WHEN A ROSE IS NOT A ROSE: DACA, THE DREAM ACT, AND THE NEED FOR MORE COMPREHENSIVE IMMIGRATION REFORM

MARISA BONO*

"This is not an amnesty . . . This is not a path to citizenship. It is not a permanent fix."

BARACK OBAMA, June 15, 2013 Remarks Regarding Deferred Action for Childhood Arrivals[1]

Well now what's the use in dreamin'
You got better things to do
Dreams never did work for me anyway
Even when they did come true

BOB DYLAN, "I Feel a Change Comin' On"

I. INTRODUCTION

Few groups in modern history have been politicized, romanticized, publicized,[2] or demonized quite like the DREAMers.[3] Characterized as

---

* Marisa Bono is Southwest Regional Counsel for the Mexican American Legal Defense and Educational Fund (MALDEF) in San Antonio, Texas. Many thanks to JonCarlo Serna for the excellent research assistance and to Enriqueta A. Perez for her substantial insights and edits. Any opinions expressed in this article are solely those of the author and do not necessarily represent the position or policy of MALDEF.

1. President Barack Obama, *Remarks by the President on Immigration*, WHITE HOUSE (June 15, 2012, 2:30 PM), http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration.

2. *See* Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students,* 21 WM. & MARY BILL RTS. J. 463, 519 (2012). [hereinafter Olivas Dream Deferred] (noting that there have been hundreds of media stories about DREAMers, as well as books and scholarly articles).

3. *See, e.g.,* S. 1291, 107th Cong. §§ 2, 3 (2001); S. 1545, 108th Cong. (2003); S. 2863, 108th Cong. §§ 1801-13 (2004); S. 2075, 109th Cong. (2005); H.R. 5131, 109th Cong. (2006); S. 2611, 109th Cong. §§ 621-32 (2006); H.R. 1275, 110th Cong. (2007); H.R. 1645, 110th Cong. §§ 621-32 (2007); S. 774, 110th Cong. (2007); S. 1348, 110th Cong. §§ 621-32 (2007) (as amended by S.A. 1150 §§ 612-19); S. 1639, 110th Cong. §§ 612-20 (2007); S. 2205, 110th Cong. (2007); H.R. 1751, 111th Cong. (2009); S. 729, 111th Cong. (2009); H.R. 5281, 111th Cong. §§ 5-16 (2010); H.R. 6497, 111th Cong. (2010); S. 3827, 111th Cong. (2010); S. 3932, 111th Cong. §§ 531-42 (2010); S. 3962, 111th Cong. (2010); S. 3963, 111th Cong. (2010); S. 3992, 111th Cong. (2010); H.R. 1842, 112th Cong. (2011); S. 952, 112th Cong. (2011); S. 1258, 112th Cong. §§ 141-149 (2011); H.R. 112th Cong. (2012)

courageous student advocates and boons to the American economy by some,[4] and as criminal deviants who demand to be rewarded for violating federal laws by others,[5] few can contest that DREAMers are firmly entrenched in American political culture and the legislative debate on immigration reform.[6]

DREAMers were perhaps never the subjects of more controversy than when President Barack Obama announced that his administration would defer deportation for DREAMers on June 15, 2012.[7] On the same day, the

---

(immigrant students residing in the United States since childhood are often referred to as "DREAMers" because they comprise most (though not all) of the individuals who meet the general requirements of the Development, Relief, and Education for Alien Minors (DREAM) Act, and many have publicly advocated for its passage. The DREAM Act, or some variation, has been introduced in Congress at least a couple of dozen times); *see generally* Elisha Barron, *The Development, Relief, and Education For Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623 (2011) (overview of legislative efforts to pass DREAM Act); *see generally* Ren Galindo, *Undocumented & Unafraid: The DREAM Act 5 and the Public Disclosure of Undocumented Status as a Political Act*, 44 URBAN REV. 589 (2012) (examples of political advocacy and strategies employed by DREAMers to support DREAM legislation).

4. *See, e.g.*, Victor Narro, *Follow the Dream(ers) to Humane Immigration Reform*, HUFF. POST (Aug. 8, 2013), http://www.huffingtonpost.com/victor-narro/follow-the-dreamers-to-hu_b_3722230.html (lauding nonviolent strategies of DREAM activists); Wendy Sefsaf, *22 Senators Demand President Obama Exercise Executive Action on Immigration,* IMMIGRATION IMPACT (Apr. 14, 2011), http://immigrationimpact.com/2011/04 /14/22-senators-demand-president-obama-exercise-executive-action-onimmigration/ (detailing letter from 22 U.S. Senators to President Barack Obama characterizing DREAMers as a "talented group of responsible young people with the potential to further enrich our great nation"); Center for American Progress, prepared by Juan Carlos Guzmán and Raúl C. Jara, *The Economic Benefits of Passing the DREAM Act*, Oct. 2012, *available at* https://docs.google.com/viewer?url=http://www.americanprogress.org/wp-content/uploads/2012/09/DREAMEcon-7.pdf (concluding that DREAMers could add $329 billion to the national economy); *see also* Olivas, *supra* note 2, at n.144 (citing additional news articles that cast DREAMers in favorable light).

5. *See, e.g.*, Todd Beamon and John Bachman, *Rep. Steve King Slams Norquist Over Attacks on Immigration*, NEWSMAX, (Jul. 18, 2013), http://www.newsmax.com/Newsfront/king-norquist-attacks-immigration/2013/07/18/id/515882#ixzz2ZVT2GoP5 (quoting U.S. Congressman who claims that DREAMers are overwhelmingly drug runners who "weigh 130 pounds — and they've got calves the size of cantaloupes because they're hauling 75 pounds of marijuana across the desert. . . ."); Ruben Navarette, *DREAMers are pushing their luck*, CNN, (Dec. 19, 2012), http://www.cnn.com/2012/12/19/opinion/navarette-dreamers (characterizing DREAMers as "spoiled brats" who throw "public tantrums" and are "drunk on entitlement"); Barron, *supra* note 3, at 624-25.

6. *See* Olivas, *supra* note 2, at 463 (overview of the role of DREAMers and the DREAM Act in efforts to achieve comprehensive immigration reform).

7. Obama, *supra* note 1; Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, The Dream Act, and The Take Care Clause,* TEX. L. REV. 781 (2013) (arguing that the Obama Administration exceed Executive authority when it initiated DACA); E.J. Montini, *Brewer's Ire over Policy Is About Timing*,

Secretary of the Department of Homeland Security ("DHS"), Janet Napolitano, issued a memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (the "DACA Memo I" or "DACA I").[8] The DACA Memo I set forth a "deferred action" initiative by which unauthorized youth who grew up in the United States were eligible for a stay of deportation.[9] Secretary Napolitano instructed United States Citizenship and Immigration Services ("USCIS"), Immigration Customs Enforcement ("ICE"), and Customs and Border Protection ("CBP") officials to use their prosecutorial discretion to refrain from prospectively placing childhood arrivals into removal proceedings, to grant childhood arrivals already in removal proceedings with deferred action, and to permit childhood arrivals to affirmatively apply for deferred action.[10] When the DACA Memo I was issued, an estimated 1.4 million DREAMers were living in the United States.[11] Later, on November 20, 2014, President Obama issued another memorandum expanding eligibility for DACA (the "DACA Memo II" or "DACA II").[12]

ARIZ. REPUB., June 18, 2012, at B1 (quoting Governor Brewer's reaction to Obama's announcement of the DACA policy: "This was an outrageous announcement...that intends to grant back-door amnesty").

8. Memorandum from Janet Napolitano, Sec'y of Homeland on DACA to Sec. to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship and Immigration Servs., and John Morton, Dir., U.S. Immigration and Customs Enforcement (June 15, 2012), *available at* https://docs.google.com/viewer?url=http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

9. *Id*.

10. *See id*.

11. *See* American Immigration Council, *Who and Where the DREAMers Are*, IMMIGRATION POLICY CENTER (Aug. 18, 2012), http://www.immigrationpolicy.org/just-facts/who-and-where-dreamers-are (this is a conservative estimate); *see, e.g.*, Agency Information Collection Activities: Application for Employment Authorization, Form I-765, Revision of a Currently Approved Information Collection; Emergency Submission to the Office of Management and Budget; Comment Request, 77 Fed. Reg. 49453 (Aug. 16, 2012), *available at* https://www.federalregister.gov/articles/2012/08/16/2012-20251/agency-information-collection-activities-application-for-employment-authorization-form-i-765.

12. Memorandum from Jeh Charles Johnson, Sec'y of Homeland on DACA to León Rodriguez, Dir. U.S. Citizenship and Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enforcement, R. Gil Krelikowski, Comm'r, U.S. Customs and Border Prot., (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf; *see also* U.S. CITIZENSHIP AND IMMIGR. SERV., EXECUTIVE ACTIONS ON IMMIGRATION, *available at* http://www.uscis.gov/immigrationaction (last updated March 3, 2015). In this article, DACA I and DACA II are referred to collectively as "DACA." Through the same executive action, the President also allowed parents of U.S. citizens and lawful permanent residents to request deferred action in a new Deferred Action for Parents

DACA opponents decried the initiative as an "unprecedented" usurpation of power by the Obama Administration,[13] when, in fact, deferred action is well established in immigration jurisprudence and has been used regularly in practice for many years.[14] On its face, DACA was a reason for DREAMers to celebrate, but their battle was far from over. First, this article provides an overview of the federal immigration system, including the exclusivity of federal power over immigration, the vigilance of federal courts guarding against piecemeal local immigration policy, and the accepted role of deferred action as a type of prosecutorial discretion. Second, after providing an explanation of the DACA initiative and a synopsis of ensuing litigation, this article explains that DACA, while better than the *status quo*, has created substantial uncertainty for DREAMers and the public-at-large. Finally, this article argues that the lack of permanent statutory relief for DREAMers as part of comprehensive immigration reform will only lead to expensive litigation and patchwork in a system that was meant to be uniform and cohesive.

