No. 14-10049

In the United States Court of Appeals for the Fifth Circuit

CHRISTOPHER L. CRANE; DAVID A. ENGLE; ANASTASIA MARIE CARROLL; RICARDO DIAZ; LORENZO GARZA; FELIX LUCIANO; TRE REBSTOCK; FERNANDO SILVA; SAMUEL MARTIN; JAMES D. DOEBLER; STATE OF MISSISSIPPI, BY AND THROUGH GOVERNOR PHIL BRYANT,
Plaintiffs-Appellants Cross-Appellees,

v.

JEH CHARLES JOHNSON, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; JOHN SANDWEG, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF IMMIGRATION & CUSTOMS ENFORCEMENT; LORI SCIALABBA, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES,
Defendants-Appellees Cross-Appellants.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, CIVIL NO. 3:12-CV-3247, HON. REED O'CONNOR

AMICUS CURIAE BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF APPELLANTS/CROSS-APPELLEES IN THE CROSS APPEAL

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The case number is 14-10049. The case is styled as *Crane v. Johnson.* The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum") is a nonprofit organization having allied state chapters active in Mississippi, Texas and Louisiana. For more than thirty years, Eagle Forum and its allied state chapters have defended American sovereignty and promoted adherence to federalism and the separation of powers under the U.S. Constitution. In addition, they have consistently opposed unlawful behavior, including illegal entry into and residence in the United States, and supported enforcing immigration laws. Eagle Forum has long defended adherence to the Constitution in limiting federal power. For all these reasons, Eagle Forum has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

Ten law-enforcement officers of U.S. Immigration & Customs Enforcement ("ICE") (collectively, hereinafter, the "ICE-officer Plaintiffs") and the State of Mississippi sue federal officers responsible for ICE and immigration policy (collectively, hereinafter, the "Administration") to enjoin the implementation of a June 2012 memorandum from the Department of Homeland Security ("DHS") on

[1] *Amicus* files this brief with the consent of all of the parties. Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for the *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

the Deferred Action for Childhood Arrivals ("DACA") as well as related agency action to implement the DACA (collectively, the "DACA Program"). The district court determined that the DACA Program was *ultra vires*, but dismissed on jurisdictional grounds. Plaintiffs appealed the dismissal, and the Administration cross appealed the merits issues. Eagle Forum previously filed an *amicus* brief in Plaintiffs' appeal of the dismissal of their action on jurisdictional grounds, and it now files this *amicus* brief on the merits issues raised by the cross appeal.

SUMMARY OF ARGUMENT

The DACA Program is procedurally invalid for its failure to comply with notice-and-comment rulemaking procedures under the Administrative Procedure Act ("APA") when the Administration narrowed agency discretion, conferred benefits, and amended prior regulations (Section I.A). Similarly, the failure to initiate required removal proceedings is not excused by the Administration's view that it could have terminated those proceedings later in the process, with the same end result as simply not invoking the required procedures (Section I.B). The general, rebuttable presumption that enforcement discretion is unreviewable from *Heckler v. Chaney*, 470 U.S. 821 (1985), is inapplicable here for two reasons: (1) the relevant statutes here require these enforcement proceedings, which gives a reviewing court "law to apply" versus the agency's chosen nonenforcement path (Section II.A); and (2) unlike an instance of nonenforcement like *Heckler*, the

Administration here has taken final agency action in the form of the promulgated DACA Program, which amends previously promulgated legislative rules (Section II.B). The Administration's claims to this Court's deference to an agency interpretation and policy are misplaced because *Heckler* does not apply (as the Administration claims) and their policy-based rationale is misdirected: Congress, not this Court, has the power to amend immigration laws (Section III).

ARGUMENT

I. THE DACA PROGRAM IS PROCEDURALLY AND SUBSTANTIVELY *ULTRA VIRES*

Because the DACA Program's unlawfulness goes to jurisdictional issues such as a narrow zone of interest for *ultra vires* agency action, procedural-rights standing, and the jurisdictional exception for judicial review of *ultra vires* actions in *Leedom v. Kyne*, 358 U.S. 184 (1958), Eagle Forum's jurisdictional brief addressed the ways in which the DACA Program violates the APA, federal immigration law, and the Constitution. *See* Eagle Forum Br. at 5-10. Without reproducing those arguments here, this Section analyzes the DACA Program's lawfulness on the merits.

