

APPEAL NO. 21-40680

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

State of Texas; State of Alabama; State of Arkansas; State of Louisiana; State of
Nebraska; State of South Carolina; State of West Virginia; State of Kansas; State
of Mississippi,
Plaintiffs-Appellees,

v.

United States of America; Alejandro Mayorkas, Secretary; U.S. Department of
Homeland Security; Troy Miller, Acting Commissioner, U.S. Customs and Border
Protection; Tae D. Johnson, Acting Director of U.S. Immigration and Customs
Enforcement; Ur M. Jaddou, Director of U.S. Citizenship and Immigration
Services,
Defendants-Appellants,

Elizabeth Diaz; Jose Magana-Salgado; Karina Ruiz De Diaz; Jin Park; Denise
Romero; Angel Silva; Moses Kamau Chege; Hyo-Won Jeon; Blanca Gonzalez;
Maria Rocha; Maria Diaz; Elly Marisol Estrada; Darwin Velasquez; Oscar
Alvarez; Luis A. Rafael; Nanci J. Palacios Godinez; Jung Woo Kim; Carlos
Aguilar Gonzalez; State of New Jersey,
Intervenor Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
THE HONORABLE ANDREW S. HANEN
CASE No. 1:18-cv-00068

**BRIEF OF AMICI CURIAE 69 LOCAL GOVERNMENTS AND LOCAL
GOVERNMENT ADVOCACY ORGANIZATIONS IN SUPPORT OF
DEFENDANTS-APPELLANTS AND FOR REVERSAL**

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 29.2 and 28.2.1, the undersigned counsel of record for amici certifies that the following persons and entities as described in the fourth sentence of Rule 28.2.1 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.

1. International City/County Management Association
2. International Municipal Lawyers Association
3. National League of Cities
4. U.S. Conference of Mayors

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae are political subdivisions or local officials for whom no corporate disclosure is required.

Dated: December 15, 2021

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INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT¹

Amici curiae are 69 local governments and local government advocacy organizations from every corner of the country.² Though amici are geographically, economically, politically, and socially diverse, amici share a common interest in fostering communities where all residents, regardless of immigration status, are able to provide for themselves and their families and feel safe and empowered to participate in civic life. That is why amici have worked tirelessly to support and

¹ All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

² Amici are located across the United States and include the County of Los Angeles, California; the City of Los Angeles, California; City of Akron, Ohio; County of Alameda, California; City of Albuquerque, New Mexico; City of Alexandria, Virginia; City of Arvin, California; City of Atlanta, Georgia; City of Austin, Texas; Mayor and City Council of Baltimore, Maryland; City of Boston, Massachusetts; County of Boulder, Colorado; County of Cameron, Texas; Town of Carrboro, North Carolina; City of Central Falls, Rhode Island; Town of Chapel Hill, North Carolina; City of Chelsea, Massachusetts; City of Chicago, Illinois; City of College Park, Maryland; County of Contra Costa, California; County of Cook, Illinois; City of Dallas, Texas; City of Dayton, Ohio; City and County of Denver, Colorado; City of Durham, North Carolina; City of Fresno, California; City of Gaithersburg, Maryland; City of Gary, Indiana; City of Hartford, Connecticut; City of Houston, Texas; City of Iowa City, Iowa; County of King, Washington; City of Las Cruces, New Mexico; City of Lauderdale Lakes, Florida; City of Long Beach, California; City of Madison, Wisconsin; County of Marin, California; County of Milwaukee, Wisconsin; City of Minneapolis, Minnesota; County of Monterey, California; City of New Rochelle, New York; City of New York, New York; City of North Lauderdale, Florida; City of Oakland, California; City of Philadelphia, Pennsylvania; City of Phoenix, Arizona; City of Pittsburgh, Pennsylvania; City of Portland, Oregon; City of Rochester, New York; City of Sacramento, California; City of Saint Paul, Minnesota; City of Salinas, California; City of San Antonio, Texas; City of San Diego, California; City and County of San Francisco, California; County of Santa Clara, California; County of Santa Cruz, California; City of Santa Monica, California; City of Seattle, Washington; City of South Bend, Indiana; City of Stamford, Connecticut; City of Tacoma, Washington; County of Travis, Texas; City of Tucson, Arizona; City of West Hollywood, California; International City/County Management Association; International Municipal Lawyers Association; National League of Cities; and U.S. Conference of Mayors.

defend the Deferred Action for Childhood Arrivals (DACA) policy: Amici recognize that by allowing and encouraging DACA recipients to openly engage in their communities and interact with local governments, the DACA policy directly benefits all residents, immigrant and non-immigrant alike.

Before DACA was instituted, many immigrants feared the basic tasks of everyday life like going to work, attending school and church, or simply buying groceries. Mothers and fathers with American-citizen children often left their homes in the morning uncertain if they would see their sons and daughters again. These same sons and daughters kept Post-It notes in their pockets with instructions about whom to call if Mom and Dad did not come home. DACA addressed these fears by focusing limited immigration enforcement resources, primarily, on the removal of serious criminals and by enabling young people who call this country home the freedom to participate in and contribute to their communities without fear of deportation.

