

# Out of the Shadows: Deferred Action for Childhood Arrivals, Deferred Action to Parents of Americans and Lawful Permanent Residents, and Executive Prosecutorial Discretion in Immigration Law

by OLGA Y. KUCHINS\*

## Introduction

From the outside, Sofia's family looks like a typical hardworking, well-assimilated family of immigrants who have found a better future and more opportunity in the United States. Sofia's brother is a college graduate and an executive at a technology firm, and Sofia is pursuing a law degree from a prestigious university. Her parents work cleaning the homes of Southern California residents. It is not until the subject comes to legal status in the United States that this façade of normalcy and integration crumbles. Sofia, who was brought to the United States by her parents when she was five years old, and her family are part of the more than eleven million undocumented immigrants living and working in the United States unlawfully.<sup>1</sup>

Like this vast group of people, Sofia's undocumented status has left her plagued by the fear of arrest and deportation, and prevented her from being a fully contributing member of society in the only country she knows and calls home. As an undocumented immigrant, Sofia was not able to legally obtain a diver's license, work, or live in the United States until the Obama Administration implemented the Deferred Action for Childhood Arrivals ("DACA") program. However, the Administration's effort to

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1. Jens Manuel Krogstad & Jeffrey S. Passel, *5 Facts About Illegal Immigration in the U.S.*, PEW RESEARCH CTR.: FACT TANK (July 24, 2015), <http://www.pewresearch.org/fact-tank/2015/07/24/5-facts-about-illegal-immigration-in-the-u-s/>.

bring undocumented immigrants out of the “shadows”<sup>2</sup> under DACA, while constitutional, is merely a Band-Aid—a temporary solution to Congress’s unsuccessful efforts to pass legislation that addresses the issue of undocumented immigrants head on. This country, a nation of immigrants, deserves more.

This Note will contextualize the Obama Administration’s deferred action programs within the larger framework of prosecutorial discretion in immigration law. Section I will lay the foundation for the Administration’s decision to implement DACA by discussing some of the major developments in United States’ immigration law and policy preceding the executive action. Section II will detail the general framework of DACA and the 2014 DACA expansion, including the 2014 Deferred Action to Parents of Americans and Lawful Permanent Residents (“DAPA”) program. Section III will explore the debate over the current state of the Administration’s executive action programs. Specifically, it will outline the positions of opponents and proponents of DACA and DAPA. It will also discuss judicial challenges to DAPA and DACA and select policies affecting DACA-eligible immigrants and undocumented noncitizens. Section IV will demonstrate the constitutionality of executive prosecutorial discretion in immigration law. It will provide examples of deferred action programs instituted by former Administrations. Finally, Section V will discuss the limitations of DACA in the narrow context of law licenses and advocate for comprehensive immigration reform.

## **I. Select Developments in Immigration Law and Policy Leading up to the Deferred Action for Childhood Arrivals Program**

Four years after the Supreme Court’s landmark decision in *Plyler v. Doe*, which held that no state shall deny a child’s access to free education on account of his or her immigration status and highlighted the “innocence” of undocumented children who accompanied their parents to the United States,<sup>3</sup> Congress passed the bipartisan Immigration Reform and Control

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2. See *Plyler v. Doe*, 457 U.S. 202, 218 (1982) (“Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial ‘shadow population’ of illegal migrants—numbering in the millions—within our borders.”).

3. *Plyler*, 457 U.S. at 202. In *Plyler*, the state of Texas enacted a statute that (1) denied funding to local school districts for the education of undocumented children; and (2) authorized the school districts to deny the children enrollment in a public school, which it makes available to all residents. Emphasizing that the appellees were “innocent children,” who can “affect neither their parents’ conduct nor their own status,” the Court struck down the Texas statute, finding it in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 238 (citing *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)); see also HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 9 (2014) (explaining that the holding in *Plyler* was narrow and “closely tied to the facts of the case;” however, it “remains a high-water mark for the constitutional protection of

Act (“IRCA”) of 1986.<sup>4</sup> IRCA aimed to deter and control illegal immigration to the United States,<sup>5</sup> which was largely the result of American employers’ demand for cheap and subservient labor.<sup>6</sup> The notable provisions of this Act placed sanctions on employers who knowingly hire undocumented workers, increased enforcement at the borders, and provided for legalization of agricultural workers and undocumented immigrants living continuously in the United States since 1982.<sup>7</sup> Under IRCA’s broadscale legalization scheme, approximately 1.1 million agricultural workers and 1.6 million unlawfully present migrants, including the children from *Plyler v. Doe*, became permanent residents.<sup>8</sup> At the time IRCA became law, the unauthorized population of the United States was estimated to be at 3.2 million.<sup>9</sup> While not without flaws, IRCA represented the first and the largest effort by Congress to address the consequences of illegal immigration.<sup>10</sup>

Ten years later, in the face of the 1993 terrorist attacks and reemerged focus on national security in immigration policy, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”).<sup>11</sup> This powerful enforcement measure reshaped the United States deportation system.<sup>12</sup> Among other features, IIRIRA created mandatory detention schemes for many noncitizens, expanded grounds for deportability, limited discretionary relief from removal, eliminated judicial review of certain removal orders, and streamlined deportation.<sup>13</sup> By

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unauthorized migrants against laws that treat them differently because they lack lawful immigration status”).

4. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat 3359 (1986).

5. *Id.*; UNITED STATES CITIZENSHIP & IMMIGRATION SERVS., IMMIGRATION REFORM AND CONTROL ACT OF 1986 (IRCA), <http://www.uscis.gov/tools/glossary/immigration-reform-and-control-act-1986-irca>; see also MOTOMURA, *supra* note 3 at 182.

6. Camille J. Bosworth, Note, *Guest Worker Policy: A Critical Analysis of President Bush’s Proposed Reform*, 56 HASTINGS L.J. 1095, 1099 (2005); MOTOMURA, *supra* note 3 at 39–40.

7. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat 3359, 3360.

8. Michael A. Olivas, *The Political Efficacy of Plyler v. Doe: The Danger and the Discourse*, 45 U.C. DAVIS L. REV. 1, 17 (2011); MOTOMURA, *supra* note 3 at 30.

9. *Id.*

10. Muzaffar Chrishti & Charles Kamasaki, *IRCA in Retrospect: Guideposts for Today’s Immigration Reform in 9* MIGRATION POLICY INST.: ISSUE BRIEF 1, 11 n.52 (Michelle Mittelstadt ed., Migration Policy Institute, 2014).

11. Pub. L. No. 104-208, 110 Stat. 3008 (1996); Kristi Lundstrom, Note, *The Unintended Effects of the Three-and Ten-Year Unlawful Presence Bars*, 76 LAW & CONTEMP. PROB. 389, 400 (2013).

12. DANIEL KANSTROOM, AFTERMATH 12 (2012).

13. *Id.*

strengthening enforcement both at the border and in the interior, IIRIRA made palpable the shift away from family unity as a fundamental feature of immigration policy.<sup>14</sup> Hundreds of thousands of immigrants who would have been allowed to become legal permanent residents under prior laws were deported from the United States under IIRIRA, affecting families and children of the undocumented.<sup>15</sup>

In 2001, the bipartisan “Development, Relief, and Education for Alien Minors Act” or “DREAM Act” was introduced in the Senate and the House of Representatives to address the problems of illegal immigration, but failed to pass.<sup>16</sup> The DREAM Act would have provided legal status and eventually a path to citizenship for undocumented youth who entered the United States as adolescents, stayed in the country unlawfully to finish high school, had good moral character, and remained in the United States to pursue higher education or military service.<sup>17</sup> The DREAM Act echoed Justice Powell’s and the majority’s view in *Plyler* that penalties and stigma should not be imposed on innocent children because of their parents’ decisions.<sup>18</sup>

Over the course of ten years, the changing bipartisan sponsors of the DREAM Act came tantalizingly close, yet never succeeded at passing the bill.<sup>19</sup> In 2008, the House passed the DREAM Act.<sup>20</sup> In 2010, however, the bill fell only five votes short of cloture in the Senate.<sup>21</sup> Like its changing sponsors, the bill went through multiple amendments to appeal to the wider public and Congressional representatives. For example, in addition to the requirements set out in the original DREAM Act, the amended 2010 House bill required applicants to pass extensive background checks and to not have been convicted of certain offenses under federal or state law.<sup>22</sup> Unlike the 2001 DREAM Act, however, the 2010 version, among other changes, would not permit noncitizens to immediately adjust

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14. See Albertina Antognini, *Family Unity Revisited: Divorce, Separation, and Death in Immigration Law*, 66 S.C. L. REV. 1, 2-4 (2014); see also 8 U.S.C. § 1153(a) (2012) (prioritizing family-based categories such as spouses and unmarried sons and unmarried daughters of permanent resident aliens, unmarried sons or daughters of citizens, married sons or daughters of citizens, and siblings of citizens); see Kristi Lundstrom, *supra* note 11, at 408 (explaining that H.R. 5678 implements the underlying intention of our immigration laws regarding the preservation of the family unit.); see MOTOMURA, *supra* note 3 at 46.

15. KANSTROOM, *supra* note 12.

16. S.129, 107th Cong. (2002).

17. *Id.*

18. MOTOMURA, *supra* note 3 at 8; *Plyler v. Doe*, 457 U.S. 202, 238-39 (1982)

19. *The Dream Act*, AMERICAN IMMIGRATION COUNSEL (updated May 18, 2011), <http://www.immigrationpolicy.org/just-facts/dream-act>.