II. AN OVERVIEW OF THE FEDERAL IMMIGRATION SYSTEM

The federal government has supreme, exclusive power to regulate immigration,[15] with a unified system being the ultimate goal. Accordingly, federal courts have struck down local immigration policies repeatedly, ever vigilant of "the prospect of a patchwork of '[s]tate immigration polic[ies].'"[16] Contrary to public proclamations by immigration opponents,[17] the DACA Memos were not an "unprecedented" use of

---

of Americans and Lawful Permanent Residents ("DAPA"). Because DACA and available relief for DREAMers is the subject of this article, DAPA is referenced but not discussed at great length.

13. *See Executive Discretion: Mini-DREAM and the Rule of Law*, THE ECONOMIST (June 18, 2012), http://www.economist.com/blogs/democracyinamerica/2012/06/executive-discretion; *see, e.g.*, Charles Krauthammer, *Charles Krauthammer, Obama's amnesty-by-fiat-- naked lawlessness,* WASH. POST.(June 21, 2012), http://www.washingtonpost.com/opinions/charles-krauthammer-obamas-amnesty-by-fiat--naked-lawlessness/2012/06/21/gJQAa5PltV_story.html (arguing that DACA represents "rewrite" of preexisting immigration laws).

14. *See infra* Part I.B.

15. DeCanas v. Bica, 424 U.S. 351, 354-55 (1976) (citing Passenger Cases, 7 How. 283 (1849); Henderson v. Mayor of New York, 92 U.S. 259 (1876); Chy Lung v. Freeman, 92 U.S. 275 (1876); Fong Yue Ting v. United States, 149 U.S. 698 (1893)).

16. Villas at Parkside Partners v. Farmers Branch, 726 F.3d 524, 549 (5th Cir. 2013)(en banc)(citing Arizona v. U.S., 132 S. Ct. 2492, 2506 (2012)).

17. *See* Krauthammer, *supra* note 13.

Executive authority. Instead, they are part of a decades-long series of directives and internal analyses by federal authorities,[18] which rely on prosecutorial discretion in immigration enforcement to defer removal action against individuals on a case-by-case basis.[19]

A. Speaking With One Voice: The Exclusivity of Federal Power Over Immigration and Its Comprehensive Regime

1. An exclusive, detailed regulatory scheme

The absolute authority of Congress over immigration and the mandate for a uniform system is explicit in the United States Constitution, which grants Congress the exclusive power to "establish a uniform Rule of Naturalization" and to "regulate Commerce with foreign Nations."[20] For at least a century, the United States Supreme Court has repeatedly interpreted these provisions to mean that the "[p]ower to regulate immigration is unquestionably exclusively a federal power."[21] Accordingly, in 1952, Congress enacted the Immigration and Nationality Act (the "INA"), "[a] comprehensive, detailed regulatory scheme."[22]

Through the INA, the federal government fully occupied the field of alien registration,[23] providing a comprehensive, unified, robust set of standards to classify and keep track of immigrants within U.S. borders.[24]

---

18. *See* Shoba S. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 248-65 (2010) [hereinafter *Wadhia Role*].

19. *See id* at 252-53.

20. U.S. Const. art. I § 8, cl. 4, 3.

21. DeCanas v. Bica, 424 U.S. 351, 354 (1976); *see* Krauthammer, *supra* note 13; *see also* Arizona v. U.S., 132 S.Ct. 2492 (2012); Plyler v. Doe, 457 U.S. 202, 225 (1982) ("The States enjoy no power with respect to the classification of aliens. This power is committed to the political branches of the Federal Government. . . . [O]nly rarely are such matters relevant to legislation by a State.") (internal citations and quotations omitted); *see* Toll v. Moreno, 458 U.S. 1, 10 (1982) ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders."); Traux v. Raich, 239 U.S. 33, 42 (1915) ("The authority to control immigration . . . is vested solely in the Federal government.").

22. United States v. Hernandez-Guerrero, 963 F.Supp. 933, 1078 (S.D. Cal. 1997).

23. *See Arizona*, 132 S.Ct. at 2502 (citing American Ins. Ass'n. v. Garamendi, 539 U.S. 396, 419 (2003); (citation omitted).

24. *See id*; Villas at Parkside Partners v. Farmers Branch, 726 F.3d 524, 537 (5th Cir. 2013) (holding that "the power to classify non-citizens is reserved exclusively to the federal government").

The INA also sets forth the exclusive means for determining which immigrants may be admitted or removed from the country.[25]

Our immigration system may be complex and has even been compared to the Internal Revenue Code,[26] but Congress very purposefully designed it as a "'harmonious whole,'"[27] given the relationship between immigration and foreign affairs.[28] As stated by the Supreme Court in *Plyler v. Doe*, "alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation."[29] In fact, the Supreme Court has repeatedly commented on the vital dependence of foreign affairs, such as trade and diplomatic relations, on comprehensive domestic immigration policy, and the resulting need for exclusive federal control.[30] More recently, the Court also noted that tourism and the threat of reciprocal mistreatment of Americans abroad were also important reasons for maintaining a uniform system.[31]

2. Federal courts parrying piecemeal in the system

Having underscored the importance of a comprehensive immigration system to national priorities, the judiciary has spoken emphatically against the threat of local immigration policy to uniformity in the system. The Supremacy Clause of the United States Constitution provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[32] In essence, the absence of an express preemption provision means federal law trumps local law.[33]

---

25. *See* 8 U.S.C. § 1229a(a)(3) (setting out the "sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States").

26. *See* Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987) ("Immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'") (citation omitted).

27. Hines v. Davidowitz, 312 U.S. 52, 72 (1941).

28. *See, e.g., Arizona*, 132 S.Ct. at 2498.

29. Plyer v. Doe, 457 U.S. 202, 219 n.19 (1982).

30. *See, e.g.*, *Arizona*, 132 S. Ct. at 2498–99; *see also* Toll v. Moreno, 458 U.S. 1, 10 (1982).

31. *See Arizona*, 132 S. Ct. at 2498–99 (citations omitted).

32. U.S. CONST. art. VI, cl. 2.

33. *Arizona*, 132 S. Ct. at 2501.

This is not to say that any state law related to immigration is automatically preempted[34] by federal law,[35] and therefore unenforceable. In *Arizona v. United States*,[36] the Supreme Court noted that a local law is preempted under the Supremacy Clause both where Congress enacts "an express preemption provision" but also where congressional "intent to displace state law altogether can be inferred from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it.'"[37]

In *Arizona*, the Supreme Court struck a state law provision, which endowed the State with independent authority to prosecute federal registration violations.[38] The provision would have allowed state actors to determine who should be admitted and allowed to remain, and "diminish[] the [Federal Government]'s control over enforcement" and "detract[] from the 'integrated scheme of regulation' created by Congress."[39] Federal courts have also prevented states from imposing *additional* burdens on certain noncitizens based on the states' own classification and enforcement schemes.[40] State and local harboring laws,[41] restrictive housing ordinances,[42] and landowner sanction laws[43] have all met the same fate on

34. *See generally* Mark S. Grube, *Preemption of Local Regulations Beyond Lozano v. City of Hazleton: Reconciling Local Enforcement with Federal Immigration Policy*, 95 CORNELL L. REV. 391 (2010) (technical and extensive review of preemption doctrine); *see also Arizona*, 132 S.Ct. at 2501.

35. *See* DeCanas v. Bica, 424 U.S. 351, 354-55 (citing a line of cases upholding certain discriminatory state treatment of immigrants lawfully within the United States).

36. *Arizona*, 132 S. Ct. at 2492.

37. *Id*. at 2501 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); *see id*. at 2502 ("Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible.").

38. *Id*. at 2502.

39. *See id.* (citing Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. 282, 288–89 (1986)).

40. *See, e.g.,* United States v. Alabama, 691 F.3d 1269, 1292-97 (11th Cir. 2012).

41. Georgia Latino Alliance for Human Rights v. Governor of Georgia, 691 F.3d 1250, 1256-57 (11th Cir. 2012) (concluding that state law proscribing harboring undocumented immigrants lacking lawful status "presents an obstacle to the execution of the federal statutory scheme and challenges federal supremacy in the realm of immigration"); *Alabama*, 691 F.3d at 1287–88; United States v. South Carolina, 906 F.Supp.2d 463, 468 (D.S.C. 2012) (concluding that provisions of state law prohibiting transporting or sheltering undocumented immigrants would interfere with federal enforcement discretion), *aff'd*, —— F.3d ——, 2013 WL 3803464 (4th Cir. July 23, 2013); Valle del Sol v. Whiting, No. CV 10–1061–PHX–SRB, 2012 WL 8021265, at *6 (D. Ariz. Sept. 5, 2012).

42. *See, e.g.*, Villas at Parkside Partners v. Farmers Branch, 726 F.3d 524 (5th Cir. 2013); Keller v. City of Fremont, 853 F.Supp.2d 959, 972–73 (D. Neb. 2012), rev'd, 2013 WL 3242111 (8th Cir. June 28, 2013) (concluding that city ordinance penalizing harboring

the preemption chopping block, with federal courts bearing one touchstone in mind: "Because the nation must necessarily speak 'with one voice' when pronouncing 'whether it is appropriate to allow a foreign national to continue living in the United States,' the Supremacy Clause does not abide local experimentation that deviates from 'the system Congress created.' "[44]

III. THE ACCEPTED ROLE OF DEFERRED ACTION IN THE FEDERAL IMMIGRATION SYSTEM

In the established immigration regime, the Secretary of Homeland Security is responsible for "the administration and enforcement" of the immigration laws of the United States,[45] and has the ability to "establish such regulations . . . deemed necessary for carrying out his [or her] authority under the provisions of this Act."[46] The President and Congress create administrative agencies, such as the DHS, to enforce the regulatory system.[47] The Executive Branch (and its agencies), by Congress's mandate, decides how to enforce the regulations.[48] The field of immigration is one where "flexibility . . . constitute[s] the essence of the program."[49] In addition to immigration statutes and federal court cases, the Executive Branch has developed guidelines for prosecutorial discretion through intra-agency memoranda and policy manuals.[50]

---

or the lease or rental of dwelling units to aliens lacking lawful status would impair "the structure Congress has established for classification, adjudication, and potential removal of aliens").

43. *See, e.g.,* Villas at Parkside Partners v. Farmers Branch, 577 F. Supp. 2d 858, 879 (N.D. Tex. 2008); Lozano v. Hazleton, 496 F. Supp. 2d 477, 533 (M.D. Pa. 2007).