With this freedom, DACA recipients have made enormous contributions to our communities and to our country. They are entrepreneurs who build businesses, employ workers, and revitalize our local economies. They are doctors, nurses, and frontline workers who help keep our communities healthy and safe. They are teachers and civil servants who shape the next generation and strive to make our communities better. They are artists who inspire us all to see the world from new

perspectives. Without deferred action, these contributions and countless others would not be possible. Amici are stronger and safer because of DACA.

Amici will suffer substantial harm if the District Court’s order vacating and remanding DACA is not reversed. More than 58% of current DACA recipients—approximately 343,000 individuals—call amici’s metropolitan areas home.³ These individuals are no different than the tens of millions of people who live and work alongside them in amici’s cities and counties. Indeed, DACA recipients are deeply integrated in this country’s culture: Magda, a DACA recipient from Houston, explained: “I only speak English at home, I’m a Christian, grew up pledging allegiance to the flag, look forward to the Fourth of July celebration, and all Thanksgiving dinners always involve turkey and sweet potato casseroles. I don’t know how not to be an American, and DACA has given me a taste of truly belonging in this country.”⁴

Amici submit this brief to tell stories like Magda’s, to inform the Court of the profound impact that DACA has had on recipients and communities, and to highlight the consequences that the District Court’s decision to vacate and remand DACA will have on amici and our residents. Amici urge this Court to reverse the

³ Nicole Prchal Svajlenka, *What We Know About DACA Recipients, by Metropolitan Area*, Ctr. for Am. Progress (Spring 2020), <https://americanprogress.org/article/know-daca-recipients-metropolitan-area-2/>.

⁴ *Stories in Defense of Deferred Action for Childhood Arrivals*, Nat’l Immigration Law Ctr., <https://www.nilc.org/issues/daca/daca-fifth-anniversary-stories/>.

District Court’s order because that order did not consider amici’s significant reliance interests and the harmful effects that the vacatur of DACA will have on recipients, their families, their employers, and communities nationwide.

Amici also write to address a discrete legal issue—the District Court’s finding that DACA should be enjoined because it purportedly conferred work authorization “benefits” on recipients. That finding was erroneous. Long before DACA was implemented, the Department of Homeland Security (DHS) had discretion to grant work authorization to immigrants with deferred action pursuant to an independent statutory and regulatory scheme. The fact that grants of deferred action under DACA made recipients eligible to apply for work authorization under this separate scheme does not render DACA a substantive rule requiring notice and comment under the Administrative Procedure Act (APA), nor does it conflict with the Immigration and Nationality Act (INA).

The District Court’s decision to set aside DACA will harm hundreds of thousands of DACA recipients in amici’s communities. It also threatens those recipients’ families, neighbors, coworkers, employers, and local governments like amici, who rely on DACA recipients and benefit from the countless contributions that DACA recipients have made and will continue to make to our country.

Consistent with the U.S. Supreme Court’s teachings in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), this

Court must give due consideration to the consequences of vacatur that “radiate outward” beyond DACA recipients themselves and, in doing so, this Court should reverse the District Court’s judgment below.

ARGUMENT

I. DACA RECIPIENTS HAVE MADE AMICI’S COMMUNITIES MORE PROSPEROUS AND SAFE.

Since its inception in 2012, DACA has advanced amici’s best interests by allowing recipients to live without fear in the communities they call home. Amici have witnessed how deferred immigration enforcement action through DACA has changed hundreds of thousands of young people’s lives. DACA recipients have applied for and received work authorization and invested in their futures by going to college, which has allowed them to get better jobs and ultimately reinvest in their communities by starting businesses, buying homes, paying taxes, and in every way contributing to the communities in which they live. Amici have experienced firsthand the benefit to their economies and public safety programs from DACA recipients’ open participation in the economy and increased interaction with local governments and law enforcement. These contributions are some of the very same that the Supreme Court recognized in the *Regents* decision just last year.⁵ The

⁵ In *Department of Homeland Security v. Regents of the University of California*, the Supreme Court concluded that the Government’s attempt to rescind DACA in 2017 violated the APA because, among other reasons, the Government failed to consider the reliance interests engendered by DACA. *See* 140 S. Ct. 1891, 1914 (2020) (finding that the Government acted

District Court’s order failed to properly consider these substantial reliance interests and the effects that DACA has had on recipients and communities like amici.

A. DACA Recipients Contribute To Amici’s Economies And Make Amici Stronger.

DACA has drastically improved recipients’ lives and livelihoods. DACA recipients are not only granted deferred action from removal, but also afforded the building blocks of a successful life. They are eligible to apply for work authorization and a social security card. In amici’s states, they can receive a driver’s license, and in several states, those choosing to pursue higher education can take advantage of tuition levels afforded to in-state residents. Buoyed by the safety afforded by deferred action, countless recipients have pursued higher education, enhancing their economic productivity and enriching their futures.⁶

The positive experiences of individual DACA recipients directly benefit amici. Some 20,000 recipients are teachers,⁷ like Miriam Gonzalez, who teaches undocumented students and has helped them cope with anxieties surrounding

arbitrarily and capriciously by refusing to consider recipients’ reliance interests as well as the “consequences of the rescission, [which] would ‘radiate outward’ to DACA recipients’ families,” schools, employers, and communities).