A. The DACA Program Violates the Procedural Protections of the APA and the Constitution

Eagle Forum's jurisdictional brief argued that promulgation of the DACA Program without notice-and-comment rulemaking violated the APA because that Program is a legislative rule under the criteria in *Shell Offshore Inc. v. Babbitt*, 238

F.3d 622, 628 (5th Cir. 2001). Eagle Forum Br. at 5-7. Thus, even if the DACA Program were not substantively inconsistent with immigration law, the DACA Program still would be a nullity for three reasons: (1) it narrows the discretion otherwise available to agency staff, *Texas Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd.*, 201 F.3d 551, 556 (5th Cir. 2001), (2) it promulgated the regulatory basis on which to confer benefits. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983); *Mercy Hosp. of Laredo v. Heckler*, 777 F.2d 1028, 1032 (5th Cir. 1985); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979), and (3) it effectively amended existing rules.[2] *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993); *Shell Offshore*, 238 F.3d at 629. Similarly, Eagle Forum's jurisdictional brief argued that any attempt by federal agencies to make law without following the APA's requirements violates the constitutional command that "All legislative Powers [are vested] in a Congress." Eagle Forum Br. at 8 (*quoting* U.S. CONST. art. I, §1). The Administration offers nothing to defend against these charges that the DACA Program violates the APA and the Constitution.

B. The DACA Program Violates Federal Immigration Law

As indicated in Eagle Forum's jurisdictional brief, the DACA Program

[2] The DACA Program authorizes the benefit of lawful employment without an illegal alien's having met any of the sixteen enumerated criteria of 8 C.F.R. §274a.12(a)(1)-(16) , (c)(14) for that benefit.

advances illegal aliens to a favorable *possible outcome* of the statutory removal process, without the statutorily required process that must precede that outcome. Eagle Forum Br. at 7-8; *accord* Pls.' Cross-Appeal Br. at 51-69. That violates both substantive and procedural requirements of immigration law, and it is *ultra vires.*

The Administration jumps through linguistic hoops in its effort to show that an illegal alien who wants to remain here illegally is not "seeking admission" for statutory purposes. Defs.' Br. at 81-82. Further, the Administration sees Plaintiffs' argument as leading to the "nonsensical result[]" of compelling the Administration to commence statutorily required removal proceedings that the Administration could later terminate under its enforcement discretion. *Id.* at 83-84. *Amicus* Eagle Forum respectfully submits that the Administration does not understand the law.

First, as even the Administration begrudgingly admits, Congress intended the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") to put illegal aliens on *no better ground* than aliens attempting to gain access legally. Defs.' Br. at 87; *see also* Pls.' Cross-Appeal Br. at 52-53. There is nothing nonsensical about a federal agency doing what a duly enacted federal statute commands the agency to do.

Second, the Administration's rejection of what it obviously regards as pointless procedure is inconsistent with the importance that our legal tradition places on process. Indeed, the "history of liberty has largely been the history of

observance of procedural safeguards," *McNabb v. U.S.*, 318 U.S. 332, 347 (1943), and "'procedural rights' are special," *Lujan v. Defenders of the Wildlife*, 504 U.S. 555, 572 n.7 (1992); *cf. Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) ("right to procedural due process is 'absolute' [and] does not depend upon the merits of a claimant's substantive assertions"). Thus, it is not nonsensical to require that the required process start, even if the Administration thinks that it knows how that process would end:

> If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case – even though the agency … might later, in the exercise of its lawful discretion, reach the same result for a different reason.

FEC v. Akins, 524 U.S. 11, 25 (1998). As such, this Court should reject the DACA Program's refusal to start statutorily required removal proceedings, even if the Court believes that the Administration could terminate those proceedings later.