44. *Farmers Branch*, 726 F.3d at 549 (citing Arizona v. U.S., 132 S.Ct. 2492, 2506–07 (2012)).

45. 8 U.S.C. § 1103(a)(1) (2014).

46. *Id*. §§ 1103(2)-(3).

47. *See id.*; Naomi Cobb, *Deferred Action for Childhood Arrivals (DACA): A Non-Legislative Means to an End That Misses the Bullseye*, 15 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 651, 671 (2013) (The U.S. Citizenship & Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration & Customs Enforcement (ICE) are component agencies of DHS that assist in enforcing immigration laws and regulations, including affirmative relief applications and enforcement activities such as detention and removal).

48. *See* Cobb, *supra* note 47, at 671.

49. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950).

50. 8 U.S.C. § 1103; 8 C.F.R. § 274a.12(c)(14); Heckler v. Chaney, 740 U.S. 821, 831 (1985); Lennon v. INS, 528 F.2d 187, 193 (2d Cir. 1975); *see, e.g.*, Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, on Exercising

In *Heckler v. Chaney*, the Supreme Court interpreted the Homeland Security Secretary's statutory authority to include the exclusive authority to initiate or terminate removal proceedings.[51] This authority, known as "prosecutorial discretion," allows the executive branch to initiate or terminate removal proceedings at will,[52] and can be applied in a wide variety of circumstances before, during, and after removal proceedings.[53] In 2011, John Morton, the director of the USCIS released a memorandum

---

Prosecutorial Discretion ("Meissner Memo") (Nov. 17, 2000), *available at* http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf/view; Memorandum from John Morton, Assistant Sec'y, U.S. Immigration and Customs Enforcement, to Peter S. Vincent, Principal Legal Advisor, on Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions ("August Morton Memo") (Aug. 20, 2010), *available at* http://www.ice.gov/doclib/detention-reform/pdf/aliens-pending-applications.pdf; Memorandum from John Morton, Dir. U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge & All Chief Counsel, on Exercising Prosecutorial Discretion Consistent with Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens ("June Morton Memo") (June 17, 2011), *available at* http://www.ice.gov /doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf; Additional specific examples of agency authority and procedure to use deferred action include, but are not limited to: the ICE Detention and Removal Operations Policy and Procedure Manual, the "Cooper Memo" on INS Exercise of Prosecutorial Discretion, the "Howard Memo" on Exercising Prosecutorial Discretion to Dismiss Adjustment Cases, the "Myers Memo" on Prosecutorial and Custody Discretion. *See* Nicole Comstock and Linnea Ignatius, *Private Bills & Deferred Action Toolkit*, *available at* http://www.scribd.com /doc/57430301/28/V-THE-COOPER-MEMO-LEGACY-INS.

51. *See Heckler*, 470 U.S. at 831.

52. *See, e.g.,* Mason v. Mukasey, 306 F. App'x 897, 902 (6th Cir. 2009) (finding that prosecutorial discretion, allows enforcement agencies to terminate proceedings, or to decline initiating proceedings or executing a final order of deportation); *see also* U.S. Dep't of Justice, "Prosecutorial Discretion Guidelines" (2000) ("Prosecutorial discretion is the authority that every law enforcement agency has to decide whether to exercise its enforcement powers against someone."); Meissner Memo, *supra* note 50, at 1. The INS was eliminated by the Homeland Security Act in November 2002 and was restructured into ICE, CBP, and USCIS, all of which are overseen by the DHS. *See* The Homeland Security Act of 2002, Pub.L. No. 107–296, 110 Stat. 2135 (Nov. 25, 2002).

53. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-67, IMMIGRATION ENFORCEMENT: ICE COULD IMPROVE CONTROLS TO HELP GUIDE ALIEN REMOVAL DECISION MAKING (2007), *available at* http://www.gao.gov/products/GAO-08-67. ("ICE officers exercise discretion when they decide whom to stop, question, and arrest; how to initiate removal; whether to grant voluntary departure. . . . and whether to detain an alien in custody . . . [If an ICE officer] pursue[s] removal, ICE attorneys exercise discretion when they decide whether and how to settle or dismiss a removal proceeding or to appeal a decision rendered by an immigration judge."). For a more technical walk-through of how removal proceedings are initiated and conducted, *see* Cobb, *supra* note 47, at 673.

(the "Morton Memorandum") providing guidelines for the use of prosecutorial discretion in immigration enforcement.[54] In order to achieve the agency priorities of national security and public safety more efficiently, the Morton Memorandum provides ICE personnel "guidance on the exercise of prosecutorial discretion to ensure that the agency's immigration enforcement resources are focused on the agency's enforcement priorities . . ." The Morton Memorandum urges USCIS and ICE agents and attorneys to assess enforcement decisions based on the totality of the circumstances, to refrain from pursuing noncitizens with close family, educational, military, or other ties in the United States, and to spend the agency's limited resources on persons who pose a serious threat to public safety or national security.[55]

Deferred action is one type of prosecutorial discretion that has existed at least since the mid-1970s[56] and, given current estimates of approximately 11 million undocumented immigrants living in the United States,[57] is another administrative tool that the DHS uses to prioritize its limited resources as directed by Congress.[58] The Executive may "defer action," or decline—at least for the time being—"to institute proceedings, terminate proceedings, or decline to execute a final order of deportation."[59] Congress has directed the DHS not to "simply round[] up as many illegal immigrants as possible,"[60] but instead to "prioritize[] the identification and removal of aliens convicted of a crime by the severity of that crime."[61]

---

54. June Morton Memo, *supra* note 50, at 2-4.

55. *Id* at 4.

56. *See* Wadhia Role, *supra* note 18, at 246. *See id*. at 246-65 for a fascinating, thorough history on the evolution of deferred action over the decades.

57. Jeffrey Passel & D'Vera Cohn, *Unauthorized Immigrants: 11.1 Million in 2011,* PEW RESEARCH CENTER (Dec. 6, 2012), http://www.pewhispanic.org/2012/12/06/unauthorized-immigrants-11-1-million-in-2011.

58. Cobb, *supra* note 47, at 673-74. Immigration officials have their hands full. In 2011, CBP's Border Patrol apprehended over half a million people. *See* John Simanski & Lesley M. Sapp, *Immigration Enforcement Actions: 2011*, DEPT. OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS 3 (2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf (last visited Aug. 12, 2013). ICE "conducts criminal investigations involving the enforcement of immigration-related statutes." *Id*. at 7. ICE officers are responsible "for the identification, apprehension, and removal of illegal aliens from the United States." *Id.* Hundreds of thousands of immigrants are removed by the Federal Government every year. *See id.* at 4.

59. Reno v. Am.-Arab Anti-Discrimination Comm. ("AADC"), 525 U.S. 471, 483-84 (1999) (quoting C. GORDON ET AL., 6 IMMIGRATION LAW AND PROCEDURE §72.03(2)(h) (1998)).

60. H.R. REP. NO. 111-157, at 8 (2009) (accompanying H.R. 2892, 111th Cong. (2009) (enacted as amended)) (noting that the DHS is better served by "ensur[ing] that the

Executive administrators have exercised their discretion to grant deferred action for two main purposes: first, to more efficiently allocate resources as a matter of "administrative convenience;"[62] and second, to recognize humanitarian considerations when removable would be unconscionable.[63] Immigration officials have been directed to use their discretion to defer action on a case-by-case basis, for non-priority offenders and to conserve finite agency resources.[64]

Executive use of deferred action has been prevalent for many years and has been prevalent for many years and is widely accepted by federal courts. The existence of potential separation from family, existing family illness, history of mental illness, criminal history, DREAM status, and negative publicity have all been factors in deferred action adjudications.[65] The DHS has also extended consideration of deferred action to specific groups, such as students affected by Hurricane Katrina,[66] and widows and widowers of U.S. citizens who reside in the United States and were married for less than two years prior to their spouse's death.[67] The Supreme Court has endorsed the use of deferred action and its underlying rationale,[68] noting that a "principal feature of the removal system is the broad discretion exercised by immigration officials . . . Federal officials, as an initial matter,

---

government's huge investments in immigration enforcement are producing the maximum return in actually making our country safer").

61. DHS Appropriations Act, 2012, Pub. L. No. 112-74, Div. D. Tit. II, 125 Stat. 786, 950 (2011); *see also* DHS Appropriations Act, 2010, Pub. L. No. 111-83, Div. D. Tit. II, 123 Stat. 2142, 2149 (2009); DHS Appropriations Act, 2009, Pub. L. No. 110-329, Div. D. Tit. II, 122 Stat. 3574, 3659 (2008).

62. 8 C.F.R. § 274a(12)(c)(14); *see also* Soon Bok Yoon v. Immigration and Naturalization Serv., 538 F.2d 1211, 1213 (5th Cir. 1976).

63. Meissner Memo, *supra* note 50, at 8.

64. Meissner Memo, *supra* note 50, at 4-5 ("Like all law enforcement agencies. . . the [former] INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. . . . the Service must make decisions about how best to expend its resources. Managers should plan and design operations to maximize the likelihood that serious offenders will be identified"). S*ee also* Morton Memorandum, *supra* note 50, at 2 (stating that immigration enforcement priorities such as national security and public safety are best achieved when finite agency resources are not allocated to the removal of low-priority immigrants).

65. *See* Wadhia Role, *supra* note 18, at 261-62.

66. *See* Press Release, U.S. Citizenship and Immigration Services, *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* (Nov. 25, 2005), *available at* http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf.

67. *See* Wadhia Role, *supra* note 18, at 263.