⁶ Roberto G. Gonzales, *Here’s how DACA changed the lives of young immigrants, according to research*, Vox (Feb. 16, 2018), <https://perma.cc/PB6B-9S9L>.

⁷ Nicole Prchal Svajlenka & Trinh Truong, *The Demographics and Economic Impacts of DACA Recipients: Fall 2021 Edition*, Ctr. for Am. Progress (Nov. 24, 2021), https://www.americanprogress.org/article/the-demographic-and-economic-impacts-of-daca-recipients-fall-2021-edition/?_ga=2.20474104.1103831798.1638986011-1034402757.1619474533.

whether they and their parents will be deported.⁸ Others have made lasting impacts in the arts, like Yehimi Cambrón from Atlanta, who has used her own immigrant experience to teach her high school students to find expression and empowerment in art,⁹ or Fatima, an interior designer in New York City who is well-known in the New York City interior design world and works for an interior design startup run by the owners of Fortuny textiles.¹⁰ Many DACA recipients have achieved educational accomplishments that inspire younger generations: Guadalupe is studying mechanical engineering at Texas A&M University, and her little sisters, inspired by her achievement, now light up when they say, “I wanna be a doctor!”¹¹

Still others are spiritual leaders, first responders, and members of the military. Father Rey Pineda—a Catholic priest at Atlanta’s Cathedral of Christ the King—helps people in times of spiritual need.¹² Houston-area paramedic Jesus Contreras worked six straight days during Hurricane Harvey to rescue people from the storm.¹³ And hundreds of DACA recipients have protected our country by

⁸ George White, *Teachers who are DACA recipients help ease anxiety of undocumented students*, EdSource (Sept. 15, 2017), <https://perma.cc/PPJ2-KR3P>.

⁹ *About*, Yehimi Cambrón, <https://www.yehimicambrom.com/about>.

¹⁰ Stories in Defense of Deferred Action for Childhood Arrivals, *supra* note 4.

¹¹ *Id.*

¹² Julie Zauzmer, *Atlanta priest, a Dreamer, leads stressed flock of them*, Northwest Ark. Democrat Gazette (Jan. 27, 2018), <https://www.nwaonline.com/news/2018/jan/27/atlanta-priest-a-dreamer-leads-stressed/>.

¹³ Adolfo Flores, *This Paramedic Who Rescued Hurricane Harvey Victims May Be Deported If Trump Ends DACA*, BuzzFeed (Sept. 1, 2017), <https://www.buzzfeednews.com/article/adolfoflores/daca-rescuer-hurricane-harvey>.

serving in the military as part of a Pentagon pilot program.¹⁴

During the COVID-19 pandemic, 343,000 DACA recipients worked in essential industries to protect the health and safety of their neighbors.¹⁵ Their contributions were critical to safeguarding and sustaining communities through the duration of the pandemic. Notably, nearly 34,000 healthcare workers are DACA recipients.¹⁶ These include Dr. Manuel Bernal, an emergency medicine resident at Advocate Christ Medical Center in Oak Lawn, Illinois, a suburb of Chicago; Dr. Jirayut New Latthivongskorn, a medical resident at Zuckerberg San Francisco General Hospital and Trauma Center;¹⁷ and Ever Arias, an internal medicine resident in Southern California—all of whom put their own health at risk to treat their neighbors infected with COVID-19.¹⁸ And more than 142,000 DACA recipients classified as essential workers in food-related occupations worked

¹⁴ Gregory Korte et al., *Trump administration struggles with fate of 900 DREAMers serving in the military*, USA Today (Sept. 7, 2017), <https://perma.cc/EH4W-2DSL>.

¹⁵ Svajlenka & Truong, *supra* note 7.

¹⁶ *Id.*

¹⁷ Bridget Balch, *DACA physicians serve on COVID-19 front lines*, AAMC (June 18, 2020), <https://www.aamc.org/news-insights/daca-physicians-serve-covid-19-front-lines>.