Third, with regard to how those proceedings would end, this Court should not prejudge how ICE professionals will perform their duties if the Administration allows them to follow the law. Maybe some DACA beneficiaries would be deferred later in the removal process as predicted by the Administration, but it is unlikely that *all* would be deferred without either an amended statute or, at least, amended regulations. Sadly, the DACA Program and the reportedly impending Executive action to grant presidential amnesty – if such a thing exists – to five to

six million illegal aliens is a political spoil that the Administration believes it can dispense or withhold for electoral favor. *Compare* Julie Hirschfeld Davis & Julia Preston, *Obama Says He'll Order Action to Aid Immigrants,* N.Y. TIMES, July 1, 2014, at A9 *with* Michael D. Shearsept, *Obama Delays Immigration Action, Yielding to Democratic Concerns,* N.Y. TIMES, Sept. 7, 2014, at A1. While *amicus* Eagle Forum finds that disturbing, it nonetheless remains true that this Court should assume that ICE professionals – such as the ICE-officer Plaintiffs here – will continue to do their jobs diligently under the law, provided that this Court provides them the relief from the unlawful oversight represented by the DACA Program.

The Administration cites language from a House report on the Department of Homeland Security Appropriations Act for fiscal year 2010, Pub. L. No. 111-83, 123 Stat. 2142 (Oct. 28, 2009), for the proposition that enforcement efforts should seek to maximize national safety, not "simply rounding up as many illegal immigrants as possible." Defs.' Br. at 89 (internal quotations omitted). But the Administration fails to cite any statutory text – whether from the irrelevant fiscal 2010 appropriation or otherwise – that modified the clear statutory text on which Plaintiffs rely. Courts "do not resort to legislative history to cloud a statutory text that is clear," *Ratzlaf v. U.S.*, 510 U.S. 135, 147 (1994), *superseded by statute on other grounds*, 31 U.S.C. §§5322(a)-(b), 5324(c), and "the authoritative statement"

for statutory interpretation "is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005). *Amicus* Eagle Forum respectfully submits that it is irrelevant what the One Hundred and Eleventh Congress thought, but did not choose to enact into law.

For all of the foregoing reasons and those argued by Plaintiffs, the DACA Program constitutes *ultra vires* agency action and, as such, this Court should declare it unlawful.

II. ENFORCEMENT DISCRETION UNDER *HECKLER* IS NOT THE ISSUE PRESENTED HERE

The Administration's claims of "enforcement discretion" under *Heckler* cannot insulate the DACA Program from review for two independent reasons. First, federal immigration law includes provisions that govern the procedural question presented here, so this is not a garden-variety statute with unfettered enforcement discretion. It is a more specialized statute, where the reviewability question turns on the fetters that Congress imposed. Second, the DACA Program is not simply a decision to focus the available enforcement resources; it is a rule that provides benefits to a class of DACA beneficiaries and so remains reviewable as a rule.

A. Enforcement Policies Are Reviewable Where – as Here – a Court Has Law to Apply

Heckler held that federal courts could not review the U.S. Food & Drug

Administration's decision not to enforce the Federal Food, Drug, and Cosmetic Act against certain drugs in a challenge by prison inmates sentenced to death by lethal injection of those drugs. Although the Administration cites *Heckler* for the proposition that the Administration is best suited to set its enforcement priorities based on factors such as its likely success, overall priorities, and available resources, Defs.' Br. at 80, federal law places certain limits on how the Administration can exercise its discretion.

The concept of unreviewable agency discretion did not begin with the APA much less with *Heckler, see, e.g., Gray v. Powell*, 314 U.S. 402, 412 (1941); Kenneth Culp Davis, *"Nonreviewable Administrative Action,"* 96 U. PA. L. REV. 749, 750-51 (1948), but the APA did provide "generous review provisions" and require "hospitable interpretation" favoring review, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967), of final agency actions like the DACA Program. 5 U.S.C. §704. As relevant in *Heckler*, 5 U.S.C. §701(a)(2) exempts "agency action … committed to agency discretion by law" from APA review. *Heckler*, 470 U.S. at 830. Although recognizing this as "a *very narrow* exception," the Supreme Court has relied on the APA's legislative history to make this exception "applicable in those *rare instances* where statutes are drawn in such broad terms that in a given case there is no law to apply." *Id.* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)) (interior

quotations omitted, emphasis added). The question is whether that this is one of the "rare instances" where that "very narrow exception" applies.

