Nos. 18-15068, 18-15069, 18-15070, 18-15071, 18-15072, 18-15128, 18-15133, 18-15134

United States Court of Appeals for the Ninth Circuit

Regents of the University of California.,
Plaintiffs-Appellees, et al.,
v.
Donald J. Trump, et al.,
Defendants-Appellants.

Appeal from the United States Northern District Court for the California (Alsup, W.)
Case Nos. 3:17-cv-05211-WHA, 3:17-cv-05235-WHA, 3:17-cv-05329-WHA, 3:17-cv-05380-WHA, 3:17-cv-05813-WHA

MOTION FOR LEAVE TO FILE, OR IN THE ALTERNATIVE TO FILE OUT OF TIME, AMICUS CURIAE BRIEF BY THE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLANTS AND DISMISSAL

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Attorney for Amicus Curiae

Pursuant to Federal Rule of Appellate Procedure 29(a)(3), the Immigration Reform Law Institute ("IRLI") makes this motion for leave to file, or in the alternative to file out of time, the accompanying *amicus curiae* brief in support of appellants in their opposition to appellees' cross appeal.

1. *Interest of amicus curiae*

IRLI is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts (including this Court) and administrative bodies, including *Trump v. Int'l Refugee Assistance Project,* 137 S. Ct. 2080 (2017); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

IRLI has long maintained that the Deferred Action for Childhood Arrivals ("DACA") program is invalid, and so argued, for example, before the U.S.

Supreme Court in *United States v. Texas*, 136 S. Ct. 2271 (2016). The lawfulness of this program is squarely at issue in this case.

2. *Why this brief is desirable and relevant*

In the accompanying brief, IRLI makes a point touched upon by appellants, but develops it differently. First, IRLI argues that the DACA program is a substantive rule that is invalid for lack of notice and comment. Then, citing precedents of this Court not cited by appellants, IRLI shows that, accordingly, even a finding by this Court that the rescission of DACA was invalid for lack of notice and comment would not give effect to DACA, and thus could afford appellees no relief. This argument is another ground to uphold the dismissal by the court below of appellees' notice and comment claims for failure to state a claim upon which relief can be granted.

3. *Consent and timeliness*

Appellants have consented to the filing of the accompanying *amicus curiae* brief. The State, University of California, and Santa Clara County appellees, considering the brief untimely, have stated that they would not oppose a motion by IRLI for leave to file it out of time, and the remaining appellees have not responded to IRLI's inquiries.

In IRLI's view, the brief is timely filed, because it is filed within seven days of April 3, 2018, when the principal brief of appellants on appellees' cross-appeal

was filed. Fed. R. App. P. 29(a)(6) ("An amicus curiae must file its brief . . . no later than 7 days after the principal brief of the party being supported is filed."). Implicitly, for purposes of Rule 29(a)(6), a "principal brief" of a party is either an opening brief or a first brief in response. Were it otherwise, and "principal brief" referred only to an appellant's opening brief, the rule would only allow *amicus* briefs supporting appellants, instead of allowing, as it does, *amicus* briefs supporting appellees to be filed seven days after appellees' response brief is filed.

Nothing in Rule 29 implies that *amicus* briefs either in support of or in support of opposition to cross-appeals are disallowed. *See, e.g., United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 705 (7th Cir. 2014) ("The government filed an *amicus curiae* brief in support of the relators' cross-appeal."); *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1290 (6th Cir. 1991) ("Vernitron now appeals the judgment in plaintiffs' favor. Plaintiffs cross-appeal the denial of attorneys fees. The American Association of Retired Persons ('AARP') is before the court as *amicus* to support the cross-appeal."). In a case involving a cross-appeal, an appellant's third brief is both its reply on its appeal and its response to the appellee's cross-appeal. Fed. R. App. P. 28.1(c)(3). Since first response briefs count as "principal briefs" in Rule 29, an *amicus* brief in support of an appellant's third brief in a cross-appeal, which contains that appellant's first response brief, is due within seven days of that third brief under

Rule 29(a)(6). Hence, the brief accompanying this motion is due seven days after appellants' third brief, filed on April 3, and is timely filed.

The alternative—that the accompanying *amicus* brief was due seven days after appellant's opening brief—is manifestly unfair. At that time (February 20, 2018), appellees had not even filed their principal briefs in their cross-appeal (filed on March 13, 2018); much less had appellants filed their response of which the accompanying *amicus* brief is in support.