¹⁸ Lilly Nguyen, *'I could finally breathe': Orange County dreamers cautiously celebrate Supreme Court ruling on DACA*, L.A. Times (June 18, 2020), <https://www.latimes.com/socal/daily-pilot/news/story/2020-06-18/i-could-finally-breathe-orange-county-dreamers-cautiously-celebrate-supreme-court-ruling-on-daca>.

tirelessly to ensure that food made it to tables in every community across the country.¹⁹

These stories show how in good times and difficult ones, DACA recipients add to the economic and social strength of their communities. DACA recipients contribute at least \$11 billion to California's annual GDP, with those residing in Los Angeles County responsible for approximately \$5.5 billion of that amount.²⁰ And in New York and Illinois, DACA recipients contribute over \$2 billion to each state's GDP.²¹ Nationwide, by 2027, DACA recipients are estimated to contribute more than \$433 billion to the United States' GDP,²² which is more than the annual GDP contribution of the State of Indiana.²³

DACA recipients also help drive local economies by starting businesses that create jobs and by reinvesting their earnings in education, leading to even brighter financial futures. Take, for example, Alejandro Flores-Muñoz, who owns a food truck and catering enterprise that serves individual customers and corporate clients

¹⁹ Nicole Prchal Svajlenka, *A Demographic Profile of DACA Recipients on the Frontlines of the Coronavirus Response*, Ctr. for Am. Progress (Apr. 6, 2020), <https://www.americanprogress.org/article/demographic-profile-daca-recipients-frontlines-coronavirus-response/>.

²⁰ Julia Wick, *L.A.-Area DACA Recipients Contribute Approximately \$5.5 Billion Annually to Economy, Chamber Estimates*, LAist (Sept. 21, 2017), <https://perma.cc/9VDJ-HEDB>.

²¹ Silva Mathema, *Ending DACA Will Cost States Billions of Dollars*, Ctr. for Am. Progress (Jan. 9, 2017), <https://perma.cc/7NSZ-Y2L7>.

²² *Id.*

²³ *News Release*, U.S. Dep't of Commerce, Bureau of Econ. Analysis at 8 (June 25, 2020), <https://www.bea.gov/sites/default/files/2021-06/qgdpstate0621.pdf>.

in Denver.²⁴ Or Los Angeleno Rudy Barrientos, who started an award-winning food truck business and used his earnings to pay for an undergraduate degree in business administration.²⁵ These stories are not uncommon among DACA recipients: One study found that 8% of DACA recipients age 25 and older start new businesses, a rate of entrepreneurship more than double that of the general population.²⁶ And the same study found that at least 36% of DACA recipients age 25 and older have a bachelor's degree or higher, with 72% of all currently enrolled DACA recipient students pursuing higher education in diverse fields ranging from biochemistry and chemical engineering to early childhood education and environmental science.²⁷

Given these statistics, it's not surprising that the DACA policy has a proven track record of improving recipients' earnings. One survey found that the average hourly wages of DACA recipients increased by 69% after receiving DACA's protection; 69% of survey respondents reported that their increased earnings

²⁴ Stephanie Griffith & Claudia Flores, *Dreamers Help Keep the Country Running During the Coronavirus Pandemic*, Ctr. for Am. Progress (Apr. 3, 2020), <https://americanprogress.org/article/dreamers-help-keep-country-running-coronavirus-pandemic/>.

²⁵ Rudy Barrientos, *'Dreamer Is Not a Metaphor!' A Chef and Entrepreneur Shares His DACA Story*, L.A. Taco (July 29, 2020), <https://www.lataco.com/gracias-senor-daca-story/>; Catalina Villegas, *Dreamer Working His Way Through College on Taco Truck*, Spectrum News (May 8, 2019), <https://spectrumnews1.com/ca/la-west/human-interest/2019/05/08/tacos-for-tuition---how-local-dreamer-is-paying-for-college>.

²⁶ Tom K. Wong et al., *DACA Recipients' Economic and Educational Gains Continue to Grow*, Ctr. for Am. Progress (Aug. 28, 2017), <https://perma.cc/JT3D-6TVR>.

²⁷ *Id.*

helped them become financially independent; and 71% reported that their increased earnings helped their families become more financially stable.²⁸ All told, DACA recipients and their households hold over \$25.3 billion in spending power.²⁹

Local communities like amici directly benefit from the economic growth associated with DACA recipients' increased purchasing power. Sixty-five percent of DACA recipients report that they bought a car since receiving deferred action, translating to increased sales tax revenue and additional local revenue from registration and title fees.³⁰ And 16% of DACA recipients bought their first home since receiving DACA, with that percentage rising to 24% among DACA recipients 25 and older.³¹ Nationwide, DACA recipients are directly responsible for \$760 million in annual mortgage payments and pay \$2.5 billion in rent to their landlords each year.³²

DACA also has helped generate tax revenue necessary to support federal, state, and local government programs and services. In the Los Angeles metro area, DACA recipients pay nearly \$785 million in federal taxes and close to \$400 million in taxes to state and local governments.³³ In the Houston metro area,

²⁸ *Id.*

²⁹ Svajlenka & Truong, *supra* note 7.

³⁰ Wong, *supra* note 26.

³¹ *Id.*

³² Svajlenka & Truong, *supra* note 7.

³³ Svajlenka, *supra* note 3.

DACA recipients pay approximately \$246.5 million in federal taxes and \$136 million in state and local taxes.³⁴ And in the San Francisco metro area, DACA recipients pay \$231.6 million in federal taxes and \$103.4 million in state and local taxes.³⁵ Nationwide, DACA recipient households pay an estimated \$6.2 billion in federal taxes and \$3.3 billion in state and local taxes every year.³⁶ Amici rely on these contributions to help fund critical programs that benefit all of amici's residents.³⁷

Without DACA, amici will be deprived of these gains on which DACA recipients have relied to pursue their dreams for a better and brighter future.