20. *Id.*

21. *Id.*

22. See H.R. 5281, 111th Cong. (2010).

status to lawful permanent resident (“LPR”).<sup>23</sup> Instead, the undocumented youth, having met all of the requirements, would be granted a total of 10 years of conditional nonimmigrant status after which they could become an LPR.<sup>24</sup> Once the noncitizens successfully adjusted status and maintained such status for three years, they would be permitted to apply for citizenship.<sup>25</sup>

Nevertheless, even these stricter requirements did not sway Congress to allow undocumented children to work and live with dignity in the United States. The stalled DREAM Act left the problem of undocumented youth and the burdened United States immigration system unaddressed. Following the defeat of the bill, President Obama released the following statement:

In an incredibly disappointing vote today, a minority of Senators prevented the Senate from doing what most Americans understand is best for the country. As I said last week, when the House passed the DREAM Act, it is not only the right thing to do for talented young people who seek to serve a country they know as their own, it is the right thing for the United States of America. Our nation is enriched by their talents and would benefit from the success of their efforts. The DREAM Act is important to our economic competitiveness, military readiness, and law enforcement efforts.<sup>26</sup>

It was against this backdrop that President Obama introduced the 2012 Deferred Action for Childhood Arrivals (hereinafter “DACA”) program to allow “DREAMers”<sup>27</sup> to remain in the United States without the fear of deportation and be contributing members of society.<sup>28</sup>

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23. *Id.*

24. *Id.*

25. *Id.*

26. Press Release, President Obama On the Dream Act: “My Administration Will Not Give Up” (Dec. 8, 2010), <https://www.whitehouse.gov/blog/2010/12/18/president-obama-dream-act-my-administration-will-not-give>.

27. See Barack Obama, *Moving Forward to Fix Our Broken Immigration System*, THE HILL (Feb. 24, 2015), <http://thehill.com/opinion/op-ed/233585-moving-forward-to-fix-our-broken-immigration-system> (using the term “Dreamers” to refer to the young people who were brought to the United States as children and were identified as those qualifying for deferred action under the DREAM Act).

28. Alejandro Mayorkas, *Deferred Action for Childhood Arrivals: Who Can Be Considered*, THE WHITEHOUSE.GOV (Aug. 15, 2012, 11:55 AM), <https://www.whitehouse.gov/blog/2012/08/15/deferred-action-childhood-arrivals-who-can-be-considered>.

## II. What is Deferred Action for Childhood Arrivals?

To better understand the Obama Administration's DACA program, it is important to define the concept of "deferred action" in immigration law. According to the regulations, deferred action is "an act of administrative convenience to the government which gives some cases lower priority."<sup>29</sup> United States Citizenship and Immigration Services ("USCIS")<sup>30</sup> describes deferred action as "a discretionary determination to defer a removal action of an individual as an act of prosecutorial discretion."<sup>31</sup> Deferred action gives Department of Homeland Security ("DHS"), specifically the Immigration and Customs Enforcement ("ICE") agency, the ability to decide whether to initiate deportation proceedings, or terminate removal proceedings against noncitizens that are already in proceedings or subject to a final order of removal.<sup>32</sup> Simply put, deferred action is a form of prosecutorial discretion that allows the United States to focus its limited resources on enforcement of high priority immigrants.<sup>33</sup> As will be discussed later in this Note, prosecutorial discretion has a long history in immigration law.<sup>34</sup> Based on both humanitarian and economic reasons, prosecutorial discretion has been an effective tool of the United States immigration system since its creation.<sup>35</sup>

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29. 8 C.F.R. § 274a.12(c)(14) (2011).

30. See U.S. CITIZENSHIP & IMMIGRATION SERVS., *Our History*, <http://www.uscis.gov/about-us/our-history> (last updated May 25, 2011) ("On March 1, 2003, U.S. Citizenship and Immigration Services ("USCIS") officially assumed responsibility for the immigration service functions of the federal government. The Homeland Security Act of 2002 (Pub. L. No. 107-296, 116 Stat. 2135) dismantled the former Immigration and Naturalization Service ("INS") and separated the former agency into three components within the Department of Homeland Security ("DHS").").

31. U.S. CITIZENSHIP & IMMIG. SERVS., *Frequently Asked Questions* <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> (last reviewed June 18, 2015) (discussing the DACA process).

32. Catherine Y. Kim, *Immigration Separation of Powers and the President's Power to Preempt*, 90 NOTRE DAME L. REV. 691, 716 (2014); see also DEP'T OF HOMELAND SEC., *Memorandum from Janet Napolitano, Sec'y, U. S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al.* (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [hereinafter *Memo from Janet Napolitano*].

33. See U.S. DEP'T OF HOMELAND SEC., *Memorandum from Jeh Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir, U.S. Immigr. & Customs Enforcement, et al.* (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf); see also SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 7* (Ediberto Román ed., 2015).

34. See *infra* Sec. IV; WADHIA, *supra* note 33; see also Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010).

35. WADHIA, *supra* note 33.

Following President Obama's announcement about DACA, Secretary of Homeland Security, Janet Napolitano, outlined the process of how DHS, in the exercise of its discretion, will enforce United States immigration laws.<sup>36</sup> The memorandum identifies children brought to the United States by their parents at a young age as "low priority" individuals against whom discretion will be exercised on a case-by-case basis.<sup>37</sup> The memorandum stresses that the United States immigration laws are not designed to deport talented young people when many of them "have already contributed to our country in significant ways" and "know only this country as home."<sup>38</sup>

The Secretary's 2012 memorandum set out the DACA eligibility criteria as following: (1) immigrants must have entered the United States before the age of sixteen and must not be above the age of thirty as of June 15, 2012; (2) they must be present in the United States as of the date of the memorandum and have continuously resided in the United States for at least the previous five years; (3) and they must currently be enrolled in school, have graduated from high school, obtained a GED, or have been honorably discharged from the United States Armed Forces or the Coast Guard.<sup>39</sup> Likewise, the immigrants must not pose any threat to national security or public safety—they must not have been convicted of any felony offense, a single significant misdemeanor, or multiple misdemeanors.<sup>40</sup>

Since the implementation of the DACA program in 2012 through June 2015, USCIS has received a total of 1,284,840 DACA applications (818,161 came from first-time applicants and 466,679 were renewal applications).<sup>41</sup> To date, USCIS has denied 49,561 DACA applications and approved a total of 1,059,112 applications, granting young adults temporary stay and work authorization in the United States.<sup>42</sup> The economic and humanitarian impact of DACA will be addressed below in Section III.<sup>43</sup>

While DACA grants no formal immigration status, on a case-by-case basis, DHS permits deferred action recipients to temporarily remain in the

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36. U.S. DEP'T OF HOMELAND SEC., *supra* note 32.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. U.S. CITIZENSHIP AND IMMIGR. SERVS., *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012–2015 (June 30)*, (June 2015), [http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821d\\_performancedata\\_fy2015\\_qtr3.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821d_performancedata_fy2015_qtr3.pdf).

42. *Id.*

43. *See infra* Sec. III.

United States for a renewable two-year period.<sup>44</sup> Additionally, DACA beneficiaries may be eligible to obtain temporary Employment Authorization Documents (“EAD”) to work in the United States.<sup>45</sup> However, DACA is not a form of amnesty, a path to citizenship, or permanent residence in the United States.<sup>46</sup> It provides eligible noncitizens a temporary stay in the United States and can be rescinded at any time unless Congress passes comprehensive immigration reform to allow undocumented young adults to remain in the country permanently.<sup>47</sup>

### A. DACA Expansion

Immigration advocates viewed DACA as a first step toward allowing undocumented youth to live and work with dignity in the United States, but DACA’s artificial age cap and silence on the issue of parents of the undocumented youth drove advocates to push for further change.<sup>48</sup> In response, on November 20, 2014, President Obama announced a new deferred action program—Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”)—and an expansion to the DACA 2012 eligibility criteria.<sup>49</sup> DAPA and the 2014 DACA expansion never went into effect because of a nation-wide injunction.<sup>50</sup> This will be

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44. *Id.*; see also *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1059 (9th Cir. 2014); U.S. DEP’T OF HOMELAND SEC., *Deferred Action for Childhood Arrivals*, <http://www.dhs.gov/deferred-action-childhood-arrivals> (last published July 17, 2015) [hereinafter *Deferred Action for Childhood Arrivals*]; see 8 C.F.R. 214.14(d)(3) (2013); U.S. CITIZENSHIP & IMMIGRATION SERVS., *Consideration of Deferred Action for Childhood Arrivals*, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last updated Aug. 3, 2015).

45. *Deferred Action for Childhood Arrivals*, *supra* note 44; *Memo from Janet Napolitano*, *supra* note 32; see *Ariz. Dream Act Coal.*, 757 F.3d at 1059; see also U.S. DEP’T OF JUSTICE, *Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, OPINIONS OF THE OFFICE OF LEGAL COUNSEL (Nov. 19, 2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [hereinafter *Prioritize Removal*] (“Under decades-old regulations promulgated pursuant to authority delegated by Congress . . . aliens who are granted deferred action—like certain other categories of aliens who do not have lawful immigration status, such as asylum applicants—may apply for authorization to work in the United States in certain circumstances, 8C.F.R. § 274a.12(c)(14) (providing that deferred action recipients may apply for work authorization if they can show an ‘economic necessity for employment’”).