If, however, this Court deems the accompanying *amicus* brief untimely, and considers the instant motion one for leave to file out of time, that motion has good cause; *amicus* would not have had the benefit of *any* party's briefing on appellees' cross-appeal if it had filed within seven days of appellants' opening brief. Furthermore, granting the motion would not prejudice any party, or burden this Court.

CONCLUSION

For the foregoing reasons, the instant motion for leave to file, or in the alternative for leave to file out of time, an *amicus curiae* brief in support of appellants should be granted.

DATED: April 10, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 10, 2018, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Christopher J. Hajec
Christopher J. Hajec

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CORPORATE DISCLOSURE STATEMENT

The Immigration Reform Law Institute is a 501(c)(3) not for profit charitable organization incorporated in the District of Columbia. It has no parent corporation, and does not issue stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

OTHER AUTHORITIES

I. INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts (including this Court) and administrative bodies, including *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

II. SUMMARY OF THE ARGUMENT

The Deferred Action for Childhood Arrivals ("DACA") program is a substantive rule that was required to go through notice and comment but did not.

[1] No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The key distinction between directives that are substantive rules, which must go through notice and comment, and directives that are policy statements, which need not, is whether the agency has discretion in their implementation. Here, the memo creating DACA removed the discretion it purported to give. Indeed, based on a thorough evidentiary hearing, the U.S. Court of Appeals for the Fifth Circuit has correctly held that DACA was a substantive rule because it removed discretion.

The effect of finding a rule invalid for lack of notice and comment is not to reinstate the preceding rule, if it also was invalid for lack of notice and comment, but to give effect to neither rule.

Thus, even if this Court were to agree with appellees that the rescission of DACA did not receive required notice and comment, it should find that DACA also did not receive required notice and comment, and accordingly give effect to neither directive. Since such a ruling would not provide appellees relief, the court below properly dismissed their notice and comment claims for failure to state a claim upon which relief can be granted.

III. ARGUMENT

Under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, DACA was required to go through notice and comment, but it never did. Thus, even if the rescission of DACA challenged in this case also was required to go through notice

and comment, as appellees contend, the effect of such a finding would not be to restore DACA, and would provide no relief to appellees.

A. Because DACA Did Not Go Through Notice And Comment, It Is Invalid.

Substantive rules issued by an agency that did not go through the notice and comment process are invalid. *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005). The Ninth Circuit has stated the test for whether an agency directive is a substantive rule as follows:

> When a federal agency issues a directive concerning the future exercise of its discretionary power, for purposes of APA section 553, its directive will constitute either a substantive rule, for which notice-and-comment procedures are required, or a general statement of policy, for which they are not. The critical factor to determine whether a directive announcing a new policy constitutes a rule or a general statement of policy is the extent to which the challenged directive leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the announced policy in an individual case.
>
> To the extent that the directive merely provides *guidance* to agency officials in exercising their discretionary power while preserving their flexibility and their opportunity to make individualized determinations, it constitutes a general statement of policy. In such cases, Congress has determined that notice-and-comment rulemaking would be of limited utility . . . .

Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1013 (9th Cir. 1987) (internal citations and quotation marks omitted) (emphasis in original) (finding that an agency directive concerning the application of a deferred action policy in the immigration context left ample discretion to agency officials and thus did not constitute a substantive rule).

By this standard, DACA is clearly a substantive rule. The memorandum establishing DACA directs agents to "exercise prosecutorial discretion, on an individual basis," to grant deferred action for two years, subject to renewal, to aliens who meet the criteria set forth in the memo, for the purpose of "preventing [such] low priority individuals from being placed into removal proceedings or removed from the United States," and to accept work authorization applications from those granted deferred action. Memorandum from Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* 2, 3 (June 15, 2012). The court below failed to examine how unreal such "prosecutorial discretion, on an individual basis" is, merely holding summarily that "[t]he DACA program allowed but did not require the agency to grant deferred action . . . on a case-by-case basis at the agency's discretion." ER 54. In fact, it is difficult to see how any agent acting pursuant to this memo would feel free *not* to grant deferred action in any given case where the criteria were met; indeed, the only purpose the agents are supposed to be fulfilling in implementing the memo is to prevent the removal of those meeting the criteria. *Compare Mada-Luna*, 813 F.2d at 1017 (finding discretion where officials were permitted to grant deferred action based on "appealing humanitarian factors"). Thus, though couched in terms of agents' discretion, the memo actually removes that discretion. Indeed, the form of words chosen verges on the comical; to order

agents to "exercise their discretion" *only in a particular way*, as the DACA memo does, is to deny them the very discretion the order presupposes.