B. DACA Makes Amici's Communities Safer.

In addition to making amici's communities more prosperous and vibrant, DACA also has made them safer because recipients are able to cooperate freely and effectively with law enforcement. Amici's community policing strategies call for trust and engagement between law enforcement and the people they protect.³⁸

³⁴ *Id.*

³⁵ *Id.*

³⁶ Svajlenka & Truong, *supra* note 7.

³⁷ *Id.*; see also Meg Wiehe & Misha Hill, *State & Local Tax Contributions of Young Undocumented Immigrants*, Inst. on Taxation & Econ. Policy (Apr. 30, 2018), <https://perma.cc/WKL6-U2HJ>.

³⁸ See e.g., Hr'g Before the S. Comm. on the Judiciary, 114th Cong. 2 (2015) (statement of Tom Manger, Chief, Montgomery Cty., Md., Police Dep't & President, Major Cities Chiefs Ass'n), <https://perma.cc/SKM2-QKV9>; Anita Khashu, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties*, Police Found. (Apr. 2009), <https://perma.cc/KL5A-EQWR>.

As police agencies themselves report, that trust is undermined when immigration enforcement and the threat of deportation increases.³⁹

Extensive evidence confirms that undocumented immigrants are less likely to report crimes, including violent crimes, when they fear that turning to the police will bring adverse immigration consequences.⁴⁰ One study found that, due to fears that law enforcement officers will ask about immigration status, 67% of undocumented individuals are less likely to offer information to law enforcement as a witness and 70% are less likely to contact law enforcement even if they were victims of a crime.⁴¹ The consequences of this fear permeate beyond unreported and unaddressed crimes: When undocumented immigrants fear police presence, they are less likely to venture into public places, they interact less with schools and other institutions, they patronize businesses less frequently, and they even change their driving patterns.⁴²

³⁹ John Burnett, *New Immigration Crackdowns Creating 'Chilling Effect' on Crime Reporting*, NPR (May 25, 2017), <https://perma.cc/3VJ3-Q8NK>.

⁴⁰ *See, e.g.*, Nik Theodore, Dep't of Urban Planning & Policy, Univ. of Ill. at Chi., *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* 5-6 (May 2013), <https://perma.cc/4B5R-7JL4>; Randy Capps et al., Migration Policy Inst., *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement* 43 (Jan. 2011), <https://perma.cc/T3PR-X4LG>.

⁴¹ Theodore, *supra* note 40.

⁴² Capps, *supra* note 40.

When immigrants do not fear deportation, they cooperate with law enforcement and make our communities safer.⁴³ DACA directly supports amici's safety efforts by decreasing fear of deportation, strengthening community trust, and encouraging immigrant cooperation with law enforcement. Nearly eight in ten DACA recipients reported that they were less afraid of removal because of DACA, and 60% reported that they were less afraid of law enforcement and more willing to report a crime than they would have been without DACA.⁴⁴

Trust and cooperation with local law enforcement is particularly important for young people. A study by the Bureau of Justice Statistics noted that young people aged 18 to 34—a population encompassing most current DACA recipients—have a prevalence rate of victimization higher than that for older individuals.⁴⁵ A strong rapport between immigrants in this age group and law enforcement is critical to protecting these young people and solving crimes. By

⁴³ See, e.g., Scott R. Baker, Econ. Dep't, Stanford Univ., *Effects of Immigrant Legalization on Crime: The 1986 Immigration Reform and Control Act* 1 (Apr. 20, 2013), <https://perma.cc/G5WH-4EX3> (estimating that granting legal status to 1% of undocumented immigrants in a county can lower crime rates there by 2 to 6%).

⁴⁴ Zenén Jaimes Pérez, United We Dream, *A Portrait of Deferred Action for Childhood Arrivals Recipients: Challenges and Opportunities Three-Years Later* 23 (Oct. 2015), <https://perma.cc/AGE7-X5UH>; Roberto G. Gonzales & Angie M. Bautista-Chavez, Am. Immigration Council, *Two Years and Counting: Assessing the Growing Power of DACA* 9 (June 16, 2014), <https://perma.cc/6UBEZ9AK>; Gonzales, *supra* note 6.

⁴⁵ U.S. Dep't of Justice, NCJ 253043, *Criminal Victimization, 2018*, 16, 19, 31 (Sept. 2019), <https://www.bjs.gov/content/pub/pdf/cv18.pdf>.

increasing trust in law enforcement, DACA bolsters amici's public safety initiatives and makes entire communities safer.

The District Court's decision to enjoin DACA threatens not only the hundreds of thousands of young people who currently receive protection under DACA, but also their families, neighbors, employers, and communities like amici who have come to rely on their open participation over the last near decade to grow their economies and make them safer.