46. *Prioritize Removal*, *supra* note 45; see also *MOTOMURA*, *supra* note 3, at 175.

47. Thomas P. Miller & Edyta Salata, *DACA (Deferred Action for Childhood Arrivals)—Making a Dream a Little More Attainable*, 27 DCBA BRIEF 30 (2015).

48. See *infra* Sec. III.

49. U.S. CITIZENSHIP AND IMMIGR. SERVS., *Executive Actions on Immigration* (Nov. 20, 2014), <http://www.uscis.gov/immigrationaction>; see also U.S. DEP’T OF HOMELAND SEC., *Fixing Our Broken Immigration System Through Executive Action—Key Facts*, <http://www.dhs.gov/immigration-action> (last published Nov. 20, 2015).

50. See *infra* Sec. III.

discussed further in the next Section. For now, the goal is to provide a general background on these initiatives.

Specifically, President Obama's supplemental initiatives aim to achieve the following: (1) expand the population eligible for DACA to include young adults of any current age who came to the United States before the age of sixteen and have lived in the United States continuously since January 1, 2010 (effectively removing the DACA 2012 requirement that an immigrant must not have been above the age of thirty as of June 15, 2012); (2) extend the period of stay for DACA-eligible immigrants and work authorization from two years to three years; and (3) allow parents of United States citizens and lawful permanent residents ("LPRs"), provided they pass background checks and satisfy the continuous residence requirement, to request deferred action and employment authorization for three years.<sup>51</sup> With these changes, the Administration seeks not only to strengthen its enforcement efforts at the border and institute tougher background checks, but prioritize deportation of felons not families.<sup>52</sup>

The Administration's programs, just like the DREAM Act and the majority's view in *Plyler*, seek not to punish the children who have lived most of their lives in the United States.<sup>53</sup> Instead, DACA mirrors *Plyler* and recognizes the "permanent attachment" that accompanying minors have to this country.<sup>54</sup> Likewise, the programs recognize that certain undocumented youth and parents of LPRs or United States citizens are "unlikely to be displaced from our territory" because DHS does not have resources to deport all undocumented noncitizens.<sup>55</sup> Thus, by keeping families together<sup>56</sup> and allowing parents of lawful permanent residents or United States citizens to temporarily live free of the threat of deportation,<sup>57</sup>

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51. U.S. CITIZENSHIP AND IMMIGR. SERVS., *supra* note 49.

52. *Id.*; see also U.S. DEP'T OF HOMELAND SEC., *supra* note 49.

53. MOTOMURA, *supra* note 3, at 147 (explaining that the DREAM Act's broad support was "a major factor" in the Administration's decision to establish the deferred action programs).

54. *Id.* at 177 (citing *Plyler v. Doe*, 457 U.S. 202, 218 n.17 (1982)).

55. Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and The Separation of Powers*, 94 B.U. L. REV. 105, 170 (2014) ("At this juncture President Obama intertwined the fairness and welfarist strands of *Plyler*."); U.S. CITIZENSHIP AND IMMIGR. SERVS., *supra* note 49; see also U.S. DEP'T OF HOMELAND SEC., *supra* note 49; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens, to All ICE Employees (Mar. 2, 2011), <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

56. EXECUTIVE OFFICE OF THE PRESIDENT, *THE ECONOMIC BENEFITS OF FIXING OUR BROKEN IMMIGRATION SYSTEM* (2013), <https://www.whitehouse.gov/sites/default/files/docs/report.pdf>.

57. Michael Vincent, *Barack Obama Removes Threat of Deportation for Nearly 5 Million People in Sweeping Immigration Reforms*, ABC NEWS (Nov. 21, 2014), <http://www.abc.net.au/news/2014-11-21/obama-delivers-new-immigration-plan/5908162>.

the programs seek to bring noncitizens out of the “shadows” to contribute to the United States economy, including paying taxes.<sup>58</sup>

However, although approximately 1.3 million noncitizens obtained temporary reprieve from deportation under DACA, it is estimated that only about 3.9 million out of more than 11 million undocumented immigrants will qualify for the Administration’s DACA expansion and DAPA programs.<sup>59</sup> Others will continue to remain in legal limbo, unable to fully contribute to the country they call home without a work permit, a driver’s license, and opportunities for economic and social integration provided to documented immigrants unless Congress passes comprehensive immigration reform.<sup>60</sup>

### III. The Debate Surrounding DACA, its Expansion, and DAPA

#### A. Proponents’ and Opponents’ Views

Like any new measure affecting United States immigration policy, the debate over the Administration’s deferred action programs is analogous to a swinging pendulum and can generally be summed up by two predominant viewpoints—those who perceive the United States as “maintaining America’s traditional open-door policy” as a nation of immigrants and those who wish to “protect American society from an onslaught of foreigners,”<sup>61</sup> who cause economic and social harm to American citizens.<sup>62</sup> This section will provide some of the arguments in support of and against the Administration’s deferred action programs that echo the general pro and anti immigrant views.

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58. U.S. DEP’T OF HOMELAND SEC., *supra* note 49; OFFICE OF THE PRESS SEC’Y, FACT SHEET: IMMIGRATION ACCOUNTABILITY EXECUTIVE ACTION (2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>; *see also* EXECUTIVE OFFICE OF THE PRESIDENT, *supra* note 56.

59. Jens Manuel Krogstad & Jeffrey S. Passel, *5 Facts About Illegal Immigration in the U.S.*, PEW RESEARCH CTR. (July 24, 2015), <http://www.pewresearch.org/fact-tank/2015/07/24/5-facts-about-illegal-immigration-in-the-u-s/>.

60. *Id.*; Jeffrey S. Passel & D’Vera Cohn, *Unauthorized Immigrant Population Stable for Half a Decade*, PEW RESEARCH CTR. (July 22, 2015), <http://www.pewresearch.org/fact-tank/2015/07/22/unauthorized-immigrant-population-stable-for-half-a-decade/>; Roberto G. Gonzales & Veronica Terriquez, *Preliminary Findings from the National UnDACAmented Research Project*, AMERICAN IMMIGRATION COUNCIL (Aug. 15, 2013), <http://www.immigrationpolicy.org/just-facts/how-daca-impacting-lives-those-who-are-now-documented>; Jens Manuel Krogstad & Ana Gonzalez-Barrera, *If Original DACA Program is a Guide, Many Eligible Immigrants Will Apply for Deportation Relief*, PEW RESEARCH CTR. (Dec. 5, 2014), <http://www.pewresearch.org/fact-tank/2014/12/05/if-original-daca-program-is-a-guide-many-eligible-immigrants-will-apply-for-deportation-relief/>.

61. William F. Shughart, Robert D. Tollison & Mwangi S. Kimenyi, *The Political Economy of Immigration Restrictions*, 4 YALE J. ON REG. 79, 80 (1986).

62. MOTOMURA, *supra* note 3, at 166.

Immigrants' rights groups and "DREAMers"<sup>63</sup> praised the Administration's 2012 actions<sup>64</sup> to inject DACA with portions of the DREAM Act's substantive criteria.<sup>65</sup> By focusing on removal of high-priority immigrants, DACA provided not only the much-needed relief to the immigration system that can remove annually only four percent of the undocumented population within the United States borders,<sup>66</sup> it also allowed young people to better integrate into their communities and enjoy the benefits of post-secondary education, including access to grants and scholarships,<sup>67</sup> work permits, social security numbers, bank accounts, and driver licenses.<sup>68</sup> Other reported benefits include increased economic and social opportunities such as better jobs, higher wages,<sup>69</sup> and access to healthcare in select states.<sup>70</sup>

At the same time, proponents of the Administration's deferred action program acknowledged DACA's limitations.<sup>71</sup> DACA 2012 had set what

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63. The term "Dreamers" refers to the young people who were brought to the United States as children. See Barack Obama, *Moving Forward to Fix Our Broken Immigration System*, THE HILL (Feb. 24, 2015), <http://thehill.com/opinion/op-ed/233585-moving-forward-to-fix-our-broken-immigration-system>; see also MARJORIE S. ZATZ & NANCY RODRIGUEZ, DREAMS AND NIGHTMARES: IMMIGRATION POLICY, YOUTH, AND FAMILIES 50 (2015) (explaining that the undocumented youth uses the term "Dreamers" to "remind themselves and others of the DREAM Act . . . but also of their dreams, their untapped potential, and the many contributions they can make to U.S. society").

64. Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES (June 15, 2012), [http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html?\\_r=0](http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html?_r=0).

65. Margulies, *supra* note 55, at 115 (describing that while DACA does not provide lawful permanent residence, like the DREAM Act, it focused on childhood arrivals, service in the military or education, and good moral character).

66. Jens Manuel Krogstad & Ana Gonzalez-Barrera, *If Original DACA Program Is a Guide, Many Eligible Immigrants Will Apply for Deportation Relief*, PEW RESEARCH CTR. (Dec. 5, 2014), <http://www.pewresearch.org/fact-tank/2014/12/05/if-original-daca-program-is-a-guide-many-eligible-immigrants-will-apply-for-deportation-relief/>; Memorandum from John Morton, *supra* note 55.

67. THE UNDOCUSCHOLARS PROJECT, *In the Shadows of the Ivory Tower: Undocumented Undergraduates and the Liminal State of Immigration Reform* (2015), <http://www.undocuscholars.org/assets/undocuscholarsreport2015.pdf>; MOTOMURA, *supra* note 3, at 59.

