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DACA RENEWALS AND THE UPHOLDING OF EXECUTIVE ACTION IN ARIZONA DREAM ACT COALITION V. BREWER

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August 15, 2014 marks the two-year anniversary of the implementation of Deferred Action for Childhood Arrivals (DACA) by the Department of Homeland Security (DHS). The policy was announced through a memorandum by then Secretary of Homeland Security Janet Napolitano on June 15, 2012. The Memo directed the heads of Customs and Border Protection (CBP), Citizenship and Immigration Services (CIS), and Immigration and Customs Enforcement (ICE) to implement DHS's decision to grant deferred action, and employment authorization, to certain eligible individuals who entered the U.S. when they were younger than 16 years old. Now, nearly two years have passed since DHS began accepting applications for the program on August 15, 2012. DACA recipients who were among the first to apply and receive DACA and employment authorization must now undergo the process of renewing their DACA.

ICE and USCIS released their renewal processes in February and early June, respectively. ICE had begun issuing DACA to eligible immigrants in removal proceedings prior to August 15, 2012, when USCIS began accepting applications. To be eligible for DACA renewal, the recipient must (1) not have departed from the U.S. on or after August 15, 2012 without advance parole; (2) have continuously resided in the U.S. since the first DACA approval; and (3) not have been convicted of a felony, significant misdemeanor, or three or more misdemeanors, and does not otherwise pose a threat to national safety or public safety.

The renewal process for ICE-granted and USCIS-granted DACA recipients is the same:

Complete and submit the following forms:

    - The new version of Form I-821D (6/4/2014 edition)
    - Form I-765
    - Form I-765 Worksheet
- Submit the $465 fee for the employment authorization application
- Submit only **new** documents involving removal proceedings or criminal history that was not previously provided to USCIS (Note: USCIS does not require previously submitted documentation establishing the applicant's DACA eligibility)

USCIS has advised DACA recipients to renew approximately 120 days (4 months), but no more than 150 days (5 months), before their current DACA grant expires. USCIS also anticipates that in the event it cannot process the submitted applications before the initial DACA expires, it might issue extensions of the initial DACA to prevent any lapse in time before the renewal is approved.

Since its implementation, DACA has been granted to over 550,000 recipients, according to USCIS statistics released on March 2014. DACA has provided more than half a million young immigrants security from removal and a means to work lawfully in the U.S. The DACA recipients, sometimes also called Dreamers, can now live openly, work, and contribute to their own and their families' wellbeing. The economic and social repercussions of this have not yet been fully studied or revealed, though the American Immigration Council recently published a studyof the economic impact of DACA on the recipients. The study found that through DACA, many young immigrants have benefitted economically through such activities as obtaining new jobs, getting driver's licenses, and opening bank accounts. We can also imagine what has been the psychological impact on these young immigrants of coming out of hiding and being able to be productive members of American society and the American workforce. They have experienced the excitement of receiving an approval notice and the much sought after work permit, then a valid Social Security Number and card, and then oftentimes a State Identification Document in the form of an ID or driver's license.

Though it has undoubtedly bettered the lives of half a million recipients, DACA has been a double-edged sword. While it provides recipients protection from removal from the U.S. and allows them to work legally, DACA is still far less than

what these young immigrants would have received from the government had the DREAM Act or Comprehensive Immigration Reform (CIR) passed in Congress. The DREAM Act would have granted a way for eligible young immigrants to apply for permanent residence, and therefore, lawful status. S.744, the CIR bill passed by the U.S. Senate on June 27, 2013, and that has since stalled in the House of Representatives, included stipulations for the implementation of the DREAM Act's provisions. In contrast, DACA is only granted for two years, and DACA recipients must renew before the expiration of their deferred action and work permits. Moreover, DACA recipients do not have lawful status in the U.S. (although they do not accrue unlawful presence upon the grant of DACA since they are still authorized to remain), and there is no direct pathway to permanent residency or U.S. citizenship.