II. DACA DOES NOT CONFER WORK AUTHORIZATION AND THUS IS NOT SUBJECT TO THE APA'S NOTICE-AND-COMMENT REQUIREMENTS OR CONTRARY TO THE INA.

The District Court's order enjoining DACA should be reversed. Appellants set forth a number of reasons that the District Court's order is erroneous on both procedural grounds and on the merits, and amici will not repeat them here. Amici instead specifically address the District Court's finding that DACA confers substantive "benefits"—specifically, work authorization—to recipients. First, the District Court found that because DACA confers such a "benefit," it is a substantive rule that must be set aside under the APA for failure to engage in notice-and-comment rulemaking. *See* ROA.25199-25201.⁴⁶ Second, the District Court found that conferral of work authorization is contrary to the INA and thus violates the APA. *See* ROA.25208-25211. The District Court's reasoning for

⁴⁶ All record citations are to the record filed by Federal-Defendants-Appellants.

enjoining DACA on both procedural and substantive APA grounds, however, misunderstands the source of work authorization: It does not come from DACA, but from decades-old regulations not at issue here, which grant the government authority to confer work authorization to certain individuals without lawful immigration status, including those receiving discretionary grants of deferred action. *See* 8 C.F.R. § 274a.12(c)(14). The District Court’s decision therefore should be reversed.

A. Recipients Of Deferred Action Obtain Work Authorization Through Valid Laws And Regulations Independent Of DACA.

The District Court ruled DACA unlawful, in part, because the court found DACA violated the APA’s notice-and-comment rulemaking requirements. *See* ROA.25199-25201, 25028-25211. But this finding is based on the false premise that DACA unlawfully confers the substantive “benefit” of work authorization on recipients. In fact, work authorization is afforded to *any* recipient of deferred action, not only DACA recipients, pursuant to a long-standing regulatory scheme that is *independent* of DACA. Critically, the District Court was not asked to, and did not analyze, the legality of that independent regulatory scheme that predates DACA, or DHS’s broad authority under it.

Since the 1980s, regulations promulgated pursuant to notice-and-comment rulemaking have authorized certain recipients of deferred action to obtain work authorization. In 1981, the Reagan Administration issued regulations that allowed

immigrants granted deferred action by the then-existing Immigration and Naturalization Service (INS) to obtain work authorization if the individual “establishes . . . that he/she is financially unable to maintain himself/herself and family without employment.” 46 Fed. Reg. 25,079, 25,081 (May 5, 1981) (formerly codified at 8 C.F.R. § 109.1(b)(7) (1982)); *see also* Written Testimony of Stephen H. Legomsky, Hearing Before the U.S. H. Comm. on the Judiciary (“Legomsky Testimony”) (Feb. 25, 2015) (“From the earliest days of the Reagan Administration, the former INS (where the analogous immigration responsibilities then resided) understood [its] authority to include the power to decide which noncitizens should receive permission to work. Exercising this power, the INS regulations specifically authorized work permits for recipients of deferred action.”). In 1987, INS promulgated the current version of the work authorization regulation, which similarly provides that “[a]n alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority,” may apply for work authorization “if the alien establishes an economic necessity for employment.” *See* 8 C.F.R. § 274a.12(c)(14); *see also* *Texas v. United States (Texas I)*, 809 F.3d 134, 197 (5th Cir. 2015) (King, J. dissenting).

This regulation, which remains in force today, does not preclude any class of immigrant granted deferred action from eligibility for work authorization. Instead,

the *only* predicate for eligibility, aside from economic need, is that the DHS Secretary (Secretary) grant the individual deferred action. *See* 8 C.F.R. § 274a.12(c)(14) (“An alien within a class of aliens described [in 8 C.F.R. § 274a.12(c)] must apply for work authorization[,],” including “[a]n alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment”); 8 U.S.C. § 1324a(h)(3) (“[T]he term ‘unauthorized alien’ means, with respect to the employment of an alien at a particular time, that the alien is not at that time . . . authorized to be so employed by this chapter or by the [Secretary].”). Work authorization therefore does not result uniquely from DACA; instead, eligibility to apply for work authorization flows collaterally from DACA’s grant of deferred action.

And DHS’s practice confirms what the regulatory text makes clear: From 2012 to 2014 alone, DHS granted work authorization to thousands of individuals who received deferred action *independent of DACA*.⁴⁷ Thus, regardless of DACA’s existence, recipients of deferred action that demonstrate an economic need are eligible to apply for work authorization.

⁴⁷ *See* Shoba S. Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6.1 Colum. J. of Race and L. 1, 16 (2015).

B. DACA Does Not Confer Work Authorization, And Its Promulgation Did Not Violate The APA.

Because DACA does not itself confer work authorization, DACA recipients' eligibility for work authorization pursuant to an independent regulation does not demonstrate any violation of the APA's procedural or substantive requirements. First, DACA recipients' eligibility for work authorization does not require DACA to undergo notice-and-comment rulemaking because DACA did not create or confer any "benefit." Second, recipients' eligibility for work authorization, which they share with all other deferred action recipients, is consistent with the broad discretion granted to the Secretary under the INA and thus is not contrary to law in violation of the APA.