As Plaintiffs explain, Congress made these removal proceedings mandatory precisely because the Administration's predecessors were too lenient in their enforcement of immigration laws. Pls.' Cross-Appeal Br. at 51-52. Obviously, agency inaction in the face of statutory mandates cannot qualify as unreviewable enforcement discretion. *Ass'n of Irritated Residents v. EPA,* 494 F.3d 1027, 1032 (D.C. Cir. 2007). Indeed, *Heckler* itself recognizes as much by holding that, if there is "law to apply" for APA review, any presumption of non-reviewability is rebutted. *Heckler,* 470 U.S. at 834-35. That is the situation that applies here: non-enforcement is reviewable.

The Administration cites *Seabrook v. Costle,* 659 F.2d 1371, 1374 n.3 (5th Cir. 1981), for the proposition that a statute's use of the mandatory term "shall" is not necessarily controlling on whether agencies retain prosecutorial discretion, Defs.' Br. at 84-85, but the Circuit precedent on which *Seabrook* relied is more relevant here. For the statute at issue in *Sierra Club v. Train,* 557 F.2d 485, 489 (5th Cir. 1977), the House and Senate conferees receded to a House bill that *authorized* enforcement over a Senate bill that *required* enforcement. That reemphasizes what Plaintiffs argue and what *Heckler* held: if, in fact, there is law to apply, Courts must apply the law.

B. Enforcement Discretion Does Not Protect the Back-Door Issuance of Substantive or Legislative Rules

An agency policy document like those that implement the DACA Program can be reviewable final agency action, even if a particular instance of discretion not to enforce a statute were not reviewable. Specifically, the APA allows review of not only actions made reviewable by statute, but also any final agency action not otherwise reviewable in court. 5 U.S.C. §704. Under the circumstances, the DACA Program would be reviewable even if the Administration were correct that immigration law gives them the discretion to proceed as outlined in the DACA Program.

Indeed, *Heckler* specifically exempts the "abdication" claim in *Adams v. Richardson,* 480 F.2d 1159, 1161-63 (D.C. Cir. 1973) (*en banc*), for review of conscious, express policies of nonenforcement:

> Nor do we have a situation where it could justifiably be found that the agency has "consciously and expressly adopted a general policy" that is so extreme as to amount to an abdication of its statutory responsibilities. *See, e. g., Adams v. Richardson,* ... 480 F.2d 1159 (1973) (*en banc*).

Heckler, 470 U.S. at 833 n.4; *accord id.* at 839 ("the Court … does not decide today that nonenforcement decisions are unreviewable in cases where … an agency engages in a pattern of nonenforcement of clear statutory language, as in *Adams v. Richardson*") (Brennan, J., concurring) (citations omitted). As indicated in note 2,

supra, the DACA Program effectively amended governing regulations, which had been promulgated by notice-and-comment rulemaking. To make that amendment, the government needs to proceed via bicameralism and presentment to the President under the Constitution or via notice-and-comment rulemaking under the APA. At least when outside the APA, mere executive action is not enough. The DACA Program would therefore be reviewable, even assuming *arguendo* that some of its components were committed to agency discretion.

III. THIS COURT SHOULD NOT DEFER TO THE ADMINISTRATION'S INTERPRETATIONS

This Court should reject the Administration's request for deference to its position because the Administration's make-weight reasons would not excuse statutory violations, even if those reasons were credible. In this section, *amicus* Eagle Forum explains why this Court should not defer to the Administration's position.

A. ***Skidmore* – Not *Chevron* – Applies to this Action**

At the outset, judicial deference to administrative comes in a variety of forms, with the two primary forms being those identified in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), and *Chevron U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 842-44, 865-66 (1984). For its part, the Administration appears to claim

Skidmore deference and, in any event, does not (and could not[3]) claim *Chevron* deference:

> The memoranda at issue here are consistent with decades of prior administrative practice, fully explain the reasons for deferring enforcement action, and, as *Chaney* indicates, concern prosecutorial decisions that are presumptively within the agency's broad discretion. For all these reasons, deference to the Secretary's interpretation is warranted. *See Siwe v. Holder*, 742 F.3d 603, 607 (5th Cir. 2014), citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Defs.' Br. at 89. Thus, if any form of deference applies here, it would be the *Skidmore* deference on which this Court relied in *Siwe* and to which the Administration refers in its brief.