68. THE UNDOCUSCHOLARS PROJECT, *supra* note 67.

69. Tom K. Wong, et al., *Results from a Nationwide Survey of DACA Recipients Illustrate the Program's Impact*, CTR. FOR AMERICAN PROGRESS (July 9, 2015), <https://www.americanprogress.org/issues/immigration/news/2015/07/09/117054/results-from-a-nationwide-survey-of-daca-recipients-illustrate-the-programs-impact/>.

70. THE UNDOCUSCHOLARS PROJECT, *supra* note 67 (explaining that currently, California, Washington, Massachusetts, Minnesota, New York, and Washington, D.C. provides healthcare to deferred action recipients).

71. Roberto G. Gonzales & Angie M. Bautista-Chavez, *Two Years and Counting: Assessing the Growing Power of DACA*, AMERICAN IMMIGRATION COUNCIL (2014), [http://www.immigrationpolicy.org/sites/default/files/docs/two\\_years\\_and\\_counting\\_assessing\\_the\\_growing\\_power\\_of\\_daca\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/two_years_and_counting_assessing_the_growing_power_of_daca_final.pdf); *At One Year Mark, NYLAG Recommends Improvements to DACA*,

immigration activists saw as “arbitrary” age limits that excluded young immigrants from being able to apply for deferred action.<sup>72</sup> Furthermore, advocates recognized that DACA-eligible noncitizens hesitated to apply for DACA for the fear of exposing their undocumented parents and siblings.<sup>73</sup>

Thus, advocates lauded the Administration’s announcement of the expanded DACA provisions and the new DAPA program.<sup>74</sup> Addressing the advocates’ criticism of the original DACA program, DACA 2014 was streamlined to be more inclusive. It particularly addresses the problem of “mix-status” immigrant families, comprised of a combination of undocumented, citizen, or LPR children and undocumented parents.<sup>75</sup> DACA 2014 expands the eligibility requirement to cover not only those undocumented immigrants born after June 15, 1981, but also those who came to the United States before the age of sixteen.<sup>76</sup> Consequently, as one example, this allows siblings who came to the United States together at a young age, one born before June 15, 1981, and another born after that date, to be eligible for temporary relief from deportation. Likewise, DAPA keeps families together by providing temporary protection to undocumented parents of LPR or United States children.<sup>77</sup>

The Administration’s deferred action programs were not without critics, however.<sup>78</sup> Opponents’ arguments against the programs, which paralleled objections to the DREAM Act, ranged from calling DACA and DAPA an amnesty to illegal aliens, a blanket award of immigration benefits, and an immunization of lawbreakers who cut in line in front of lawfully admitted immigrants who abide by the rules.<sup>79</sup> Further, opponents maintained that the Obama Administration bypassed Congress and wrote the DREAM Act into law.<sup>80</sup> Some went as far as to claim that the President

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NYLAG (June 14, 2013), <http://nylag.org/news/2013/06/at-one-year-mark-nylag-recommends-improvements-to-daca>; see WADHIA, *supra* note 33, at 106.

72. Aura Bogado, *Here’s How DACA Will Be Expanded Under Obama*, COLORLINES (Nov. 21, 2014), [http://colorlines.com/archives/2014/11/heres\\_how\\_daca\\_will\\_be\\_expanded\\_under\\_obama.html](http://colorlines.com/archives/2014/11/heres_how_daca_will_be_expanded_under_obama.html); NYLAG, *supra* note 71.

73. NYLAG, *supra* note 71.

74. *Broad support for Pres. Obama’s #ImmigrationAction*, GALEO (Nov. 20, 2014), <http://www.galeo.org/broad-support-pres-obamas-immigrationaction/>.

75. *The Affordable Care Act & Mixed-Status Families*, NAT’L IMMIGRATION LAW CTR. (revised Dec. 2014), [https://www.nilc.org/aca\\_mixedstatusfams.html](https://www.nilc.org/aca_mixedstatusfams.html); see also THE UNDOCUSCHOLARS PROJECT, *supra* note 67.

76. NYLAG, *supra* note 71.

77. See U.S. DEP’T OF HOMELAND SEC., *supra* note 49.

78. See WADHIA, *supra* note 33, at 106.

79. See Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1185, 1189, 1194 (2015); see also MOTOMURA, *supra* note 3, at 42, 177; see WADHIA, *supra* note 33, at 99.

80. See WADHIA, *supra* note 33, at 107.

violated his duties to “take Care that the Laws be faithfully executed,” arguing that he is failing to enforce the immigration statute.<sup>81</sup> Still others stress that the undocumented noncitizens, particularly the parents who crossed the border, are illegal lawbreakers who do not deserve any protections from removal.<sup>82</sup>

Regardless of one’s views on undocumented immigrants, recent statistical findings illustrate an overall positive impact of DACA on the program’s recipients, as well as the United States economy as a whole. Data shows that as of June 2015 DACA recipients are finding employment and receiving better paying jobs than before.<sup>83</sup> They are enrolling in institutions of higher education, as well as purchasing vehicles at increased rates.<sup>84</sup> Further, data shows that DACA beneficiaries’ hourly wage increased significantly.<sup>85</sup> Legal employment without fear of arrest and deportation allows noncitizens to increase their standard of living by finding jobs that match their skills and abilities.<sup>86</sup> Because higher wages translate into economic growth through increased tax revenue, DACA benefits are not limited to recipients alone.<sup>87</sup>

DACA translates to increased prosperity to all Americans.<sup>88</sup> Not only do undocumented workers pay into the public fiscal structure through Social Security and local and state taxes, they also complement the United States workforce by taking undesirable, underpaid jobs under harsh working conditions.<sup>89</sup> A state-by-state analysis of the economic impact of the Administration’s deferred action programs reveals that the programs will raise the United States economy by 0.4 percent over ten years.<sup>90</sup> In

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81. *Id.*

82. MOTOMURA, *supra* note 3, at 10 (“[M]any who urge strict responses to unauthorized migration today start—and sometimes end—their arguments by emphasizing that the offenders are illegal aliens.”).

83. Wong et al., *supra* note 69; RESULTS OF TOM K. WONG, NATIONAL IMMIGRATION LAW CENTER, AND CENTER FOR AMERICAN PROGRESS NATIONAL SURVEY, [https://cdn.americanprogress.org/wp-content/uploads/2015/07/DACA-Wong\\_NILC\\_CAP-Codebook-PDF.pdf](https://cdn.americanprogress.org/wp-content/uploads/2015/07/DACA-Wong_NILC_CAP-Codebook-PDF.pdf).

84. Wong et al., *supra* note 69.

85. *Id.*

86. Silva Mathema, *Assessing the Economic Impacts of Granting Deferred Action Through DACA and DAPA*, CTR. FOR AMERICAN PROGRESS (Apr. 2, 2015), <https://www.americanprogress.org/issues/immigration/news/2015/04/02/110045/assessing-the-economic-impacts-of-granting-deferred-action-through-daca-and-dapa/>.

87. Wong et al., *supra* note 69; RESULTS OF TOM K. WONG, *supra* note 83.

88. Mathema, *supra* note 86; *see* MOTOMURA, *supra* note 3, at 166.

89. *See* MOTOMURA, *supra* note 3, at 166.

90. Mathema, *supra* note 86; EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, THE ECONOMIC EFFECTS OF ADMINISTRATIVE ACTION ON IMMIGRATION (Nov. 2014), [https://www.whitehouse.gov/sites/default/files/docs/cea\\_2014\\_economic\\_effects\\_of\\_immigration\\_executive\\_action.pdf](https://www.whitehouse.gov/sites/default/files/docs/cea_2014_economic_effects_of_immigration_executive_action.pdf).

2012, the undocumented immigrants paid \$11.84 billion in state and local taxes.<sup>91</sup> Data demonstrates that tax contributions would increase by more than 2 billion per year under full implementation of the Administration's deferred action programs.<sup>92</sup>

### **B. The Legal Debate: Judicial Responses to State Policies Affecting DACA-Eligible Undocumented Immigrants**

Following the announcement of the Administration's executive actions, some states instituted policies to prevent DACA-eligible noncitizens from obtaining driver's licenses.<sup>93</sup> This section will address Arizona's attempt to bar DACA beneficiaries from obtaining a driver's license.

In 2005, Congress passed the REAL ID Act, which mandated states to issue driver's licenses only to United States citizens and lawfully present noncitizens.<sup>94</sup> However, the Act permitted states to issue driver's licenses, not valid for boarding a commercial airline flight, based on deferred action status.<sup>95</sup> The enactment of DACA resulted in action by the governor of Arizona to close this loophole in the federal legislation by implementing a policy that aimed to prevent DACA recipients from obtaining state driver's licenses.<sup>96</sup> On November 29, 2012, plaintiffs, five DACA recipients residing in Arizona and an organization representing interests of the immigrants, filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Arizona. Plaintiffs sought a preliminary injunction against the Governor of Arizona, Janice Brewer, and the Arizona Department of Transportation for the department's refusal to accept Employment Authorization Documents ("EADs") issued to DACA

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91. *Undocumented Immigrants' State and Local Tax Contributions*, INST. OF TAXATION AND ECON. POLICY (Apr. 15, 2015), [http://itep.org/itep\\_reports/2015/04/undocumented-immigrants-state-local-tax-contributions.php#.ViwxSqKnGgQ](http://itep.org/itep_reports/2015/04/undocumented-immigrants-state-local-tax-contributions.php#.ViwxSqKnGgQ).