One limitation that some DACA recipients face is getting a driver's license. Until recently, two states, Arizona and Nebraska, refused to grant driver's licenses to DACA recipients. The Ninth Circuit, on July 7, 2014, struck down Arizona's law that denied driver's licenses to DACA recipients. *Arizona Dream Act Coalition v. Brewer*, No. 13-16248, WL 3029759 (9th Cir. July 7, 2014). This much-maligned law (see Cyrus Mehta's take down of it here) was put in place as soon as DACA was first announced in the summer of 2012. Governor Jan Brewer issued Executive Order 2012-06 "Re-Affirming Intent of Arizona Law In Response to the Federal Government's Deferred Action Program," August 15, 2012, directing Arizona state agencies to design rules to prevent DACA recipients from becoming eligible to obtain state identification such as driver's licenses. Arizona's Department of Transportation's Motor Vehicle Decision changed its requirements for state identification eligibility such that Employment Authorization Documents (EADs or work permits) with the DACA category code of (c)(33) would not be accepted as proof that the license or ID applicant's presence was authorized in the U.S. Five DACA recipients living in Arizona, along with the Arizona Dream Act Coalition, filed suit to stop Arizona from enforcing its policy. The Ninth Circuit found that the law violated the Equal Protection Clause and there was *no rational basis* for the Arizona government's policy. The decision hinged on Arizona's refusal to accept as proof of "authorized presence" in the U.S. an EAD based on DACA category (c)(33) work while they continued to accept EADs based on (c)(9) and (c)(10) categories, which respectively correspond to applicants for adjustment of status and applicants for cancellation of removal. The Ninth Circuit systematically rejected

each of Arizona's arguments that it had a legitimate state interest in upholding the policy. Initially the Court rejected Arizona's argument that (c)(9) and (c)(10) noncitizens could demonstrate authorized presence in the U.S. while (c)(33) could not. Putting aside the nonsensical use of the term "authorized presence" which holds no actual meaning in immigration law, Arizona conflates the immigration concepts of unlawful presence and unlawful status – two very different things. Unlawful presence is used in determining admissibility under the 3- and 10-year bars, while a noncitizen not in lawful status may be authorized to stay in the U.S. The Court's clearly did not make that mistake: "Employment Authorization Documents merely "tied" to the *potential*for relief do not indicate that the document holder has *current* federally authorized presence, as Arizona law expressly requires." *Arizona Dream Act Coalition,* at *9. Moreover, the Court found that Arizona's other four arguments also could not hold up against a rational basis test. Arizona could not show it might have to issue licenses to 80,000 unauthorized immigrants (less than 15,000 Arizona residents have applied for DACA). DACA recipients cannot access state or federal benefits using a driver's license alone. Though the DACA program might be canceled at any time and DACAs could lose their authorized stay, the same could occur to (c)(9) and (c)(10) noncitizens whose corresponding applications are denied. Therefore, these arguments also do not pass the rational basis test. The Court went on and mentioned that additionally, Arizona's policy "appears intended to express animus toward DACA recipients themselves, in part because of the federal government's policy toward them." *Id.* at *25. The court pointedly stated: "Such animus, however, is not a legitimate state interest." *Id*.

Interestingly, the Court struck down the law on equal protection grounds rather than conflict-preemption. Generally, courts use preemption analysis to strike down a conflicting state law acting to regulate immigration. In a concurrence, Circuit Court Judge Christen analyzed the case's conflict-preemption argument and found that Arizona's policy effectively created a new class of noncitizens who are not under "authorized presence" – a descriptor not recognized in immigration law. The act of creating a new immigration classification, in Judge Christen's view, is preempted by federal law because states may not directly regulate immigration. *Id*. at *13, citing *Valle del Sol Inc. v. Whiting,* 732 F.3d 1006, 1023 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1876 (2014). Moreover, in footnote 3, the Court notes that Judges Pregerson and Berzon agree with the concurring

opinion, and specifically that the plaintiffs in the case could succeed on a conflict preemption argument.