68. *See, e.g.*, Reno v. Am.-Arab Anti-Discrimination Comm. ("AAADC"), 525 U.S. 471, 483-84 (1999).

must decide whether it makes sense to pursue removal at all."[69] Several circuit courts have followed suit, finding deferred action to be a legitimate and valid exercise of prosecutorial discretion.[70]

Thus, by the time DACA came around, federal immigration agencies had been using deferred action with the Supreme Court's blessing for over 60 years. Deferred action was nothing new, so to speak, and the astonishment and outrage of opponents was indeed perplexing to more experienced immigration advocates.[71]

IV. A NEW CAN OF WORMS: DACA AND ENSUING LITIGATION

Neither the INA nor federal regulations contain eligibility criteria "for seeking a favorable grant of deferred action",[72] and instead, as shown *supra*, officers and agents rely on guidance set forth in intra-agency memoranda.[73] Any argument, however, that the use of discretion uncodified in statute represents the overstepping of Executive authority represents a simplistic view that, willfully or unwittingly, disregards the well-established role of discretion in immigration enforcement.[74] The DACA Memos fell in with a long line of directives from the DHS and other immigration agencies to personnel, instructing how best to expend limited enforcement resources

---

69. Arizona v. United States, 132 S.Ct. 2492, 2499 (2012).

70. *See, e.g.,* Soon Bok Yoon v. Immigration and Naturalization Serv., 538 F.2d 1211, 1211-1213 ("The decision to grant or withhold nonpriority status lies within the particular discretion of the Immigration and Naturalization Service . . . [W]e decline to hold that the agency has no power to create and employ such a category for its own administrative convenience without standardizing the category and allowing application for inclusion in it."); David v. Immigration and Naturalization Serv., 548 F.2d 219 (8th Cir. 1977); Nicholas v. Immigration and Naturalization Serv., 590 F.2d 802 (9th Cir. 1979). Before deferred action was formally recognized in 1975, it was known within the former INS as "nonpriority status" and was described as an informal administrative stay of deportation. Lennon v. Immigration and Naturalization Serv., 527 F.2d 187, 191 (1975).

71. *See, e.g.*, Shoba Sivaprasad Wadhia, *Deferred Action in Immigration Law: The Next Generation* IMMIGRATIONPROF BLOG (June 28, 2012), http://lawprofessors.typepad.com/immigration/2012/06/deferred-action-in-immigration-law-the-next-generation-by-.html (noting that the DACA Memo "is in fact consistent with the longstanding features of the deferred action program and has [already] further been identified by more than 90 law professors as a potential administrative remedy for DREAM Act eligible individuals").

72. Wadhia Role, *supra* note 18, at 246.

73. *See* discussion *supra* Part I.B.

74. *See* discussion *supra*, Part I.A.

while staying aligned with enforcement priorities.[75] The memo did not even present deferred action for a novel group, since DREAMers had received deferred action on many occasions before August of 2012.[76]

A. What DACA Is Not

DACA is not the DREAM Act. Like any other type of deferred action, DACA does not confer citizenship, amnesty, or legal immigration status [77] of any kind. The DACA memos are not Executive Orders. Instead, "[i]t effectively grants a 'stay' of deportation that is renewable . . . every two years"[78] – essentially a promise from the government not to deport for a fixed period of time. Most notably, the government can rescind its "promise" for any reason, at any time.[79]

In order to qualify for DACA I, applicants must meet certain criteria by presenting material documentation in each area.[80] Deferred action determinations under DACA are not statutory entitlements and are non-appealable[81] – they are made on a case-by-case basis, and meeting all the

---

75. *See* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950).

76. *See* Olivas, *supra* note 2 at 523-24; *see* also *DREAMer Pedro Gutierrez Is Granted One Year Stay of Deportation*, BEFORE IT'S NEWS (March 13, 2011), http://beforeitsnews.com/alternative/2011/03/dreamer-pedro-gutierrez-is-granted-one-year-stay-of-deportation-478587.html; *see also* Julianne Hing, *DREAMer Walter Lara's Delayed Deportation A Pyrrhic Victory for Immigrant Rights,* COLORLINES (July 6, 2006), http://colorlines.com/archives/2009/07/dreamer_walter_laras_delayed_d.html.

77. The DACA I Memo itself emphasizes explicitly that deferred action is not a form of relief in itself. *See* DACA Memo, *supra* note 8, at 3. *See also* Olivas Dreams Deferred, *supra* note 2, at 482-83 (noting that DACA "serves merely to 'freeze' the case, and does not remove or reconstitute the underlying adjudication of the alien's deportability").

78. Brief of Pamela Resendiz, Carolina Canizalez, and The University Leadership Initiative as Amici Curiae in Support of Defendants, Crane v. Napolitano, 920 F. Supp. 2d 724 (2013) (No. 3:12-CV-3247-0), http://www.maldef.org/assets/pdf/AmicusBrief_050613.pdf.

79. *See* Reno v. Am.-Arab Anti-Discrimination Comm. ("AADC"), 525 U.S. 471, 483-85 (1999).As discussed, *infra*, DACA II, which provides for renewable three-year periods, is currently enjoined at this time.

80. DACA I Memo, *supra* note 8, at 1. In July 2012, DHS issued the "ERO Supplemental Guidance: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," which directs DHS to implement the terms of the Directive. In early August 2012, DHS issued a document entitled "National Standard Operating Procedures (SOP): Deferred Action for Childhood Arrivals (DACA) (Form I-821D and Form I-765)," which explains how DHS processes applications for deferred action under the DACA Memo.

81. *See AAADC*, 525 U.S. at 483-86.

identified criteria *does not guarantee* the granting of discretion.[82] DACA eligible individuals who are not in proceedings may receive deferred action prospectively after completing an application. They may also receive deferred action while in removal proceedings, while facing a final order of removal, or voluntary departure.[83] DACA I applicants must: (1) have come to the United States under the age of sixteen and not be older than thirty; (2) have continuously resided in the United States for at least five years; (3) have a high school diploma, (4) general education development certificate (GED), (5) or honorable discharge from the Coast Guard or the Armed Forces of the United States; (6) and not have a conviction for a felony, "significant misdemeanor,"[84] multiple misdemeanor offenses, or "otherwise pose a threat to national security or public safety."[85] Applicants also must have entered without inspection *or* have expired immigration status prior to June 15, 2012.[86] All supporting documentation establishing the above criteria must be attached and submitted with several USCIS forms.[87]

DACA II would extend the deferred action period and employment authorization from two years to three years.[88] If the DACA II applicant meets all the eligibility requirements of DACA I, she is eligible for DACA II if she: (1) "entered the United States before the age of 16 and (2) lived in the United States continuously since at least January 1, 2010" (rather than

---

82. *Instructions for Consideration of Deferred Action for Childhood Arrivals, USCIS form I-821D* [hereinafter *DACA Instructions*], *available* at http://www.uscis.gov/files/form/i-821dinstr.pdf (last visited Aug. 13. 2013).

83. *Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions*, [hereinafter *DACA FAQ*] (Oct. 23, 2014), http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.

84. *Id.* (USCIS has defined the "significant misdemeanor" category as any offense involving "domestic violence, sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence. . . or any offense for which the individual was sentenced to time in custody for more than 90 days").

85. DACA Instructions, *supra* note 82, at 2.

86. *See id.* at 1.

87. These include form I-821D, "Consideration of Deferred Action for Childhood Arrivals," form I-765 "Application for Employment Authorization" and form I-765WS Worksheet, in addition to an $85 fee for fingerprints and a background check and a $385 fee for processing the Application for Employment Authorization Document (EAD). *Consideration of Deferred Action for Childhood Arrivals (DACA),* OFFICIAL WEBSITE OF DEPARTMENT OF HOMELAND SECURITY (Dec. 4, 2014), www.uscis.gov/humanitarian /consideration-deferred-action-childhood-arrivals-daca.

88. DACA II Memo, *supra* note 12, at 1. As discussed, infra section Part III.A., DACA II has been enjoined by federal court order and is not in effect as of March 23, 2015.

the prior requirement of June 15, 2007).[89] DACA II removes the age requirements of DACA I.[90]

Although deferred action does afford recipients certain opportunities, it does not provide administrative benefits. A grant of deferred action allows recipients the opportunity to work temporarily in the United States with an EAD, which includes the issuance of a social security number. In order to receive work authorization, a DACA recipient must "demonstrate 'economic necessity' by submitting an application for employment authorization listing his or her "assets, income, and expenses as evidence of his or her need to work."[91]

DACA recipients also cease accruing unlawful presence once they are granted relief. Unlawful presence is the duration of time during which an alien over the age of eighteen is present in the United States without permission and may later prevent admissibility under the INA.[92] DACA applicants accrue unlawful presence while their application is processed, unless they are younger than 18-years old at the time of application.[93] DACA does not excuse any previously accrued period of unlawful presence.[94]

As discussed in some detail in the following section, eligibility for benefits such as Medicaid, in-state tuition, professional licensure to practice law or medicine, and driver's licenses vary on a state-by-state basis. DACA recipients who wish to reenter the country cannot travel outside the United States without advance parole, which generally is only approved "if the purpose of the intended travel is humanitarian, educational, or employment-related."[95]

Put simply, DACA lets DREAMers stay in the country without fear of deportation, at least temporarily, and gives them the opportunity to work

---

89. *Id*.

90. *See id*.

91. Brief for Pamela Reséndiz et al. as Amici Curiae Supporting Respondents, Crane v. Napolitano, No. 3:12-cv-03247-O (N.D. Tex., 2012).

92. 8 U.S.C. § 1182 (a)(9)(B) (2012).

93. *See* DACA FAQ, *supra* note 83.

94. U.S. CITIZENSHIP AND IMMIGR. SERV., HUMANITARIAN, *available at* http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (last updated Oct. 23, 2014).

95. American Immigration Lawyers Association (AILA), *Practice Advisory*, http://www.legalactioncenter.org/sites/default/files/PA%20Compilation%20%28November%202013%29,%20revised%20FIN.pdf. Without advance parole, DACA recipients would be barred from re-entry under the inadmissibility ground of prior unlawful presence. 8 U.S.C. § 1182(a)(9) (2012).

lawfully. It's an incremental gain that, in turn, has opened the door to substantial uncertainty and legal challenges nationally.