92. *Id.*

93. *DACA Access to Driver's Licenses*, NAT'L IMMIGRATION LAW CTR. (May 2015), <https://www.nilc.org/dacadriverslicenses2.html> (stating that a few states announced that they would deny driver's licenses to DACA beneficiaries. However, two states instituted policies to prohibit DACA recipients from obtaining driver's licenses—Arizona and Nebraska. In May 2015, Nebraska legislature passed a bill allowing people granted deferred action to obtain a driver's license). This Note will only address Arizona's policy.

94. See REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, 311-12 (codified at 49 U.S.C. § 30301); MOTOMURA, *supra* note 3, at 84.

95. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, 311-12, § 202(c)(2)(C); MOTOMURA, *supra* note 3, at 84.

96. *Ariz. Dream Act Coal. v. Brewer* 757 F.3d 1053, 1074-75 (9th Cir. 2014).

recipients under federal law as proof of their lawful presence in the United States.<sup>97</sup>

The court denied plaintiffs' motion, and they appealed, arguing that Arizona's policy violated the Equal Protection and Supremacy Clauses of the United States Constitution.<sup>98</sup> On July 7, 2014, a panel of three Ninth Circuit Court of Appeals judges enjoined Arizona from enforcing the state's policy of denying driver's licenses to DACA recipients.<sup>99</sup> The Court, while unable to rule on the merits of the preemption claim, held that the plaintiffs had demonstrated that they were likely to succeed on the merits of their equal protection claim because defendants' policy "targets DACA recipients for disparate treatment, as compared to other persons who are similarly situated," such as asylees, for example.<sup>100</sup>

Defendants presented four main arguments against issuing driver's licenses to DACA recipients.<sup>101</sup> First, defendants were concerned with a potential legal liability of issuing driver's licenses to 80,000 unauthorized immigrants.<sup>102</sup> Second, defendants asserted that issuing driver's licenses would allow DACA recipients to unlawfully access federal and state benefits.<sup>103</sup> Third, defendants alleged that because the DACA program is a form of temporary relief and might be cancelled at any time, Arizona would be required to revoke DACA recipients' driver's licenses.<sup>104</sup> And finally, defendants suggested that because DACA recipients' presence in the United States is temporary, no financial recourse would be available to victims of automobile accidents caused by the immigrants should they be deported.<sup>105</sup>

Addressing each one of the arguments and noting the district court's finding, the Court held that defendants had not shown a legitimate state interest that was rationally related to their decision to ban DACA recipients from applying for state driver's licenses.<sup>106</sup> First, defendants failed to identify instances of legal liability as a result of the department's issuance of driver's licenses to noncitizens lawfully present in the United States.<sup>107</sup>

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97. Complaint, *Ariz. Dream Act Coal. v. Brewer*, 945 F. Supp. 2d 1049 (D. Ariz. 2013) (No. 2:12-cv-02546) 2012 WL 5952174.

98. *Ariz. Dream Act Coal. v. Brewer*, 945 F. Supp. 2d 1049 (D. Ariz. 2013), (reconsideration denied June 6, 2013, *rev'd and remanded to 757 F.3d 1053* (9th Cir. 2014)).

99. *Ariz. Dream Act Coal.* 757 F.3d at 1074–75.

100. *Id.* at 1065.

101. *Id.* at 1066.

102. *Id.*

103. *Id.*

104. *Id.* at 1066–67.

105. *Id.* at 1067.

106. *Id.* at 1065.

107. *Id.* at 1066.

Second, defendants presented “no basis whatsoever for believing that a driver’s license alone could be used to establish eligibility for [federal and state] benefits.”<sup>108</sup> Third, defendants’ DACA longevity argument was “purely speculative” as compared to applications of other forms of relief that are often denied.<sup>109</sup> Lastly, defendants’ financial recourse argument fails because Arizona grants other noncitizens the ability to obtain driver’s licenses.<sup>110</sup>

In its opinion, the Court highlighted the importance of driver’s licenses to the integration of undocumented immigrants into the workforce and consequently into the public and private sectors at large.<sup>111</sup> Judge Pregerson wrote, “Plaintiffs’ ability to drive is integral to their ability to work . . . . There can be no serious dispute that Defendants’ policy hinders Plaintiffs’ ability to drive, and that this (in turn) hinders Plaintiffs’ ability to work and engage in other everyday activities.”<sup>112</sup>

In sum, much of the fear associated with issuing driver’s licenses to DACA-eligible immigrants in Arizona was irrational and speculative.<sup>113</sup> This case illustrates not only the importance of driver’s licenses as an integration tool but also highlights the misconceptions opponents attribute to undocumented immigrants.

### C. Legal Challenges to the Implementation of DACA and DAPA

In addition to the judicial challenge in the limited context of driver’s licenses discussed above, *Crane v. Napolitano* was a case challenging the general implementation of DACA.<sup>114</sup> On August 23, 2012, lead counsel Kris Kobach filed a lawsuit on behalf of ten ICE officers and the state of Mississippi,<sup>115</sup> claiming that federal law prohibits the executive branch from issuing deferred action as a form of prosecutorial discretion.<sup>116</sup> This assertion rested on the officers’ improper reading of INA § 235(b)(2)(A),

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108. *Id.*

109. *Id.*

110. *Id.* at 1067.

111. *Id.* at 1068.

112. *Id.*; see also Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2079 (2008) (“Restrictions on eligibility for driver licenses and other identity documents limit lawful access not only to the streets and highways, but also to a full range of public and private activities that require identification documents.”).

113. *Id.* at 1066–67 (“The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”) (quoting *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985)).

114. *Crane v. Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013).

115. Amended Complaint, *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2012 WL 519509, (N.D. Tex. Oct. 10, 2012). Mississippi was not a plaintiff in the original complaint. The substantive arguments were not altered in the amended complaint.

116. *Crane*, 920 F. Supp. 2d at 730.

which they interpreted as mandating the government to initiate removal proceedings against any alien who unlawfully entered the United States.<sup>117</sup> The plaintiffs asserted that DACA strips them of their ability to commence mandatory removal proceedings of DACA-eligible immigrants should they find that an immigrant is not “clearly and beyond a doubt entitled to be admitted” to the United States.<sup>118</sup> The American Immigration Lawyers Association (“AILA”) filed an amicus brief pointing out that INA § 235(b)(2)(A) provides that all inadmissible applicants seeking admission “shall be detained” for removal proceedings.<sup>119</sup> AILA argued that the section does not impose a mandatory duty on immigration officers to commence removal proceedings against DACA-eligible immigrants.<sup>120</sup> The court dismissed the case on procedural grounds—lack of subject matter jurisdiction<sup>121</sup>—and the plaintiffs appealed to the Fifth Circuit Court of Appeals.

On appeal, plaintiffs continued to claim that the exercise of deferred action violates federal law.<sup>122</sup> Additionally, the state of Mississippi contended that President Obama’s programs will cost the state money in healthcare, law enforcement, education, and lost tax revenue.<sup>123</sup> On April 7, 2015, a three-judge panel on the Court of Appeals affirmed the district court’s judgment and upheld dismissal of the lawsuit.<sup>124</sup> The court explained that it agreed with the district court’s finding that the state’s “alleged fiscal injury was purely speculative because there was no concrete evidence that Mississippi’s costs had increased or will increase as a result of DACA.”<sup>125</sup> The court also noted “a fundamental flaw” in plaintiffs’ assertions regarding their inability to exercise discretion.<sup>126</sup> The court

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117. Complaint, *Crane v. Napolitano*, No. 3:12-cv-03247-O, 21012 WL 3629252, (N.D. Tex. Aug. 23, 2012); *AILA Amicus Brief in Crane Lawsuit Argues DACA Does Not Violate INA*, AM. IMMIGRATION LAWYERS ASS’N (July 16, 2014), <http://www.aila.org/infonet/amicus-brief-crane-v-dhs>; Heather Fathali, Note, *The American Dream: DACA, Dreamers, and Comprehensive Immigration Reform*, 37 SEATTLE U. L. REV. 221, 240 (2013).

118. Complaint, *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2012 WL 3629252, (N.D. Tex. Aug. 23, 2012).

119. *AILA Amicus Brief in Crane Lawsuit Argues DACA Does Not Violate INA*, *supra* note 117; Immigration and Nationality Act § 235(a)(1) (2012).

120. *AILA Amicus Brief in Crane Lawsuit Argues DACA Does Not Violate INA*, *supra* note 117.

121. Verdict, Agreement and Settlement, *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 WL 8359811 (N.D. Tex. July 31, 2013).

122. *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015).

123. *Id.*

124. *Id.*

125. *Id.* at 11.

126. *Id.* at 15.

explained that Secretary Napolitano's memorandum<sup>127</sup> clearly states that officers "shall" exercise discretion as to whether they grant deferred action to immigrants, on a case-by-case basis.<sup>128</sup> Therefore, the officers are not stripped of their discretionary ability.<sup>129</sup> Further, while the 2014 DACA expansion was not at issue in this case, the court nevertheless gave a nod towards its validity, stating:

The 2014 supplemental directive, which . . . supplements DACA, reinforces this approach to the application of deferred action: "Under any of the proposals outlined above, immigration officers will be provided specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis."<sup>130</sup>

This could thwart any future litigation on the issue of the officers' discretion under INA § 235(b)(2)(A).

