Intervenor Carolina Canizales graduated college with honors. ROA.1138. Before DACA was implemented, Ms. Canizales graduated with honors from college, but she had no full time employment prospects post-college. ROA.1139 ¶ 6. After she received work authorization and deferred action through DACA, she was able to obtain a full-time job as a National Coordinator for a national organization that advocates for the dignity and fair treatment of immigrant youth and families. ROA.1139 ¶ 7. DACA has allowed Ms. Canizales to support herself and to improve her financial situation and that of her family. ROA.1139.

When Proposed Defendant Intervenor Pamela Resendiz received work authorization under DACA, she found employment as a facilitator with at-risk students and parents, and is now financially independent. ROA. 1134. Ms. Resendiz is a college graduate. ROA.1133. Many members of Proposed Defendant Intervenor University Leadership Initiative (ULI) who received DACA

Discrimination Comm., 525 U.S. 471, 489–92 (1999). It is not clear why the treatment of such challenges brought by those doing the enforcing should be any different.

finished their education and went on to full time employment. ROA.1143-44. Mr. Javier Huamani, the former treasurer of ULI, graduated from UT Austin and became an engineer.[17] These stories reflect gainful education, full time employment, and meaningful contributions to society.[18]

Appellants' real complaint is that they believe that the program is bad policy. Whatever the merits of those views, the remedy for bad federal policy is to be found in biannual elections, not in lawsuits filed by disgruntled state and federal employees, or by one of the fifty states.

Because Appellants fail to tie the studies they cite to any costs imposed by DACA, they ultimately offer nothing more than speculation that DACA costs the state anything. Such bare assertions do not satisfy the concrete, particularized injury that may be redressed by a favorable ruling required under Article III of the U.S. Constitution. *See, e.g.*, *Lujan*, 504 U.S. at 560 (holding that "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . .trace[able] to the challenged action of the defendant. . . .").

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[17] Julian Aguilar, *USCIS Sets Instructions for Deferred Action Renewals*, The Texas Tribune (June 5, 2014), http://http://www.texastribune.org/2014/06/05/daca-renewal-deadline-greeted-hope-uncertainty/.

[18] If accepted, Appellants' position would mean that any DACA recipient encountered by DHS officials would be detained and have removal proceedings initiated against them. Such a result would conflict starkly with the federal policy that individually adjudicates the applications of DACA recipients, and based on that review, may grant them deferred action and work authorization.

CONCLUSION

For the reasons set forth above, the Court should find that Appellants have not shown standing. If the Court finds that Appellants have standing, and reaches the merits of their arguments, it should reject Appellants' contention that § 1225(b)(2)(A) eliminates decades of well-established immigration procedures, and hold that it does not eliminate the general prosecutorial discretion authority possessed by DHS and its agents.

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ADDENDUM TO STATEMENT OF INTEREST

Amicus curiae **American Immigration Lawyers Association (AILA)** is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

Amicus curiae the **Mexican American Legal Defense and Educational Fund (MALDEF)** is the leading Latino legal organization in the United States focusing on litigation, advocacy, and educational outreach. MALDEF's mission is to foster sound public policies, laws, and programs to safeguard the civil rights of the 45 million Latinos living in the United States. Protecting the rights of immigrants is the focus of MALDEF's Immigrant's Rights Program. MALDEF monitors federal and state proposed legislation, submits comments on matters that affect the fair and equitable treatment of immigrants, and brings litigation to further its mission. In state and federal court, including the U.S. Supreme Court, Amicus has had significant victories in the area of immigrants' rights.

Amicus curiae the **National Immigrant Justice Center (NIJC)**, a program of the Heartland Alliance for Human Needs and Human Rights, is a nonprofit immigration-focused organization accredited by the Board of Immigration Appeals since 1980 to provide immigration assistance to low-income individuals. NIJC provides legal education and representation to low-income immigrants, asylum seekers, and refugees, including survivors of domestic violence, victims of crimes, detained immigrant adults and children, and victims of human trafficking, as well as immigrant families and other non-citizens facing removal and family separation. NIJC provides such legal services to more than 10,000 non-citizens each year. NIJC also promotes respect for human rights and access to justice for immigrants, refugees, and asylum seekers through advocacy for policy reform, impact litigation, and public education. Many individuals assisted by NIJC are eligible for asylum, temporary protected status, protection under the Violence Against Women Act, or protections for victims of human trafficking and other specified offenses. As described in detail below, the Plaintiffs' proposed interpretation of 8 U.S.C. § 1225(b)(2)(A) is inconsistent with the ability of the Department of Homeland Security (DHS) to grant these forms of relief.

Amicus curiae the **American Immigration Council ("Immigration Council")** is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our

immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Immigration Council has an interest in ensuring that the immigration laws are interpreted properly and in a manner that honors fundamental constitutional and human rights.

Amicus curiae **National Immigration Law Center (NILC)** is a national legal advocacy organization based in Los Angeles whose mission is to defend and promote the rights and opportunities of low-income immigrants and their family members. NILC has worked extensively on the implementation of the Deferred Action for Childhood Arrivals program, and regularly works closely with organizations led by DACA recipients. Since 1988, NILC has litigated key immigrants' rights cases; written basic reference materials relied on by the field; trained countless advocates and attorneys on immigrants' rights, and provided technical assistance on a wide range of issues affecting low-wage immigrants. NILC's interest in the outcome of this case arises out of a concern that the Appellants advance an interpretation of the federal immigration statutes that cannot be sustained by the text or reconciled with the overall statutory scheme and that such an interpretation, if adopted, would have an adverse impact on DACA recipients and other immigrants.

The **New York Legal Assistance Group (NYLAG)** is a non-profit which provides a wide range of legal services to abject poor and working poor New

Yorkers. NYLAG maintains intake sites in all five boroughs and works with more than 600 community-based organizations throughout the city to increase accessibility of our services. NYLAG's Immigrant Protection Unit ("IPU") provides legal representation and advice to immigrants in their affirmative immigration applications and in removal defense. Further, IPU attorneys are dedicated to working on immigrant advocacy and impact litigation. NYLAG's IPU regularly provides trainings and information for attorneys, social service professionals, advocates, local politicians, and immigrants themselves. IPU has assisted hundreds of DACA applicants since June 15, 2012 and continues to develop its DACA services initiative.

Amicus curiae the **United We Dream Network (UWD)** is the largest immigrant youth-led organization in the nation with thousands of members in 52 affiliate organizations across 25 states. UWD is a nonprofit, nonpartisan network that organizes and advocates for the dignity and fair treatment of immigrant youth and families. UWD seeks to address the inequities and obstacles that immigrant youth face and promote justice for all immigrants by empowering immigrant youth. Youth and young adults involved with UWD often qualify for Deferred Action for Childhood Arrivals, among other forms of immigration relief described in this brief. These directives and programs have expanded their opportunities to

contribute positively to the nation they call home in their capacities as students and professionals.

CERTIFICATE OF COMPLIANCE

I certify that this brief has been prepared in Microsoft Word using a 14-point, proportionally spaced font, and based on word processing software, the brief contains **5,739** words.

___/S/ David Hinojosa_____
David Hinojosa

CERTIFICATE OF SERVICE

I certify that on July 16, 2014, I electronically filed the foregoing Brief Amici Curiae in Support of Respondents using the Court's CM/ECF system, which constitutes service under the Court's rules.

___/S/ David Hinojosa_____
David Hinojosa