1. DACA Was Not Required to Undergo Notice-and-Comment Rulemaking Because It Does Not Confer Work Authorization.

This Court should reverse the District Court's finding that DACA recipients' eligibility for work authorization means DACA violates the APA because it did not undergo notice-and-comment rulemaking. *See* ROA.25199-25201. DACA is exempt from this APA requirement because it is a "general statement of policy."⁴⁸ 5 U.S.C. § 553(b)(A) (explaining that "interpretative rules, general statements of

⁴⁸ In any event, the District Court's finding that DACA violates the APA because it did not undergo notice-and-comment rulemaking is now moot. As Intervenor-Defendants-Appellants DACA Recipients explain in their brief, DHS's recent notice of proposed rulemaking cures that purported procedural deficiency. Intervenor-Defendants-Appellants DACA Recipients' Brief at 44.

policy, or rules of agency organization, procedure, or practice” are exempt from the APA’s notice-and-comment requirements); *W & T Offshore, Inc. v. Bernhardt*, 946 F.3d 227, 237 (5th Cir. 2019) (“[Substantive rules] typically grant rights, impose obligations, or produce other significant effects on private interests.”) (internal quotations omitted).

Courts look to two factors to determine if an agency action is a general policy statement exempt from notice and comment or a substantive rule that must comply with notice-and-comment procedures. *See Texas I*, 809 F.3d at 171. The court considers whether the action “genuinely leaves the agency and its decision-makers free to exercise discretion”⁴⁹ and whether the rule “imposes any rights and obligations.” *Id.* (alteration omitted). Authorizations that may flow indirectly from agency action—arising from other laws enacted by Congress—do not convert the agency action into a substantive rule that must comply with notice-and-comment procedures. *Cf. Indus. Safety Equip. Ass’n, Inc. v. Envtl. Prot. Agency*, 837 F.2d 1115, 1121 (D.C. Cir. 1988) (holding that agency action that may have had an effect on certain manufacturers was not a substantive rule subject to notice

⁴⁹ Although the District Court questioned whether DACA genuinely leaves DHS and its agents free to exercise discretion in deciding when to grant deferred action, *see* ROA.25201-25206, Appellants explain at length how the discretion afforded to DHS weighs against concluding that DACA does not afford discretion. Federal-Defendants-Appellants’ Brief at 26-27.

and comment because the effect was indirect, arising from the choices of third parties).

The District Court's finding that DACA imposes rights and obligations is rooted in the erroneous conclusion that, in creating DACA, DHS granted recipients the "benefit" of work authorization. *See* ROA.25199-25201, 25217-25218. This conclusion is simply wrong. As discussed above, the work authorization granted to individuals with deferred action, including (but not limited to) DACA recipients, flows from decades-old statutory and regulatory authority wholly independent of DACA and that in fact preceded it. *See* 8 U.S.C. § 1324a(h)(3); 8 C.F.R. § 274a.12(c)(14).

Indeed, the 2012 memorandum that established DACA did not purport to grant recipients either work authorization or some substantive benefit. In fact, it said the exact opposite: "This memorandum confers no substantive right, immigration status or pathway to citizenship."⁵⁰ In the months following the creation of DACA, U.S. Citizenship and Immigration Services (USCIS) published public guidance making clear that DACA merely provided recipients with deferred action, while separate and preexisting regulations made recipients of deferred

⁵⁰ Memorandum for David V. Aguilar, et al. from Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children 3* (June 15, 2012).

action eligible to apply for work authorization.⁵¹ The Supreme Court also has recognized the separation between DACA and work authorization, noting in the fact recitation of the *Regents* case that DACA simply “directs [USCIS] to ‘accept applications to determine whether these individuals qualify for work authorization during this period of deferred action,’ . . . as permitted under regulations long predating DACA’s creation.” *Regents*, 140 S. Ct. at 1902 (citing 8 C.F.R. § 274a.12(c)(14); 46 Fed. Reg. at 25,080-81) (emphasis added).

The interaction between DACA and the work authorization regulation is similar to other deferred action initiatives that have been previously implemented by DHS. Like DACA, other deferred action initiatives, including those involving classes of individuals, permit recipients of deferred action to obtain work authorization under longstanding regulations. *See* Federal-Defendants-Appellants’ Brief at 5, 44-45. And like DACA, none of those deferred action initiatives engaged in notice-and-comment rulemaking, and none have been set aside for any purported failure to do so.