The most recent constitutional challenge to the Obama Administration's executive actions commenced in the Texas District Court on December 4, 2014.<sup>131</sup> Less than a month after the Administration's announcement of the supplemental programs, the State of Texas and twenty-five states filed a petition for injunctive relief against the United States and select DHS officials seeking to prevent implementation of the DACA expansion and the DAPA program.<sup>132</sup> Plaintiffs allege that the actions of Secretary of DHS, Jeh Johnson, directing USCIS and ICE officials to grant deferred action to illegal immigrants,<sup>133</sup> violate the Take Care Clause of the Constitution and the Administrative Procedure Act ("APA").<sup>134</sup> The APA, as defined in section 553 of Title 5 of the United States Code, sets out the formal rulemaking procedures by which the

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127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 15–16.

131. *Texas v. United States*, No. CIV. B-14-254, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015).

132. *Id.* at \*2. The court explained that DACA 2012 was not at issue before the court, and stated, "this case does not involve the DACA program . . . the Complaint in this matter does not include the actions taken by Secretary Napolitano, which have to date formalized the status of approximately 700,000 teenagers and young adults." *Id.*

133. Memorandum from Jeh Johnson, Sec'y, U.S. Dep't of Homeland Sec., to R. Gil Kerlikowske, Acting Comm'r, U.S. Customs & Border Prot., et al. (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

134. *Texas v. United States*, No. CIV. B-14-254, 2015 WL 648579 at \*3 (S.D. Tex. Feb. 16, 2015); see U.S. CONST. ART. II, § 3; 5 U.S.C. §§ 500 *et seq.*

agency promulgating the rule must abide.<sup>135</sup> These procedures require the agency to publish a notice of the proposed rule in the Federal Register and give the public an opportunity for comment on the rule.<sup>136</sup> Plaintiffs assert that defendants have not followed the notice and comment procedure outlined in the APA.<sup>137</sup> In response, defendants advance two arguments: (1) plaintiffs lack standing and (2) their claims are not meritorious.<sup>138</sup> The court certified the issue as follows: “[d]o the laws of the United States, including the Constitution, give the Secretary of Homeland Security the power to take the action at issue in this case?”<sup>139</sup>

In his 123 page opinion, Judge Hanen held that the State of Texas had standing under Article III and that defendants showed a substantial likelihood of succeeding on the merits of their claim.<sup>140</sup> While his opinion was “pregnant with constitutional rhetoric,” he did not rule on the plaintiffs’ constitutional arguments, instead he only addressed DHS’s failure to comply with the APA.<sup>141</sup> Nevertheless, Judge Hanen granted plaintiffs’ request for a preliminary injunction,<sup>142</sup> singlehandedly halting the implementation of the DACA 2014 and DAPA programs.<sup>143</sup> As a result, USCIS issued the following disclaimer on its website:

Update: Due to a federal court order, USCIS will not begin accepting requests for the expansion of DACA on February 18 as originally planned and has suspended implementation of Deferred Action for Parents of Americans and Lawful Permanent Residents. The court’s temporary injunction, issued February 16, does not affect the existing DACA. Individuals may continue to come forward and request an initial grant of DACA or renewal

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135. 5 U.S.C. §§ 553; *Texas v. United States*, No. CIV. B-14-254, 2015 WL 648579 at \*52.

136. *Id.*

137. *Id.*

138. *Id.* at \*3.

139. *Id.* at \*2.

140. *Id.* at \*62.

141. Eric Posner, *Faithfully Executed: Obama’s New Immigration Program is Perfectly Legal and Should Not be Blocked*, SLATE (Feb. 19, 2015), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2015/02/obama\\_s\\_dapa\\_immigration\\_program\\_is\\_legal\\_judge\\_hanen\\_s\\_injunction\\_will.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/02/obama_s_dapa_immigration_program_is_legal_judge_hanen_s_injunction_will.html).

142. *Texas v. United States*, No. CIV. B-14-254, 2015 WL 648579 at \*62.

143. Ian Milhiser, *Federal Judge Blocks Obama’s Immigration Action At The 11th Hour. Here’s Why It Probably Won’t Work*, THINKPROGRESS (Feb 17, 2015), <http://thinkprogress.org/justice/2015/02/17/3623484/breaking-republican-judge-halts-key-prong-president-obamas-new-immigration-policy/> (“a single judge in Texas who holds no elected office and who few Americans have ever heard of effectively prevented the United States of America from implementing a policy impacting millions of people.”).

of DACA under the original guidelines. Please check back for updates.<sup>144</sup>

Additionally, Jeh Johnson issued a statement concerning Judge Hanen's ruling on the DHS website:

I strongly disagree with Judge Hanen's decision to temporarily enjoin implementation of Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and expanded Deferred Action for Childhood Arrivals (DACA). The Department of Justice will appeal that temporary injunction; in the meantime, we recognize we must comply with it . . . . The Department of Justice, legal scholars, immigration experts and even other courts have said that our actions are well within our legal authority. Our actions will also benefit the economy and promote law enforcement.<sup>145</sup>

While the case is still pending as this Note goes to publication, scholars are encouraged that the Fifth Circuit Court of Appeals' ruling in *Crane*, holding that the exercise of deferred action does not violate federal law, will help the Administration in its fight over the expanded DACA and DAPA programs in *Texas*.<sup>146</sup> Moreover, constitutional and immigration law scholars agree that President Obama's executive actions are constitutional.<sup>147</sup> Section IV will illustrate how the Obama Administration's DACA and DAPA initiatives fall squarely within the scope of executive prosecutorial discretion.

Nevertheless, the above cases illustrate the shortcomings of executive action programs, particularly the programs' vulnerability to attack in courts. While cases are pending, this puts the lives of entire communities on hold. Congressional action to reform the immigration system would

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144. U.S. CITIZENSHIP AND IMMIGR. SERVS., *supra* note 49.

145. Statement by Sec'y Jeh C. Johnson Concerning the District Court's Ruling Concerning DAPA and DACA (Feb. 17, 2015), <https://www.dhs.gov/news/2015/02/17/statement-secretary-jeh-c-johnson-concerning-district-courts-ruling-concerning-dapa>.

146. Josh Gerstein, *Appeals Court Sides With Obama on Immigration Action*, POLITICO (Apr. 7, 2015), <http://www.politico.com/story/2015/04/obama-immigration-action-lawsuit-dismissal-upheld-appeals-court-116738.html#ixzz3WsFhxf7E>.

147. Hiroshi Motomura, Shoba Sivaprasad Wadhia & Stephen H. Legomsky, Letter to the Obama Administration (Nov. 25, 2014), <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/executive-action-law-prof-letter.pdf> ("Our conclusion is that the expansion of the DACA program and the establishment of Deferred Action for Parental Accountability are legal exercises of prosecutorial discretion. Both executive actions are well within the legal authority of the executive branch of the government of the United States.").

eliminate this and other hardships facing more than 11 million individuals and families.

#### IV. Executive Prosecutorial Discretion in Immigration Law

Though Judge Hanen did not specifically address the plaintiffs' claim that DACA 2014 and DAPA violate the Take Care Clause of the Constitution, plaintiffs and critics of the Administration's executive actions maintain that President Obama violated his obligation to "take Care that the Laws be faithfully executed."<sup>148</sup> Plaintiffs in *Texas* contend that the Take Care Clause does not permit the President to "dispense with laws he dislikes" by choosing not to remove DACA and DAPA-eligible undocumented immigrants "in contravention of statutory objectives and in the face of congressional opposition."<sup>149</sup> One of the plaintiffs' central arguments was that by granting automatic relief to millions of immigrants who are able to establish eligibility under DACA and DAPA, defendants abdicated their duty to faithfully execute the law.<sup>150</sup> This section will demonstrate how the Administration's deferred action programs fall squarely and lawfully within the President's authority to enforce the immigration laws. It will then provide examples of deferred action programs implemented by former Administrations to unburden the immigration system.

Whereas Congress has plenary power over the United States immigration laws,<sup>151</sup> Article II, Section 3—the Take Care Clause of the United States Constitution—confers on the President the duty to make sure that those laws are faithfully executed.<sup>152</sup> Thus, the President may employ discretion to assess the costs and benefits of faithfully executing the laws of the United States.<sup>153</sup> In passing the Immigration and Nationality Act ("INA") in 1952, Congress further established the authority of the

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148. Trial Motion, Memorandum, and Affidavit, *Texas et al. v. United States*, No. 1:14-cv-254, 2014 WL 7497774, at \*5 (N.D. Tex. December 4, 2014); U.S. CONST. ART. II, § 3, cl. 5.

149. Trial Motion, Memorandum, and Affidavit, *State of Texas et al. v. United States*, No. 1:14-cv-254, 2014 WL 7497774, at \*5 (N.D. Tex. December 4, 2014); U.S. CONST. ART. II, § 3, cl. 5.