B. Legal and Local Policy Reactions to DACA

On August 15, 2012, DHS began accepting requests for consideration of deferred action and applications for employment authorization pursuant to the DACA Memo. As of December of 2014, USCIS had approved more than 638,000 individuals, out of more than 727,000 applicants.[96] The DACA backlash was substantial, including a legal challenge to the validity of DACA itself, and local state policies that proscribe various benefits for DACA recipients, which have also resulted in litigation. Regardless of the outcome, these events have injected uncertainty and inconsistency in the system, creating precisely the type of national discordance that all three branches of government have historically tried to avoid.[97]

1. Crane v. Napolitano

On August 23, 2012, ten ICE agents filed a lawsuit in the United States Northern District of Texas challenging the constitutional and statutory validity of the DACA Memo.[98] Represented by Kris Kobach,[99] the Kansas Secretary of State who nationally promotes and litigates anti-immigration

---

96. USCIS Office of Performance and Quality (OPQ), *Deferred Action for Childhood Arrivals Process*, December 2014, *available at* https://docs.google.com/viewer?url=http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821d_performancedata_fy2015_qtr1.pdf.

97. *See supra* Part I.

98. Complaint, Crane v. Napolitano, No. 3:12-cv-03247-O (N.D. Tex., 2012). The lawsuit also challenged unspecified provisions of the Morton Memo. *See id*.

99. *See* Complaint, Crane v. Napolitano, No. 3:12-CV-03247-O (N.D. Tex., 2012), *available at* http://dl.dropboxusercontent.com/u/27924754/Crane1.pdf. *See also* John Eligin, *Kansas Official Holds Line Against Moderation in Debate on Immigration*, N.Y. TIMES (July 13, 2013), http://www.nytimes.com/2013/07/14/us/politics/kansas-official-holds-line-against-moderation-in-debate-on-immigration.html?pagewanted=2&_r=1&ref=kriswkoba (overview of Kobach's background). Kobach has drafted state legislation in various parts of the country allowing local law enforcement officers the right to check the status of people they suspect are in the country illegally; required voters to show identification when they vote and to prove their citizenship when they register; repeal the awarding of in-state college tuition for illegal immigrants; and require businesses to verify their workers' immigration status. *See id*.; *see also* John Celock, *Kris Kobach, Kansas Secretary Of State, Faces Recall Attempt*, HUFF. POST (Oct. 5, 2012), http://www.huffingtonpost.com/2012/10/04/kris-kobach-recall-kansas_n_1941020.html describing Kobach's role in anti-migrant efforts).

issues, the agent plaintiffs alleged that the DACA Memo violated federal immigration law, Article II, Section 3 of the United States Constitution (separation of powers); and the Administrative Procedures Act (hereinafter, the "APA claim").[100] Five of the plaintiffs' six claims survived a motion to dismiss challenging the plaintiffs' standing.[101] On April 8, 2013, the Court held a hearing on the plaintiffs' Application for Preliminary Injunction and later found that the plaintiffs were likely to prevail on their Section 1225 and APA claims, but deferred ruling on the preliminary injunction pending further briefing.[102] The Court ultimately dismissed the case for lack of jurisdiction on July 31, 2013, finding that the plaintiffs' claims were employment grievances barred by the Civil Service Reform Act (CSRA).[103] Although it was dismissed, the lawsuit deepened public misunderstanding about DACA and further divided the public on the merit of allowing DREAMers to remain in the country. Specifically, the plaintiffs' lynchpin argument was based on a section of the INA that *did not even apply* to potential DREAM applicants.

The plaintiffs argued that under 8 U.S.C. § 1225(b)(2)(A),[104] they had no discretion to refrain from detaining and placing into removal

---

100. Amended Complaint, Crane v. Napolitano, No. 3:12-cv-03247-O (N.D. Tex., 2012), *available at* https://www.numbersusa.com/content/news/august-23-2012/ice-agents-v-napolitano-read-complaint.html (last visited Aug. 13, 2013) [hereinafter *Crane Complaint*].

101. *See* Memorandum Opinion and Order, Crane v. Napolitano, No. 3:12-cv-03247-O (N.D. Tex., 2012), *available at* http://dl.dropboxusercontent.com/u/27924754/Crane%2041%201-24-13.pdf [hereinafter *Order Denying Dismissal*].

102. Memorandum Opinion and Order, Crane v. Napolitano, No. 3:12-cv-03247-O (N.D. Tex., 2012), *available at* http://www.gpo.gov/fdsys/pkg/USCOURTS-txnd-3_12-cv-03247/pdf/USCOURTS-txnd-3_12-cv-03247-1.pdf [hereinafter *Crane Memorandum Opinion and Order*].

103. Order, Crane v. Napolitano, No. 3:12-cv-03247-O (N.D. Tex., 2012), *available at* https://dl.dropboxusercontent.com/u/27924754/Crane75%207-31-13.pdf [hereinafter *Crane Order of Dismissal*]. The Mexican American Legal Defense and Educational Fund (MALDEF) represented DREAMers who attempted to intervene as defendants, and in the alternative as friends of the court, on May 6, 2013, but their motion was moot once the Court dismissed the lawsuit. Brief of Pamela Resendiz, Carolina Canizalez, and the University Leadership Initiative as *Amici Curiae* in Support of Defendants, Crane v. Napolitano, No. 3:12-cv-03247-O (N.D. Tex., 2012), *available at* http://www.maldef.org/assets/pdf/AmicusBrief_050613.pdf [hereinafter *Crane Amicus Brief*].

104. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") requires immigration officers to initiate removal proceedings when they encounter illegal immigrants who are not "clearly and beyond a doubt entitled to be admitted," and that any "prosecutorial discretion" can only be exercised after removal proceedings have been initiated. *See* 8 U.S.C. § 1225. Section 1225 corresponds to Section 235 of the INA, and it is often referred to as Section 235 in opinions from the Board of Immigration Appeals and in the immigration regulations located in Title 8 of the Code of

proceedings[105] individuals who are seeking admission and are not clearly and beyond a doubt entitled to be admitted – including DREAMers.[106] Plaintiff DHS enforcement agents testified at the preliminary injunction hearing that as soon as an immigrant claimed eligibility for DACA, they were required under the DACA Memo to release them without investigation, even if the individual posed a threat to public safety.[107] As a result, the plaintiffs testified that they were being forced to release thousands of criminals into the streets.[108]

Under a broad interpretation of the INA, however, this particular provision *does not apply* to DREAM applicants. 8 U.S.C. § 1225(b)(2)(A) includes an exception at 8 U.S.C. § 1225(b)(2)(B)(ii), providing that it is inapplicable to a person to whom 8 U.S.C. § 1225(b)(1) applies. In turn, 8 U.S.C. § 1225(b)(1) exempts from the description of persons who shall be detained as persons who establish "to the satisfaction of the immigration officer, that . . .[s/he] has been physically present in the United States continuously for the 2-year period immediately prior to 'the officer's determination of inadmissibility under [8 U.S.C. § 1225(b)(1)(A)].'"[109] Thus, an ICE officer, including any of the plaintiffs, who targets a detainee must allow the detainee an opportunity to demonstrate the requisite two years of continuous presence that would exempt them from enforcement of the statute.

To qualify for favorable discretion under DACA, the DACA Memo states that an applicant must show that she/he has continuously resided in the United States for at least *five* years preceding the date of the DACA Memo.[110] Accordingly, the plaintiffs could not suffer negative employment consequences for refraining from initiating proceedings against DACA-eligible detainees under Section 1225(b) - those individuals are

---

Federal Regulations. Federal courts use citations to the United States Code when addressing immigration law. *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492, 2502 (2012).

105. The "DHS initiates removal proceedings by serving the individual with a" Notice to Appear ("NTA"), or a charging document. Cobb, *supra* note 47, at 673. Once the NTA is filed in an immigration court, "the court schedules a removal hearing before an immigration judge." *Id.*

106. Crane Mem. Op. and Order, *supra* note 102, at 9-11.

107. Crane v. Napolitano, 4/8/13 Hrg. Tr. at 12, , Civil Action No. 3:12-cv-03247-O (U.S. Dist. Ct. Dallas, 2012) (hereinafter "Crane Hrg. Tr."). A copy of the transcript is on file with the author.

108. *Id.* at 224.

109. 8 U.S.C. § 1225(b)(1)(A)(iii) (2009); *see also* 8 U.S.C. § 1225(b)(2)(B)(ii) (2009), 8 U.S.C. § 1225(b)(1) (2009).

110. The DACA Memo, *supra* note 8, at 1.

automatically exempted! Oddly, the plaintiffs' requested injunctive relief would have allowed them to violate federal law, not comply with it.[111]

Without the benefit of this specific legal analysis,[112] on April 23, 2013, after reviewing briefing from the parties and holding a hearing on the matter, the Court entered a Memorandum Opinion and Order that the plaintiffs were likely to succeed on the merits of their claim that the DHS Memo violated 8 U.S.C. 1225(b)(2)(A), but deferred its ruling pending requested supplemental briefing from the parties.[113]

The case was ultimately dismissed, but the damage was done. Even though DACA applies to immigration officials, other than enforcement agents like the plaintiffs, the plaintiffs sought to prevent the implementation of the entire program nationwide, even though they never established an injury or controversy that would warrant such a broad injunction.[114] In

111. Brief for Defendants at 4, Crane v. Napolitano, 920 F. Supp. 2d 724 (N.D. Tex. 2013) (No. 3:12-CV-3247-0). "The plaintiffs' misinterpretation of 8 U.S.C. § 1225(b) is not limited to the two-year exemption set forth at 8 U.S.C. § 1225(b)(2)(B)(ii). The Plaintiffs also argue, incorrectly, that Section 1225(b) applies to all DACA-eligible applicants regardless of the manner in which they entered the United States. Crane Hrg. Tr., *supra* note 107, at 17-19, 120. Without any counter argument from the defendants, the Court accepted this argument. Crane Mem. Op. and Order, *supra* note 102, at 10. However, by its express terms, 8 U.S.C. § 1225 only applies to arriving immigrants and those who have not been admitted. *See* 8 U.S.C. § 1225(a)(1) (2009). It excludes immigrants who were admitted, inspected by immigration officers, and overstayed their visas, such as one of MALDEF's clients in the intervention, Carolina Canizalez. *See id*. Crane Amicus Brief, *supra* note 103, at ¶ 2. The INA provides over twenty lawful ways to enter the United States for a temporary duration, including tourist, investor and student visas. 8 U.S.C. § 1101(a)(15). Up to 50% of DACA applicants simply overstayed their period of authorized stay, and fall in the same category as Ms. Canizalez, and therefore do not trigger 8 U.S.C. § 1225(a); *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). In these instances, the "shall be detained" provision that Plaintiffs claim requires the initiation of removal proceedings cannot apply. *See* 8 U.S.C. §§ 1225(b)(2)(A), 1229a; Brief for Defendant, Crane, 920 F. Supp.2d at 4-5 (No. 3:12-CV-3247-0).