In its Order, the District Court offered no analysis for why DACA should be set aside because the grant of deferred action triggered the application of other

⁵¹ *Frequently Asked Questions*, U.S. Citizenship & Immigration Servs., <https://www.uscis.gov/archive/frequently-asked-questions> (“Q4: *If my removal is deferred under the consideration of DACA, am I eligible for employment authorization?* A4: Yes. **Under existing regulations, if your case is deferred, you may obtain employment authorization from USCIS provided you can demonstrate an economic necessity for employment.**”) (emphasis added).

lawful statutes and regulations. Nor did it offer authority for why *eligibility to apply for* work authorization under a separate and discretionary regulatory scheme should be treated as a *conferral of a substantive benefit*. Because DACA does not confer a right to work on recipients but instead merely makes them eligible, like all individuals granted deferred action, to apply for work authorization pursuant to other lawful regulations, DACA does not impose substantive “rights and obligations” for purposes of the APA. *See W & T Offshore, Inc.*, 946 F.3d at 237.

2. DACA Does Not Conflict with the INA’s Work Authorization Scheme.

This Court also should reject the District Court’s finding that DACA must be set aside because it is contrary to law in violation of the APA. Among other things, the District Court found that DACA is incompatible with the INA, which “intricately describes groups to whom Congress wishes to grant work authorization, delineating precise categories of aliens for whom work authorization is available.” ROA.25216. This finding rests on the same faulty premise that DACA somehow affirmatively grants work authorization, despite the existence of preexisting regulations that apply generally to all deferred action recipients, and it fails to explain how a work authorization regulation independent of DACA renders DACA unlawful but does not void every other deferred action initiative.

The District Court summarily dismissed Appellants’ argument that 8 C.F.R. § 274a.12(c)(14) is a separate federal regulation that permits DACA recipients to

obtain work authorization. The District Court found that it would be outside the powers authorized by the INA to read the regulation as allowing DHS to issue employment authorization to “any class of illegal aliens whom DHS declines to remove.” ROA.25218. But the District Court wholly failed to reconcile this finding with the other grants of deferred action that past administrations have granted to broad swaths of people. And as Appellants explain, the District Court erroneously concluded that because Congress committed to statute that certain classes of immigrants must receive work authorization and others must not, this must mean that Congress has committed to statute every group of immigrants eligible for work authorization. Federal-Defendants-Appellants’ Brief at 49. That conclusion fundamentally misunderstands the INA’s work authorization scheme and related authority. *See* 8 U.S.C. § 1324a(h)(3); *Doe v. KPMG, LLP*, 398 F.3d 686, 688 (5th Cir. 2005) (“When interpreting a statute, we start with the plain text, and read all parts of the statute together to produce a harmonious whole.”). Indeed, this Court has explicitly recognized that the Secretary has the authority to grant work authorization, explaining that “the agency’s decision to grant . . . work authorization has been committed to agency discretion by law.” *Perales v. Casillas*, 903 F.2d 1043, 1045 (5th Cir. 1990).

Without even addressing the fact that statutory grants and denials of work authorization to certain classes of noncitizens do not eviscerate the Secretary’s

discretion to afford work authorization to other classes of noncitizens, the District Court found that Congress must have intended to prevent the Secretary from granting work authorization to deferred action recipients because immigration laws are meant to regulate the presence of immigrant workers in the labor force.

ROA.25217-25219. This is wrong because it fails to explain how a general goal of immigration law could somehow repudiate Congress's specific grant of discretion to the Secretary. *See Immigr. & Naturalization Serv. v. Nat'l Ctr. For Immigrants' Rights*, 502 U.S. 183, 194-95 (1991).

Even though the District Court relied on Congress's passage of the Immigration Reform and Control Act of 1986 (IRCA) as support for its finding, *see* ROA.25217-25219, IRCA actually undermines the District Court's finding. In IRCA, Congress chose *not* to explicitly limit the original work authorization regulation or the Secretary's broad authority under it to grant deferred action to individuals lacking lawful immigration status and to offer such individuals work authorization for demonstrated financial need. *See* 46 Fed. Reg. at 25,081.

Instead, IRCA made the Secretary's authority explicit, 8 U.S.C. § 1324a(h)(3), and did nothing to restrict the INS's ongoing exercise of that authority to grant work authorization to individuals previously granted deferred action. *See* 8 C.F.R. § 274a.12(c)(14). When passing IRCA, Congress also did not place any limits on the Secretary's discretion because IRCA did not limit the number of work permits

that USCIS could grant to deferred action recipients under 8 C.F.R.

§ 274a.12(c)(14). Congress knows how to impose limits in the area of immigration law when it wants to impose such limits. *See* 8 USC §§ 1151-1153, 1184(g), (o), (p). But it chose not to do so here.

Finally, the District Court improperly analyzed only one goal of the immigration laws while ignoring another. The District Court singularly focused on regulating the presence of immigrant workers in the labor force, *see* ROA.25217-25219, but wholly failed to consider that Congress also considers it a compelling government interest to enact new rules “to assure that aliens be self-reliant in accordance with national immigration policy.” *See* 8 U.S.C. § 1601(5). Both DACA and the separate work authorization regulation align with this compelling interest.

CONCLUSION

For the reasons stated above, the Court should reverse the District Court’s order vacating and enjoining DACA.

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CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 27(d)(2)(A) and 29(a)(5) because it contains 6,094 words, as measured by Microsoft Word software. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced, Roman-style typeface of 14 points or more.

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