150. *Id.*

151. *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012) ("This authority rests, in part, on the National Government's constitutional power to 'establish an uniform Rule of Naturalization,' U.S. Const., Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations."); Fathali, *supra* note 117, at 228

152. U.S. CONST. ART. II, § 3.

153. The Heritage Guide to the Constitution, the Take Care Clause, THE HERITAGE FOUNDATION (last visited Oct. 25, 2015), <http://www.heritage.org/constitution/#!/articles/2/essays/98/take-care-clause>.

executive branch to enforce immigration laws.<sup>154</sup> Under the INA, Congress defines certain categories of immigrants that are removable.<sup>155</sup> For example, “any alien who at the time of entry [was] . . . inadmissible by the law existing at such time is deportable.”<sup>156</sup> Yet it is the executive branch that has “practically unbridled authority” to decide whether to commence deportation proceedings notwithstanding the immigrant’s statutory deportability.<sup>157</sup> Congress provided the DHS with the primary responsibility for commencing removal proceedings and for carrying out final orders of removal.<sup>158</sup>

The Supreme Court addressed the role of prosecutorial discretion in the context of administrative law in *Heckler v. Chaney*.<sup>159</sup> There, respondents convicted of capital offenses brought a claim against the Food and Drug Administration (“FDA”), alleging that the agency failed to initiate enforcement proceedings to ban certain lethal injection drugs in capital cases.<sup>160</sup> The Court, rejecting the challenge, concluded that the FDA has enforcement discretion, which entails “a complicated balancing of . . . factors which are peculiarly within its expertise,” that is “immune from judicial review.”<sup>161</sup> Further, the Court explicitly analogized the president’s duties under the Take Care Clause to the prosecutor’s authority not to indict. It stated:

We recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is

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154. Fathali, *supra* note 117, at 228; *see also* OFFICE OF LEGAL COUNCIL OPINION: DEPARTMENT OF HOMELAND SECURITY’S AUTHORITY TO PRIORITIZE REMOVAL OF CERTAIN ALIENS UNLAWFULLY PRESENT IN THE UNITED STATES AND TO DEFER REMOVAL OF OTHERS 3 (2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf>.

155. *See* 8 U.S.C. § 1182; *see also* OFFICE OF LEGAL COUNCIL OPINION, *supra* note 154, at 3.

156. Immigration and Nationality Act § 237(a)(1)(A).

157. Fathali, *supra* note 117, at 228.

158. *See* OFFICE OF LEGAL COUNCIL OPINION, *supra* note 154, at 3 (“In the Homeland Security Act of 2002, Congress transferred most of these functions to DHS, giving it primary responsibility both for initiating removal proceedings and for carrying out final orders of removal”) (citations omitted); *see also* 6 U.S.C. §§ 101 et seq.; *Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005) (noting that the immigration authorities previously exercised by the Attorney General and INS “now reside” in the Secretary of Homeland Security and DHS).

159. *Heckler v. Chaney*, 470 U.S. 821 (1985).

160. *Id.* at 823.

161. *Id.* at 831–32.

the Executive who is charged by the Constitution to “take Care that the Laws be faithfully executed.”<sup>162</sup>

Thus, the Court explained that the President’s duty under the Take Care Clause establishes discretion, whereby “faithful” execution of the law does not necessarily mean that an agency charged with enforcing the law has to “act against each technical violation of the statute.”<sup>163</sup>

More recently, the Supreme Court reaffirmed the legality of prosecutorial discretion in the context of immigration law.<sup>164</sup> In *Arizona v. United States*, the Court addressed several issues concerning Senate Bill 1070.<sup>165</sup> One issue addressed by the Court was whether section 6 of the bill is preempted by federal law.<sup>166</sup> Section 6 authorized Arizona state officials to arrest without a warrant lawfully present immigrants, if officials had probable cause to believe that the immigrant had committed a deportable offense.<sup>167</sup> The Court determined that the issue of whether and when to arrest an individual for being unlawfully present in the United States is solely a question for the federal government.<sup>168</sup> Delivering the opinion of the Court, Justice Kennedy explained that “removal is a civil matter, and one of its principal features is the broad discretion exercised by immigration officials, who must decide whether to pursue removal at all.”<sup>169</sup> The Court also alluded to the brief filed by the government, which states, “the Executive Branch’s ability to exercise discretion and set priorities is particularly important because of the need to allocate scarce enforcement resources wisely.”<sup>170</sup>

In fact, the policy behind prosecutorial discretion, such as the Administration’s deferred action programs, is both humanitarian and economic.<sup>171</sup> President Ford’s INS General Counsel Sam Bernsen asserted in a legal opinion published in 1976, which was cited by the *Plyler* Court that “[t]he reasons for the exercise of prosecutorial discretion are both practical and humanitarian. There simply are not enough resources to

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162. *Id.* at 832.

163. See OFFICE OF LEGAL COUNCIL OPINION, *supra* note 154, at 4 (quoting *Heckler*, 470 U.S. at 831).

164. *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012).

165. *Id.* at 2497.

166. *Id.* at 2510.

167. *Id.*

168. *Id.*

169. *Id.* at 2495.

170. *Id.* at 2520.

171. See WHADHIA, *supra* note 33, at 8.; see also *Arizona*, 132 S. Ct. at 2499, 2520; *Heckler v. Chaney*, 470 U.S. 831 (1985).

enforce all of the rules and regulations presently on the books.”<sup>172</sup> Likewise, in her memorandum, Commissioner of the former Immigration and Naturalization Services (“INS”) Doris Meissner, listed “contribut[ion] to more effective management of the Government’s limited prosecutorial resources” as one of the important purposes served by prosecutorial discretion.<sup>173</sup> Similar to criminal prosecutors, due to the lack of resources, administrative agencies are simply not able to enforce every violation.<sup>174</sup> Each year, Congress appropriates funds to remove four percent or 400,000 of the undocumented population in the United States who are deemed “high priority.”<sup>175</sup> President Obama, like his predecessors, has wholly utilized all the enforcement resources Congress has appropriated to deport dangerous and violent felons rather than families and children who only know the United States as their home.<sup>176</sup> The Obama Administration has deported more noncitizens than any other United States Administration.<sup>177</sup>

While prosecutorial discretion first came to light with the Beatles’ John Lennon case in the 1970s, discretion over the immigration laws is a well-settled general principle of enforcement by the executive branch that dates back to the 1900s.<sup>178</sup> Currently, there are at least twenty-five types of prosecutorial discretion.<sup>179</sup> Several former presidents have utilized prosecutorial discretion as a way to enforce the United States immigration laws.<sup>180</sup> In 1981, President Reagan’s Administration issued a form of prosecutorial discretion called “Extended Voluntary Departure” to

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172. Motomura et al., *supra* note 147 (citing Sam Bernsen, INS General Counsel, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976), <http://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf>).

173. *Id.*

174. Fathali, *supra* note 117, at 227.

175. Shoba Sivaprasad Wadhia, *The Morton Memo and Prosecutorial Discretion*, AM. IMMIGR. COUNCIL (July, 2011), [http://www.immigrationpolicy.org/sites/default/files/docs/Shoba\\_Prosecutorial\\_Discretion\\_072011\\_0.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/Shoba_Prosecutorial_Discretion_072011_0.pdf).

176. Motomura et al., *supra* note 147; *see also* Eric Posner, *Faithfully Executed: Obama’s New Immigration Program is Perfectly Legal and Should Not be Blocked*, SLATE (Feb. 19, 2015), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2015/02/obama\\_s\\_dapa\\_im\\_migration\\_program\\_is\\_legal\\_judge\\_hanen\\_s\\_injunction\\_will.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/02/obama_s_dapa_im_migration_program_is_legal_judge_hanen_s_injunction_will.html).

177. Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. Deportations of Immigrants Reach Record High in 2013*, PEW RESEARCH CTR. (Oct. 2, 2014), <http://www.pewresearch.org/fact-tank/2014/10/02/u-s-deportations-of-immigrants-reach-record-high-in-2013/>; *see also* Alejandra Marchevsky & Beth Baker, *Why Has President Obama Deported More Immigrants Than Any President in US History*, THE NATION (Mar. 31, 2014), <https://www.thenation.com/article/why-has-president-obama-deported-more-immigrants-any-president-us-history/>.

178. WADHIA, *supra* note 33, at 14, 18 (describing that the INS General Counsel Sam Bernsen identified a decision from 1909 in which INS exercised prosecutorial discretion); *see also* Motomura et al., *supra* note 147.

179. WADHIA, *supra* note 33, at 11.

180. FATHALI, *supra* note 117, at 227.; *see also* Motomura et al., *supra* note 147.

thousands of Polish immigrants.<sup>181</sup> Presidents Ronald Reagan and George H.W. Bush exercised discretion when they deferred removal of and authorized work permits for noncitizen spouses and children of immigrants who qualified under the Immigration Reform and Control Act (“IRCA”) of 1986.<sup>182</sup> Other examples of deferred action include two during the George W. Bush Administration.<sup>183</sup> First, in 2005, President Bush granted deferred action for foreign academic students affected by Hurricane Katrina.<sup>184</sup> Second, in 2007, he promulgated “Deferred Enforcement Departure” for certain qualified Liberians.<sup>185</sup>

These brief historical examples, as well as the above case law highlight the legal authority of an Administration to exercise prosecutorial discretion.<sup>186</sup> Hundreds of scholars assert that by no means is President Obama “re-writing” the immigration laws.<sup>187</sup>

### V. Limitations of DACA and a Call for Full Reform

Although the President’s deferred action programs are constitutional, because deferred action is a temporary form of reprieve from deportation, many young adults and their families are afraid to “come out of the shadows” and register for the DACA programs.<sup>188</sup> They fear that with the

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181. Motomura et al., *supra* note 147.

182. *Id.* at 5; *see also* OFFICE OF LEGAL COUNCIL OPINION, *supra* note 154 (explaining that “[i]n 1990, INS implemented a “Family Fairness” program that authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens who had been granted legal status under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (“IRCA”); *see also* Memorandum for Regional Commissioners, INS, from Gene McNary, Commissioner, INS, Re: Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens (Feb. 2, 1990) [hereinafter Family Fairness Memorandum].