Indeed, based on a thorough evidentiary hearing, the Fifth Circuit held that DACA was a substantive rule because it withdrew discretion from agents:

> [T]he DACA Memo instructed agencies to review applications on a case-by-case basis and exercise discretion, but the district court found that those statements were "merely pretext" because only about 5% of the 723,000 applications accepted for evaluation had been denied, and "[d]espite a request by the [district] [c]ourt, the [g]overnment's counsel did not provide the number, if any, of requests that were denied [for discretionary reasons] even though the applicant met the DACA criteria . . . ." The finding of pretext was also based on a declaration by Kenneth Palinkas, the president of the union representing the USCIS employees processing the DACA applications, that "DHS management has taken multiple steps to ensure that DACA applications are simply rubberstamped if the applicants meet the necessary criteria"; [and on] DACA's Operating Procedures, which "contain[] nearly 150 pages of specific instructions for granting or denying deferred action . . . ."

Texas v. United States, 809 F.3d 134, 172-73 (5th Cir. 2015). Surveying the above and other evidence relied on by the district court, the Fifth Circuit roundly held that the district court's finding that DACA "severely restricts" agency discretion, "[f]ar from being clear error, . . . was no error whatsoever." *Id.* at n.133 (internal quotation marks and brackets omitted). Though questioning this holding, the court below was able to cite no evidence contradicting it. ER 36-37.

B. Because DACA Is Invalid, Finding Its Rescission Invalid For Failure Of Notice And Comment Can Give Appellees No Relief.

Courts must hold unlawful, rather than give effect to, invalid agency actions. 5 U.S.C. § 706(2)(A) ("The reviewing courts shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"). Thus, if this Court were to agree with appellees and set aside the rescission of DACA for failure to go through notice and comment, the effect would be to reinstate the rule previously in force—but only if that previous rule were valid. Otherwise, neither rule should be given effect.

This Court has followed such a course repeatedly. In *Paulsen*, 413 F.3d at 1008, this Court held that "[t]he effect of invalidating an agency rule is to reinstate the rule previously in force," but it refused to reinstate a previous rule under that standard because it was itself invalid. In *Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008), this Court found that a subsequent rule referred to in *Paulsen* was itself invalid (on grounds this Court had had no occasion to consider in *Paulsen*), and refused to reinstate any in a series of previous, invalid rules:

> For twelve years, the Bureau [of Prisons] has sought to exclude those convicted of offenses involving the carrying, possession, or use of a firearm or other dangerous weapon or explosives from eligibility for early release under 18 U.S.C. § 3621(e). In that time, the Bureau has failed to adopt a valid regulation to support its exclusion policy. Its first attempt was struck down because the Bureau adopted an impermissible

> definition of "crime of violence." *See Davis [v. Crabtree]*, 109 F.3d [566,] 568-70 [(9th Cir. 1997)]; *Downey [v. Crabtree]*, 100 F.3d [662,] 666-70 [(9th Cir. 1996)]. Its second attempt was struck down on notice and comment grounds. *See Paulsen*, 413 F.3d at 1004. The final rule, like its predecessors, also falls short of meeting the governing legal standards. The Bureau has failed to set forth a valid rationale for its categorical exclusion rule. Section 706 of the Administrative Procedure Act requires that it do so. We therefore reverse the judgments of the district court in the consolidated cases and direct it to grant the habeas corpus petitions. *See Paulsen*, 413 F.3d at 1008.

Id. at 1116.

So, too, here. Even if this Court finds that the rescission of DACA is invalid for failure to go through notice and comment, DACA itself is invalid for the same reason, and thus this Court should give neither rule effect. But if DACA is not given effect, the setting aside of its rescission would avail appellees nothing. Thus, the court below properly dismissed their notice and comment claims for failure to state a claim upon which relief can be granted.

IV. CONCLUSION

For the foregoing reasons, the dismissal of appellees' notice and comment claims should be affirmed.

DATED: April 10, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(7)(B), the foregoing *amicus curiae* brief is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 1,794 words, excluding those sections identified in Fed. R. App. P. 32(f).

/s/ Christopher J. Hajec
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CERTIFICATE OF SERVICE

I certify that on April 10, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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