112. This argument was not briefed outside of MALDEF's brief, which was filed after the Court issued its Memorandum Opinion and Order.

113. Crane Mem. Op. and Order, *supra* note 102, at 1. The Court did not complete its analysis of the plaintiffs' APA claim, but inferred that the Defendants would likely to succeed on the merits of that claim. *Id*. at 34-35.

114. In its April 23 order, the Court stated that "[n]othing in this order limits DHS's discretion at later stages of the removal process," but it was not clear what the injunction would look like if entered, as the plaintiffs demanded for an injunction of the entire DACA program. Mem. Op. and Order, *supra* note 102, at 24. In their Amicus Brief, MALDEF's clients argued, for the first time in the case, that the plaintiffs were not entitled to a broad-sweeping injunction against the implementation and enforcement of the DACA memo. Crane Amicus Brief, *supra* note 103, at 3-7. Declaratory and injunctive relief must be

addition to raising questions about the proper enforcement of DACA, there was mass confusion about whether DACA was still in effect, and whether deferred action was a legitimate use of authority.[115]

---

narrowly tailored to remedy the actual controversy between the parties. FED. R. CIV. P. 65; Califano v. Yamasaki, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established. . . ."). The Plaintiffs argued that they suffered an invasion of a legally protected interest - the threat of disciplinary action if they issue an NTA to a DACA-eligible immigrant. Yet, the plaintiffs requested declaratory and injunctive relief that far exceeded their ability to issue an NTA. Crane Complaint, *supra* note 100, at 23.

The DACA Memo applies to many different situations outside the issuance of an NTA. Examples include, but are not limited to:

- A Customs and Border Patrol ("CBP") agent who encounters an applicant for admission (or "arriving alien") at the border, airport, or seaport, can opt not to perform an expedited removal and instead release the individual on parole so that they can file an I-821D, "Consideration of Deferred Action for Childhood Arrivals;"

- An ICE attorney can opt not to file the NTA, thereby not commencing (as opposed to "initiating") removal proceedings under 8 U.S.C. § 1229a (2006); *see also* Arenas Yeses v. Gonzalez, 421 F.3d 111, 116-17 (2d Cir. 2005) (proceedings not commenced until NTA, formerly an Order to Show Cause ("OSC"), is filed with the immigration court);

- An ICE attorney could agree to close administratively the case in order to allow the potentially DACA-eligible respondent to file an I-821D;

- An ICE attorney can terminate proceedings altogether for someone who has already been granted deferred action;

As proposed amici, MALDEF's clients argued that at most, "the injunction could only prohibit negative employment consequences to Plaintiffs specifically for issuing an NTA to any individual who cannot establish two years of continuous presence." Relief beyond this scope would not have been narrowly tailored. Crane Amicus Brief, *supra* note 103, at 10.

115. *See, e.g.*, Ted Hesson, *Here's What Could Happen if DREAMers Lose DACA*, ABCNEWS (Apr. 29, 2013, 11:22 AM), http://abcnews.go.com/ABC_Univision/Politics/happen-dreamers-lose-daca/story?id=19051042&page=2; Being Latino Contributors, *Final decision on Deferred Action lawsuit deferred*, BEING LATINO (May 8, 2013), http://www.beinglatino.us/politics-2/final-decision-on-deferred-action-lawsuit-deferred/ (informing readers that DACA "will probably not survive its first year in existence"); Jeremy Roebuck, *Judge says Obama reprieves lacked legal basis,* MY SA (Apr. 25, 2013, 10:59 PM), http://www.mysanantonio.com/news/article/Judge-says-Obama-reprieves-lacked-legal-basis-4464726.php (stating that Court found that "the Obama Administration overstepped its authority"); Montag813, *Judge Sides With ICE Agents: Says Obama Admin. Can't Refuse to Deport Illegal Aliens*, FREE REPUBLIC (Apr. 24, 2013, 10:20 PM), http://www.freerepublic.com/focus/news/3012079/posts (misreporting that the Court ruled that the Executive did not have the authority to set the priority for arresting immigrants); Jorge Rivas, *Will the Courts Block Deferred Action? Keep Calm and Apply For DACA*, COLORLINES (Apr.

2. Texas v. U.S.

A more recent legal challenge to DACA II further compounded the confusion surrounding the implementation of DACA. In December of 2014, Texas and seventeen additional states or state officials filed a lawsuit challenging DACA II in the United States Southern District of Texas.[116] The lawsuit alleges that DACA II is unconstitutional because it violates the President's duty to "take Care that the Laws be faithfully executed" pursuant to Article II, Section 3, Clause 5 of the United States Constitution, and that it violates the Administrative Procedures Act because it is a "rule" made "without authority and without notice-and-comment rulemaking" and because it is agency action that is an "abuse of discretion" and "in excess of statutory jurisdiction, authority, or limitations. . ."[117]

On February 16, 2015, the district court issued an opinion and order granting a preliminary injunction of DACA II.[118] The district court's ruling did not address the constitutionality of DACA II, and conceded that "DHS has virtually unlimited discretion when prioritizing enforcement objectives."[119] Instead, the court's decision was based "on narrow procedural grounds,"[120] finding that DACA II and DAPA were substantive rules that fall under the Administrative Procedure Act, which subjects them to "notice and comment procedure, rather than general statements of policy."[121] The federal government appealed, and the matter is currently pending in the Fifth Circuit.

Meanwhile, the court's order has temporarily halted the expansion of DACA, as well as the implementation of DAPA, and has fueled the charge against programs that provide need relief for DREAMers and is only in

---

24, 2013, 7:03 PM), http://colorlines.com/archives/2013/04/will_the_courts_invalidate_deferred_action_keep_calm_and_apply_for_daca.html.

116. Complaint, Texas v. United States, No. 15-40333 (S.D. Tex., 2014). The lawsuit also challenged DAPA. *See id*.

117. *Id*.

118. Intervention Order, Texas v. United States, No. 15-40333 (S.D. Tex., 2014), ECF No. 141.

119. *Id*.

120. *Id*.; *see also Understanding the Legal Challenges to Executive Action: Long on Politics, Short on Law,* IMMIGRATION POL'Y CTR. 3–4 (Feb. 26, 2015), http://www.immigrationpolicy.org/sites/default/files/docs/understanding_initial_legal_challenges_to_immigration_accountability_executive_action-long_on_politics_short_on_law_final.pdf.

121. *Id*.; *see also Understanding the Legal Challenges to Executive Action: Long on Politics, Short on Law,* IMMIGRATION POL'Y CTR. 3 (Feb. 26, 2015), http://www.immigrationpolicy.org/sites/default/files/docs/understanding_initial_legal_challenges_to_immigration_accountability_executive_action-long_on_politics_short_on_law_final.pdf.

place because the United States Congress has failed to pass comprehensive immigration reform.[122] The order also contributed to confusion and fear surrounding DACA implementation, as it enjoined DACA II but not DACA I.[123]

3. State Drivers Licenses

Although USCIS confirmed that DREAMers granted deferred action under DACA are considered to be lawfully present during the period for which they've been granted deferred action,[124] a grant of DACA does not automatically provide access to a state driver's license for the DACA recipient. DACA recipients who have obtained work authorization and social security numbers, however, generally fit within rules for driver's license issuance in almost every state.[125] Nevertheless, at least two states, Arizona and Nebraska have singled out DACA recipients for discriminatory

122. Michael D. Shear & Julia Preston, *Dealt Setback, Obama Puts off Immigration Plan*, N.Y. TIMES (Feb. 17, 2015), http://www.nytimes.com/2015/02/18/us/obama-immigration-policy-halted-by-federal-judge-in-texas.html (highlighting that the court did not enjoin original DACA, which will continue to allow individuals who meet the criteria to request initial grant of the program or its renewal, pursuant to the 2012 guidelines).

123. Intervention Order, Texas v. United States, No. 15-40333 (S.D. Tex., 2014), ECF No. 141; *see also* Howard Koplowitz, *Immigration Lawsuit Against Obama: Confusion, Fear After Federal Judge Blocks Illegal Immigrant Policies*, INTERNATIONAL BUSINESS TIMES (Feb. 17, 2015), http://www.ibtimes.com/immigration-lawsuit-against-obama-confusion-fear-after-federal-judge-blocks-illegal-1819104. Read more: http://cmsny.org/federal-court-halts-dapa-and-expanded-daca-programs/#ixzz3Vopg6YRp.

124. DACA FAQ, *supra* note 83.

125. The National Immigration Law Center (NILC) has conducted a comprehensive, ongoing review of state policies, focusing on whether DACA recipients fit within current state laws and policies governing driver's licenses and whether, in practice, DACA recipients have been able to obtain a state driver's license. *See* National Immigration Law Center, *Are Individuals Granted Deferred Action under the Deferred Action for Childhood Arrivals (DACA) Policy Eligible for State Driver's Licenses?*, NILC (June 19, 2013), http://www.nilc.org/dacadriverslicenses.html [hereinafter, "NILC Study"]; NILC, *Overview of States' Driver's License Requirements*, http://www.nilc.org/search.html?act=soon&srch=Overview+of+States'+Driver's+License+Requirements (last visited Aug. 15, 2013).

treatment, announcing that they are not eligible for state driver's licenses,[126] even though other immigrants granted deferred action are eligible.[127]

MALDEF, along with a coalition of civil rights organizations, represents plaintiff DACA recipients in two lawsuits challenging these state policies. *Arizona Dream Act Coalition v. Brewer* is a class action lawsuit in the U.S. District Court of Arizona, challenging the executive order of Arizona, where Governor Jan Brewer denies driver's licenses to DACA recipients.[128] On August 15, 2012, the day DHS began accepting DACA applications, Governor Brewer issued an executive order 2012-06, which states, "the Deferred Action program does not and cannot confer lawful or authorized status or presence upon the unlawful alien applicants."[129] The Order directs state agencies to "prevent Deferred Action recipients from obtaining eligibility . . . for any . . . state identification, including a driver's license."[130] In public comments on her executive order, Governor Brewer said there would be "no drivers [sic] licenses for illegal people," and "[t]he Obama amnesty plan doesn't make them legally here."[131] After implementing the Executive Order, the Motor Vehicle Division ("MVD") of the Arizona Department of Transportation ("ADOT") barred the acceptance of the EADs of DACA recipients as evidence of authorized presence in the United States sufficient to establish their eligibility for state driver's licenses.[132] The MVD continued to accept EADs from all other noncitizens, including those in other forms of deferred action other than

126. NILC Study, *supra* note 125, at 1. Michigan and North Carolina also briefly excluded DACA recipients, but reversed their policies. *See id* at 2.; *see also* Letter from N.C. Atty. Gen., Roy Cooper, to J. Eric Boyette, Acting Comm'r, N.C. Div. of Motor Vehicles (Jan. 17, 2013) *available at* www.wral.com/asset/news/local/2013/01/17/11992902/AG_letter_to_DMV_on_DACA_licenses.pdf.