183. Motomura et al., *supra* note 147.

184. *Id.*

185. *Id.*

186. *Id.*

187. Motomura et al., *supra* note 147; *see also* Amy Grenier, *Law Professors Affirm Obama’s Immigration Action Within Legal Authority*, AM. IMMIGRATION COUNCIL (Nov. 24, 2014), <http://immigrationimpact.com/2014/11/25/law-professors-affirm-obamas-immigration-action-within-legal-authority/>.

188. Simeon Lancaster, *As ‘Dreamers’ Renew Status, They Face Both Opportunities and Fears*, MINN. POST (Oct. 2, 2014), <https://www.minnpost.com/politics-policy/2014/10/dreamers-renew-status-they-face-both-opportunities-and-fears>; *see also* DREAMER, *DACA Recipient Yoli Navas: ‘We Live in Fear Every Day,’* AMERICA’S VOICE (June 25, 2013), <http://americasvoice.org/blog/dreamer-daca-recipient-yoli-navas-we-live-in-fear-every-day/>.

change in administration in 2016, the DACA and DAPA programs will no longer be available to undocumented immigrants.<sup>189</sup>

Moreover, as this next subsection will demonstrate, although deferred action aims to integrate young adults into the public and private spheres, it presents substantial limitations, particularly in the narrow context of law licenses, that are best addressed by legislative action.

Three seminal cases in Florida, California, and New York courts have addressed the question of undocumented immigrants' ability to obtain a license to practice law as a means to better integrate into and contribute to the society.<sup>190</sup> In the Florida case, on December 13, 2011, the Florida Board of Bar Examiners ("Board") filed a petition with the Supreme Court of Florida for guidance as to whether Jose Godinez-Samperio, an undocumented DACA-eligible immigrant, and future similarly situated applicants are eligible for admission to the Florida Bar.<sup>191</sup> In its March 15, 2014, *per curiam* advisory opinion, the court stated that unauthorized immigrants are ineligible for admission to the Florida Bar.<sup>192</sup> The court explained that because federal law prohibits certain noncitizens from obtaining state public benefits—a professional license being one of them—the court, which is funded by appropriations, is prohibited from issuing a law license to an unauthorized immigrant.<sup>193</sup> While Godinez-Samperio's counsel argued that the federal statute in question, 8 USC § 1621, allows states to "override the federal barrier" and afford a state public benefit to undocumented immigrants, the court noted that a state "may only do so through the enactment of a state law."<sup>194</sup> Subsequently, the legislature enacted a statute that permits the Supreme Court of Florida to admit to the Florida Bar undocumented immigrants who were brought to the United States as children.<sup>195</sup>

Similarly, the case of *In re Garcia* before the Supreme Court of California focused on whether state law prevents admission of undocumented immigrants to the State Bar of California.<sup>196</sup> The Committee of Bar Examiners filed a motion to admit Sergio C. Garcia—an

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189. Amy Chozick, *Ahead of 2016, Immigration Activists Want Answers from Clinton*, N.Y. TIMES, (Oct. 26, 2014), [http://www.nytimes.com/2014/10/27/us/ahead-of-2016-immigration-activists-want-answers-from-clinton.html?\\_r=0](http://www.nytimes.com/2014/10/27/us/ahead-of-2016-immigration-activists-want-answers-from-clinton.html?_r=0).

190. While both the California and New York cases have consequences for DACA recipients who wish to be admitted to the state bar, only the Florida case actually concerns a DACA grantee.

191. Fla. Bd. of Bar Exam'rs, 134 So.3d 432 (Fla. 2014).

192. *Id.* at 434.

193. *Id.*

194. *Id.*

195. See Florida Laws 1955, Ch. 29796, §§ 1, 2, 7; Laws 1961, Ch. 61-530, § 10, amended by Laws 2014, Ch. 2014-35, 3 (effective May 12, 2014).

196. *In re Garcia*, 315 P.3d, 120–22 (Cal. 2014).

undocumented immigrant (not a DACA recipient) with a pending green card application, who passed the moral character and fitness test and the state bar exam—to the State Bar.<sup>197</sup> However, because admission of undocumented immigrants to the State Bar has not been previously addressed by the court, the Committee raised an issue of proper interpretation of 8 USC § 1621 that prohibits issuance of professional licenses to undocumented immigrants, and which authorizes a state to pass legislation expressly authorizing such licensing.<sup>198</sup> During oral argument, the court noted it “had no law that authorized [it] to grant an attorney’s license.”<sup>199</sup> While this case was pending, California legislature passed and signed into law Assembly Bill 1024 allowing applicants, who are unlawfully present in the United States, to be admitted as attorneys.<sup>200</sup> Subsequently, the court held that it would admit Garcia to the California state bar.<sup>201</sup> The court stated, “[t]he new legislation removes any potential statutory obstacle to Garcia’s admission” presented by the federal statute.<sup>202</sup>

Although Garcia’s case did not present the question of admission to the California bar of DACA beneficiaries, just like the case of Jose Godinez-Samperio, it highlights the importance of legislation in the realm of undocumented youth. Until 2014, absent explicit legislation to allow bar admission for unlawfully present immigrants, courts were likely to deny admission.<sup>203</sup>

In 2015, a precedential ruling came down in New York, which allowed a DACA recipient, César Vargas, and similarly situated applicants, to be admitted to the state bar of New York without legislative action.<sup>204</sup> Like Sergio Garcia and Jose Godinez-Samperio, César Vargas is an undocumented immigrant. His mother brought him to New York when he was five and one-half years old, where he later finished law school, and passed the New York bar exam.<sup>205</sup> The question before the court was

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197. *Id.* at 122–123.

198. *Id.* at 121.

199. Bob Egelko, *Bill Would Let Undocumented Immigrants Be Lawyers*, SF GATE (Sept. 15, 2013, 10:16 PM), <http://www.sfgate.com/news/article/Bill-would-let-undocumented-immigrants-be-lawyers-4816911.php>.

200. *Garcia*, 315 P.3d at 123–24; *see also* GOVERNOR BROWN SIGNS IMMIGRATION LEGISLATION (Oct. 5, 2013), <http://gov.ca.gov/news.php?id=18253>.

201. *Garcia*, 315 P.3d at 121–23.

202. *Id.* at 121.

203. Tara Kennedy, Note, *Barred from Practice? Undocumented Immigrants and Bar Admissions*, 63 DEPAUL L. REV. 833, 851 (2014); *see also* Fla. Bd. of Bar Exam’rs, 134 So.3d 432, 437 (Fla. 2014).

204. *Matter of Application of Cesar Adrian Vargas for Admission to the Bar of the State of New York*, 131 A.D.3d 4, 2015 (N.Y. App. Div. 2d Dep’t 2015).

205. *Id.* at 6.

twofold. First, whether a DACA beneficiary, who meets the eligibility requirements to practice law in New York, may satisfy the standard of fitness and character necessary for admission.<sup>206</sup> Second, whether 8 USC § 1621 requires states to enact legislation affirmatively authorizing the issuance of state professional licenses.<sup>207</sup> In a *per curiam* opinion, the court found that “the undocumented status of an individual applicant does not, alone, suggest that the applicant is not possessed of the qualities that enable attorneys to vigorously defend their client’s interests within the bounds of the law.”<sup>208</sup> It also held that to require enactment of state legislature to be the only means by which New York may opt out of the restrictions imposed by 8 USC § 1621 on the issuance of licenses, is unconstitutional because it violates the sovereign authority of the state to “divide power among its three coequal branches of government.”<sup>209</sup> Moreover, the court held that because the judiciary regulates the issuance of law licenses, it may act to opt out of the restrictions imposed by § 1621.

Thus New York is the first state, which did not pass legislation to authorize undocumented immigrants who meet the requirements for admission to obtain a license to practice law. At the same time, although the New York case is encouraging and could be a test case for other states,<sup>210</sup> two of three cases demonstrate that passing legislation is a sure way to allow eligible noncitizens to become productive members of society by pursuing their dream careers as attorneys.

### Conclusion

The Administration’s deferred action programs have allowed more than a million talented young adults to come out of the shadows by enrolling in institutions of higher education and receiving driver’s licenses and work authorizations to continue to contribute to the country in which they grew up and consider home. However, the best way to alleviate the fear of deportation for the millions of immigrants who were brought or came to the United States illegally but do not remain a high priority or pose a threat to national security is to fully integrate them into the public and private spheres by passing comprehensive immigration reform. In the meantime, while it is likely that challenges to the Obama Administration’s executive actions will continue to be introduced in courts, what is clear

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206. *Id.*

207. *Id.*

208. *Id.* at 15.

209. *Id.* at 6.

210. Liz Robbins, *New York Court Rules for Immigrant in Fight to Become Lawyer*, N.Y. TIMES (June 4, 2015), [http://www.nytimes.com/2015/06/05/nyregion/undocumented-immigrant-may-work-as-a-lawyer-new-york-court-rules.html?\\_r=0](http://www.nytimes.com/2015/06/05/nyregion/undocumented-immigrant-may-work-as-a-lawyer-new-york-court-rules.html?_r=0).

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from present case law and supported by legal scholars is that the President's actions to either terminate or not to initiate removal proceedings for certain immigrants fall lawfully within his authority to enforce the immigration laws of the United States.

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