Under *Skidmore*, courts defer to an agency interpretation based on the "thoroughness evident in the [agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control." 323 U.S. at 140. By contrast, under *Chevron,* courts owe deference to an agency's plausible construction of an interstitial gap in a statute under that agency's administration as delegated by Congress (*Chevron* prong two), unless the Court can interpret the

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[3] "*Chevron* deference is not accorded merely because the statute is ambiguous and an administrative official is involved. A rule must be promulgated pursuant to authority Congress has delegated to the official." *Gonzales v. Oregon*,546 U.S. 243, 248 (2006).

statute's requirements using tools of traditional statutory construction (*Chevron* prong one). *Chevron*, 467 U.S. at 842-44, 865-66. Because the Administration does not invoke *Chevron*, however, this Court must evaluate the DACA Program on the factors that the Administration cites to justify *Skidmore* deference – namely, prior administrative practice, the agency memoranda's full explanations, and the non-reviewability of enforcement discretion under *Heckler*.

B. The DACA Program Does Not Warrant Deference under *Skidmore*

The reasons that the Administration gives to justify *Skidmore* deference are each misplaced. As such, together they add up to no basis whatsoever for this Court to defer to the Administration's merits views.

Before even considering the Administration's arguments, this Court should acknowledge that the DACA Program is a nullity as the result of its APA procedural violations, *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 909-10 (5th Cir. 1983), and as such cannot command any deference. The right to comment provides the public an opportunity to convince agencies to change an unwise ("arbitrary or capricious") or unlawful ("not in accordance with the law") course. 5 U.S.C. §706. "The notice-and-comment procedure encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking." *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985). By declining to undertake that path,

the Administration has only itself to blame for any deficiencies that the public-comment period might have revealed. Moreover, APA compliance would have provided the Administration the only lawful path to set enforceable norms without going through bicameralism and presentment under the Constitution.

The Administration's argument of decades of past practice fails for two independent reasons. First, as Plaintiffs explain, Congress enacted IIRIRA precisely to put an end to lenient "catch-and-release" agency practices. Pls.' Cross-Appeal Br. at 52-53; *see also* Defs.' Br. at 87. Second, while consistency of interpretation can increase deference, *Skidmore,* 323 U.S. at 140, consistency alone cannot make an arbitrary position rational: "Arbitrary agency action becomes no less so by simple dint of repetition." *Judulang v. Holder,* 132 S.Ct. 476, 488 (2011). Here, since IIRIRA's enactment in 1996, the Administration's position has been untenable. Whatever happened in the prior decades is therefore irrelevant.

The Administration's argument (Defs.' Br. at 89) that the DACA Program "fully explain[s] the reasons for deferring enforcement" is entirely irrelevant. The question here is not whether the Administration has identified a wise policy but, rather, whether it has adopted a lawful policy. As Plaintiffs and *amicus* Eagle Forum explain, the DACA Program is unlawful.

As explained in Section II, *supra,* and by the Plaintiffs, the presumption of non-reviewability under *Heckler* (Defs.' Br. at 89) offers the Administration no

help. That general presumption is rebutted by the specific laws – both substantive immigration law and procedural APA requirements – at issue here.

CONCLUSION

For the foregoing reasons and those argued by Plaintiffs, *amicus* Eagle Forum respectfully submits that – if it decides that federal jurisdiction exists for Plaintiffs' claims – this Court should rule for Plaintiffs on the merits.

Dated: September 17, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

No. 14-10049, *Crane v. Johnson.*

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 3,471 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: September 17, 2014, 2014 Respectfully submitted,

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CERTIFICATE OF SERVICE

No. 14-10049, *Crane v. Johnson.*

I hereby certify that, on September 17, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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