127. NILC Study, *supra* note 125 at 2. In the past year, California, Colorado, Connecticut, Georgia, Illinois, Maryland, Maine, Nevada, Oregon and Vermont enacted legislation to give DACA recipients access to driver's licenses or some equivalent. Another dozen states have introduced bills related to DACA and requirements to provide licenses. *Id*. Bills in Tennessee would not deny licenses to DACA recipients. *See id.*

128. Complaint at 1. Arizona Dream Act Coalition v. Brewer, 2013 WL 5279121, at *1 (Ariz. Dist. Ct. 2012) (No. 02:12-cv-02546-DGC-PHX), *available at* https://docs.google.com/viewer?url=http://www.maldef.org/assets/pdf/FINAL-AZ%20Complaint_112912.pdf [hereinafter Arizona DL Complaint].

129. Arizona DL Complaint, *supra* note 128, at 3; 18 Ariz. Admin. Reg. 2237 (Sept. 7, 2012), *available at* http://www.azsos.gov/public_Services/Register/2012/36/governor.pdf [hereinafter Arizona Executive Order].

130. Arizona DL Complaint, *supra* note 128, at 3; Arizona Executive Order, *supra* note 129.

131. Arizona DL Complaint, *supra* note 128, at 3.

132. *See* Arizona DL Complaint, *supra* note 128, at 4.

DACA,[133] essentially creating different "classes" of deferred action never conceived or employed by federal immigration officials. The Court denied the defendants' motion to dismiss and the plaintiff's motion for preliminary injunction on May 16, 2013,[134] noting:

> The Governor's disagreement with the DACA [amnesty] program may be a rational political or policy view in a broad sense—reasonable people certainly can disagree on an issue as complex and difficult as immigration—but it provides no justification for saying that an Arizona's driver's license may be issued to one person who has been permitted to remain temporarily in the country on deferred action status—say for an individual humanitarian reason—while another person who has been permitted to remain temporarily in the country on deferred action status under the DACA program is denied a license.[135]

The Court of Appeals for the Ninth Circuit has since reversed and remanded the district court's ruling.[136] The Ninth Circuit reviewed the district court's denial of a preliminary injunction, noting that such relief only requires that a plaintiff successfully establish that he is "likely to suffer irreparable harm in the absence of relief, that the balance of equities tips in his favor, and that an injunction is in the public's best interest."[137] Furthermore the Court found that plaintiffs established that they were likely

---

133. *Id.*

134. Arizona Dream Act Coalition v. Brewer*,* 945 F.Supp.2d 1049, 1053 (D. Ariz. 2012).

135. *Id*. at 1070. The Court noted that because the MVD policy was not promulgated through formal rulemaking procedures, it did not have the force of law sufficient to support a traditional preemption claim. *Id*. at 1059. The Court, however, acknowledged the illogical distinction in categories created by the defendants. *See id.* at 1059-60.

136. Arizona Dream Act Coalition v. Brewer, 757 F.3d 1053 (9th Cir. 2014).

137. Arizona Dream Act Coalition v. Brewer, 757 F.3d 1053 (9th Cir. 2014) (citing Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)). Here, the Court determined that the plaintiff's indeed made all showings. Furthermore, the Court questioned the enforceability of Arizona's new policies, specifically regarding the refusal to accept Employment Authorization Documents issued under DACA. Until August 2012, Arizona policy accepted all Employment Authorization Documents issued by the federal government, establishing authorized presence in the United States under federal law. On the day DACA policy went into effect, on August 15, 2012, Arizona Governor Janice Brewer "directed state agencies to prevent DACA recipients from becoming eligible for any 'state identification, including a driver's license.'" The Court focused on and took umbrage with Arizona's changing of the status quo and the lower court's application of the status quo *anti litem*. *Id*. at 1059–61.

to succeed on the merits of their equal protection claim.[138] The lawsuit remains pending and undecided.

MALDEF filed *Saldana v. Lahm* in the U.S. District Court of Nebraska, on the behalf a young DACA recipient seeking a driver's license in order to work.[139] To the detriment of DREAMers in the state of Nebraska, and in contrast to the federal court in Arizona, in *Saldana v. Lahm*, the U.S. District Court upheld the state's policy denying DACA applicants driver's licenses, stating that "the very act of federal interference in the domain of state government, without strong legal justification, is an intrusive harm."[140] Nebraska Governor Dave Heineman refuses to grant DACA recipients driver's licenses, stating "President Obama's deferred action program to issue employment authorization documents to illegal immigrants does not make them legal citizens. The State of Nebraska will continue its practice of not issuing driver's licenses, welfare benefits or other public benefits to illegal immigrants unless specifically authorized by Nebraska statute."[141] State policies preventing DACA recipients from obtaining driver's licenses undermine executive determinations that they are lawfully present, and should be able to work. In fact, proponents of such state policies expressed desire to penalize DACA recipients for their perceived unlawful behavior—despite the determination of DHS that DACA recipients are not unlawfully present for the duration of time that they are in deferred action.[142] Governor Heineman explicitly stated that he disagreed with the Executive Branch's authority to consider granting deferred action to DREAMers, stating "[t]he United States Constitution squarely places the responsibility for establishing immigration laws on the

138. Arizona Dream Act Coalition v. Brewer, 757 F.3d 1053, 1069 (9th Cir. 2014).

139. First Amended Complaint and Prayer for Declaratory and Injunctive Relief, Saldana v. Lahm, No. 13-3108, 2013 WL 3859089 ¶¶ 1-4 (D. Neb. Jul. 3, 2013), *available at* https://docs.google.com/viewer?url=http://www.maldef.org/assets/pdf/Complaint_DACA_072413.pdf [hereinafter Nebraska DL Complaint]. Saldana v. Lahm, No. 4:13CV3108, 2013 WL 5658233, at *1 (D. Neb. Oct. 11, 2013).

140. Saldana v. Lahm, No. 4:13CV3108, 2013 WL 5658233, at *7 (D. Neb. Oct. 11, 2013).

141. Press Release, Gov. Dave Heinemen, Neb. Gov. Dave Heinemen's Statement (Aug. 17, 2012) (on file with author) [hereinafter Heinemen Statement].

142. *See, e.g.*, Arizona Executive Order, *supra* note 129.

federal government."[143] Currently, Nebraska is the only state that denies DACA recipients from obtaining state driver's licenses.[144]

Finally, on June 4, 2013, Florida Governor Rick Scott vetoed a bill that would have allowed DACA recipients to obtain state driver's licenses.[145] House Bill 235 would have amended Florida's current law by expanding the list of documents that are acceptable as proof of identity to obtain a temporary Florida driver's license, to include a notice of an approved application for DACA status as proof of identity and legal presence.[146] Although Florida law currently permits non-citizens with federal work authorization, like DACA recipients, to obtain temporary driver's licenses,[147] Governor Scott concluded that the Obama Administration did not have the authority to implement DACA because it was not approved by Congress or officially promulgated through federal rulemaking.[148] Following the Governor's veto, House Bill 235 was sent back to the legislature where the House and Senate may override the Governor's veto by a two-thirds vote.[149] Florida began its organizational session on November 20, 2013.[150]

By enacting policies that create new "categories" of deferred action recipients (those entitled to driver's licenses and other state benefits, and those who are not), and by publicly justifying those policies by questioning the validity and authority of well-established prosecutorial discretion, state officials are undermining the uniformity and cohesiveness of the federal system. In this sense, DACA has led to more division and confusion in the immigration scheme.

---

143. Letter from Dave Heinemen, Gov., State of Neb., to Mayra Saldana, Plaintiff (Aug. 17, 2012) (on file with author), *available at* http://www.courthousenews.com /2013/06/03/58133.htm.

144. *Access to Driver's Licenses for Immigrant Youth Granted DACA*, NAT'L IMMIGR. L. CENTER (Jan. 22, 2015), http://www.nilc.org/dacadriverslicenses2.html.

145. News Release, Fla. Gov. Rick Scott, Gov. Rick Scott Vetoes HB 235 (June 4, 2013), http://www.flgov.com/2013/06/04/governor-rick-scott-vetoes-hb-235/.

146. H.R. 235, 2013 Leg., Reg. Sess. (Fla. 2013) *available at* http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=49465.

147. FLA. STAT. § 322.08(2)(c)(7) (2013).

148. Scott, *supra* note 145.

149. FLA. CONST. art. III, § 8.

150. National Conference of State Legislatures, 2013 Legislative Session Calendar, *available at* http://www.ncsl.org/legislatures-elections/legislatures/session-calendar-2013.aspx (last visited Aug. 13, 2013).

V. THE LACK OF PERMANENT STATUTORY RELIEF FOR DREAMERS HAS LED TO PATCHWORK IN A SYSTEM THAT MUST BE UNIFORM AND COHESIVE.

Although DACA is a legitimate use of prosecutorial discretion, the repercussions for implementing the program in such a complex political climate have clouded the incremental gains made by the immigrant community and advocates. As shown, *supra*, legal challenges and state policies differentiating DACA recipients contradict longstanding federal immigration policy and procedures, and undercut the well-established authority of the Executive branch and its agencies.[151] DACA itself, while providing at least some temporary relief, has created substantial uncertainty for DREAMers and the public at large, and threatened the objectives of a cohesive federal immigration system.