Here, however, the Court's majority analyzed Arizona's law from an equal protection perspective, which gives it lasting and powerful impact. By going this route, the 9th Circuit recognized DACA recipients to be part of a protected class. This can have huge implications for any other state laws that purport to discriminate against this now recognized protected class of noncitizens. Moreover, the Court, in footnote 4, acknowledged that the Supreme Court in other cases applied strict scrutiny standard of review when state action discriminates against noncitizens authorized to be present in the U.S., see e.g. *Graham v. Richardson*, 403 U.S. 365 (1971). But here, the Court states it did not have to analyze under strict scrutiny review because Arizona could not even make its case under the lower rational basis test. In its analysis the Court found it could "identify **no legitimate state interest** that is rationally related to Defendant's decision to treat DACA recipients disparately from noncitizens holding (c)(9) and (c)(10) Employment Authorization Documents" *Arizona Dream Act Coalition* at *8. (emphasis added). It is also worthwhile to note that, unlike the Arizona district court which also held that the Arizona government's arguments failed a rational basis review, the 9th Circuit found that the protected class, here the DACA recipients, would likely suffer irreparable harm in the absence of a preliminary injunction. The irreparable harm was the limiting of the DACA recipients' professional opportunities, hurting their abilities to seek or maintain a job in a state where 87 percent of its workers commute by car.

The decision lays bare the type of backlash that occurred after the Obama administration introduced DACA. Conservative pundits and anti-immigration groups believe that these young people should receive no acknowledgement or benefits from a country to which they do not belong. This type of thinking is not only wrong, but it fuels hatred toward a group that, for all intents and purposes, took no part in the decision to enter the U.S. without inspection or to overstay visas. The point of the DACA policy is to respond to the cries from millions of young immigrants brought into the U.S. as children, who have grown up in the U.S., but who are forced to stay in hiding. They are punished for someone else's sins.

I have personally processed over 100 DACA applications in the past two years. When talking to these young immigrants and their families, it is often

impossible to tell apart the individuals who were born here and the ones who were brought here. DACA requestors speak like Americans, look like Americans, and dream the American dream like native-born Americans. It is hard to put into words the unfairness of their lives: to live in a country that is oftentimes the only one they have known, and yet to be denied full recognition and basic equal treatment. Worse, they are called "illegal" and are made to feel unwanted and unwelcome. This treatment is confusing and painful to many of these young people who had no choice about coming to the U.S. Yet they are undoubtedly the future of this country. They will help shape the U.S. cultural, economic, and political landscape. And we are not doing enough to acknowledge their presence, since they are here to stay, and provide them with the tools to be full active members of American society.

The Obama administration has implemented regulations and executive policies to alleviate some of the pain from long-standing immigration problems that Congress has time and again failed to address. DACA, for instance, was the Executive's response to Congress's failure to pass the DREAM Act in 2010. Recently President Obama spoke out angrily against Congress's ability to compromise on immigration reform, calling it the reason behind his decision to direct more resources to address the ongoing crisis of unaccompanied children. As has been pointed out on this blog, Obama can expand the use of Executive action to confront problems in immigration law while we wait for Congress pass CIR. The Obama administration can do more than just grant deferred action to young immigrants. DHS could grant deferred action to DACA parents. The Department of Education could grant federal student loans to DACA recipients. Paradoxically, the Obama administration has specifically rendered DACA recipients ineligible for healthcare benefits under the Affordable Care Act even though prior to the August 2013 rule, DACA recipients would have been eligible. There are myriad ways Executive action, such as DACA, can provide relief to millions of immigrants who live and work beside us every day. Until such time that Congress takes action, the Executive will have to be the branch taking action, and immigrants must be content with its limitations.

Because the basis of a deferred action grant is DHS's policy of prosecutorial discretion, it remains only in the form of executive action and it is not an actual law passed by Congress and signed by the President. DACA and any other executive action are thus vulnerable to attacks from groups and individuals

who consider them an overreach by the Obama administration. These attacks, such as Arizona's driver's license law, are often informed by fear and a fundamental misunderstanding of immigration law. Litigation to strike down these anti-immigrant and anti-immigration state laws, which are arguably preempted by federal law, can sometimes take years. Moreover, executive action while necessary in the face of Congressional inaction is limited in scope: it cannot grant visas or permanent residence, which only Congress can do by expanding the eligibility categories for permanent residence. Meanwhile, immigrants languish in backlogged visa lines, wait months and years for hearings before an immigration judge, face harsh vitriol from anti-immigration groups, and DACA recipients still do not have a way to become fully integrated into American life.