First, because any administration can revoke DACA at any time for any reason, many DREAMers do not apply for DACA even though they are

151. The arguments the author presents in this article in no way reflect agreement with the position that DHS should have followed procedures for rulemaking established by the Administrative Procedures Act (APA), and the author does not believe DACA is problematic for this reason. The APA requires that substantive or legislative rules, which have the force and effect of law, are subject to the APA's notice-and-comment rulemaking requirements. *See* 5 U.S.C. § 553(b) (1980). The APA exempts "interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A) (1980). Federal appeals courts have long held that a grant of deferred action does not have the force and effect of substantive law, which means that a non-citizen cannot sue for denial of deferred action since it creates not property or liberty interest. *See, e.g.*, Soon Bok Yoon, 538 F.2d 1211, 1213 (5th Cir. 1976) (affirming that non-priority status as originally set forth in Operations Instructions is not a substantive right); Romeiro de Silva v. Smith, 773 F.2d 1021 (9th Cir. 1985) (providing review of other federal courts which concluded that the Operations Instruction is an intra-agency guideline which confers no substantive benefit on aliens seeking inclusion in the deferred action category); Velasco-Gutierrez v. Crossland, 732 F.2d 792, 798 (10th Cir. 1984); Pasquini v. Morris, 700 F. 2d 658, 659 (11th Cir. 1983); Dong Sik Kwon v. INS, 646 F.2d 909 (5th Cir. 1981); Lennon v. INS, 527 F.2d 187 (2d Cir. 1975). As stated, *supra*, this discretion is not appealable, meaning that people who are denied deferred action do not have a valid basis to sue for denial of an affirmative benefit. Most courts have held that internal memoranda, formerly "Operating Instructions," which issue guidance on deferred action function as "internal guideline[s] or general statement[s] of policy" and therefore are not subject to notice-and-comment rulemaking requirements. *See* Wadhia Role, *supra* note 18, at 282. The DACA Memo itself states that it "confers no substantive rights, immigration status, or pathway to citizenship." The DACA Memo, *supra* note 8, at 3.

eligible.[152] Half of eligible DREAMers have not applied for DACA, citing fear of deportation for family members.[153] Fewer than 30% of eligible New Yorkers have applied for DACA, citing fear of exposing themselves or family members to deportation at some later time.[154] Mitt Romney, the GOP candidate in the 2012 presidential election, announced that he would reverse the policy if elected, underscoring the fragility of the program.[155] The United States House voted to defund the administration of DACA, with proponents citing the "usurpation of power" as a basis for their votes,[156] and opponents telling DACA recipients that they were at risk for "immediate deportation."[157] In some cases, applicants have been deterred by public communications that their parents would be deported if they apply.[158] The reluctance of eligible DREAMers to apply for DACA thwarts the DHS's objective to prioritize resources on non-priority individuals in the interest of public safety and national security.

Second, as previously mentioned, eligibility for benefits such as Medicaid, in-state tuition, professional licensure to practice law or medicine, and driver's licenses vary on a state-by-state basis and may also be temporary. In some cases, DACA recipients who have work authorization are not able to work because they do not have licenses, or are unable to practice their trades. DACA recipients who do have access to benefits are constant victims to the whims of their local legislatures, who

---

152. *See, e.g.*, Erica Pearson, *Immigrants in NY mostly shun deferral program that lets them work legally*, N.Y. DAILY NEWS (June 30, 2013, 7:48 PM), http://www.nydailynews.com /new-york/immigrants-ny-shun-daca-article-1.1386654#ixzz2btg9AGUz.

153. Cinday Carcamo, *Half of eligible immigrants sign up for deferred deportation program*, L.A. TIMES NATION (Aug.14, 2013, 7:00 AM), http://www.latimes.com/news /nation/nationnow/la-na-nn-ff-deferred-deportation-20130813,0,7698740.story.html.

154. *See id*.

155. David Leopolid, *Obama's Dream Initiative Proves to Be a Nightmare for the GOP*, HUFF. POST (Aug. 16, 2012, 5:12 AM), http://www.huffingtonpost.com/david-leopold/obamas-dream-initiative-_b_1602595.html?utm_hp_ref.

156. *See, e.g.*, Elise Foley, *Steve King Amendment Passes House To Deport More Dreamers*, HUFF. POST (June 6, 2013, 6:18 PM), http://www.huffingtonpost.com /2013/06/06/steve-king-amendment-deport_n_3397126.html; Andrew Stiles, *House Votes to Defund Obama's DREAM Policy*, NAT'L REVIEW ONLINE.

157. Ellyn Fortino, *House Amendment Could Lead To Deportation of DREAMers, Immigrant Advocates Say*, PROGRESS ILLINOIS (June 7, 2013, 12:45PM), http://www.progressillinois.com /quick-hits/content/2013/06/07/house-amendment-could-lead-deportation-dreamers-immigrant-advocates-sa.

158. Adrian Carrasquillo, *With Romney gone, more Dreamers apply for deferred action*, NBC LATINO (Nov. 19, 2012), http://nbclatino.com/2012/11/19/with-romney-gone-more-dreamers-apply-for-deferred-action.

can bestow benefits one day and then take it away the next.[159] This yo-yo effect is detrimental to the economy and certainly does not boost the trade interests, which bolster the federal government's desire for a uniform system.[160]

Third, DACA has created inconsistency in its application, again creating patchwork in the system. The hearing testimony in *Crane v. Napolitano* highlighted this problem. For example, the lead plaintiff, Christopher Crane, head of the National ICE Council 118, testified that under DACA, DHS enforcement agents were not permitted to investigate immigrants they encounter once they claim eligible for DACA, *even if they are threats to public safety*.[161] He provided the same testimony to the House Judiciary Committee in early 2013.[162] If these allegations are true, they represent blatant mal-enforcement of the DACA Memo on its face, and they contradict the guidelines officers were given to implement DACA, which specifically state that an investigation must be conducted.[163] Crane and other plaintiff agents also testified that all field offices are applying DACA differently,[164] that no ICE office in the country is documenting the individuals they are releasing under DACA, that local offices are not making any record entries of those individuals at all, and that they are deleting records of those individuals *en masse*.[165] Again, if this is true, it will prevent the DHS from taking affirmative steps to correct inconsistent application in the system.[166]

---

159. For an overview of variation in state responses to DACA, see *Deferred Action for Childhood Arrivals: Federal Policy and Examples of State Actions*, NCLS (Nov. 18, 2014), *available at* http://www.ncsl.org/issues-research/immig/deferred-action.aspx.

160. *See supra* Part I.A.i.; *see also*, *Economic Benefits of Granting Deferred Action to Unauthorized Immigrants Brought to U.S. as Youth*, IMMIGR. POL'Y CTR. (June 22, 2012), http://www.immigrationpolicy.org/just-facts/economic-benefits-granting-deferred-action-unauthorized-immigrants-brought-us-youth (providing a specific explanation of how giving DREAMers lawful status would benefit the U.S. economy).

161. Crane Hrg. Tr. *supra* note 107, at 20-24.

162. Ed Resnikoff, *ICE union resists immigration reform*, MSNBC, http://www.msnbc.com/the-ed-show/ice-union-resists-immigration-reform (last updated Sept. 19, 2013, 8:47 AM).

163. CBP Guidance for Field – U.S. Border Patrol, AM. IMMIGR. LAW. ASS'N, *available at* http://www.aila.org/content/default.aspx?docid=43662 (last visited Aug. 14, 2013). The American Immigration Lawyers Association (AILA) received this document in response to a Freedom of Information Act request on Feb. 28, 2013).

164. Crane Hrg. Tr. *supra* note 107, at 16.

165. Crane Hrg. Tr. *supra* note 107, at 16, 19, 20.

166. *See* Cobb, *supra* note 47, at 679 (arguing that because deferred action is not mandatory, its application may be applied inconsistently with the established criteria, and the lack of judicial review further prevents consistent application); *see also* Mary Giovagnoli, *Prosecutorial*

Finally, if, as stated *supra*, reciprocal treatment of Americans abroad is one objective of a cohesive immigration system, arbitrary, piecemeal state policies that create contradictory distinctions and treatment not contemplated by the federal scheme, will certainly not have a positive impact on that interest. Neither will the attempts of federal agents to refuse to enforce federal immigration policy, of legislators to defund it, or political candidates to rescind it.[167]

VI. CONCLUSION

Although DACA was intended to provide some relief for DREAMers, in many ways, it has created unintended fractures in the system, and has created an additional barrier to speaking in "one voice" on immigration. DACA is temporary, fragile, and does not create any substantive benefits for DREAMers. Its implementation has led to lingering litigation that has created more confusion among DREAMers and the general public, and created discordance in the immigration system that courts have guarded against so carefully. State policies have singled out DREAMers as less deserving of benefits than other recipients of deferred action, contrary to the objectives of the federal scheme. Until there is permanent immigration reform for DREAMers, these fissions in the system will remain.

Discretion Survey Demonstrates Need for More Training, Consistency Across ICE Field Offices, AM. IMMIGR. COUNCIL (Nov. 14, 2011), http://immigrationimpact.com/2011/11/14/prosecutorial-discretion-survey-demonstrates-need-for-more-training-consistency-across-ice-field-offices/#sthash.EzV9vAPw.dpuf (explaining inconsistency and barriers to consistency when applying prosecutorial discretion even before DACA).

167. To quote the testimony of the Hispanic National Bar Association to the U.S. Senate Judiciary Committee in 2011: "How can we stand as a beacon for the basic human rights we wish to inspire in countries that do not practice democracy, if we turn against individuals to whom we have made an equal protection and financial commitement to educate?" *Statement of the Hispanic National Bar Association Before the Subcomm. on Immigr., Refugees and Border Sec. Comm. on the Judiciary U.S. Senate at a Hearing entitled "S. 952 Development, Relief, and Education for Alien Minors (DREAM) Act of 2011,"* (2011) (statement of Diana Sen, HNBA National President, Claudine Martinez, HNBA National Vice President of External Affairs).