November 29, 2021

Ms. Andria Strano
Acting Chief, Office of Policy and Strategy
Division of Humanitarian Affairs
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
5900 Capital Gateway Drive,
Camp Springs, MD 20746

RE: DHS Docket No. 2021-0006, Deferred Action for Childhood Arrivals

Dear Ms. Strano,


FAIR is a national, nonprofit, public-interest organization comprised of millions of concerned citizens who share a common belief that our nation's immigration laws must be enforced, and that policies must be reformed to better serve the national interest. Our organization examines trends and effects, educates the public on the impacts of sustained high volume immigration, and advocates for sensible solutions that enhance America’s environmental, societal, and economic interests today, and into the future.

DACA provides immigration benefits, including lawful presence and employment authorization, as well forbearance from deportation to certain aliens who are in the United States illegally. In addition to other eligibility criteria, these aliens must have been under the age of 31 by June 15, 2012 and have entered United States prior to 2007, thus making the eligible population between the ages of 25 to 41 years old.
As of September 2021, more than 825,000 individuals have received DACA.\(^1\) The Migration Policy Institute estimates that there are 636,390 active DACA beneficiaries and an eligible population of at least 1,331,000 illegal aliens.\(^2\) In 2021, not one DACA recipient or DACA-eligible alien is a minor.

Maintaining DACA through rulemaking is both unlawful and bad immigration policy. Recent judicial decisions have held that DACA violates both substantive and procedural requirements under federal law. As a result, any regulatory proposal to maintain DACA will not only continue to fuel the border crisis, but it will also be ultra vires. FAIR urges DHS to withdraw this proposed rule because DACA is unsupportable under federal law and violates the U.S. Constitution. It is also reckless immigration policy that sets a dangerous non-enforcement precedent.

I. DACA is not authorized by Congress, and therefore, outside of the scope of DHS’s rulemaking authority

DHS cannot lawfully implement DACA by this proposed rule because the program is invalid under federal immigration law. Congress has not authorized DACA, and DHS’s interpretation of the Immigration and Nationality Act (“INA”) is an impermissible reading of the statute.\(^3\) The proposed rule maintains the core properties of the original DACA program and DACA directly conflicts with Congress’s explicit scheme to regulate employment of aliens in the United States, restrict adjustment of status from aliens who entered the United States without inspection, restrict the employment of unauthorized aliens from competition with U.S. workers and certain immigrants, require the removal of certain illegal aliens from the United States, and prohibit reentry from aliens who excessively accrue unlawful presence. As a result, any regulation codifying the DACA statute will be ultra vires.

A. The Proposed Rule Violates the Administrative Procedures Act

In July, the U.S. District Court for the Southern District of Texas signaled that DHS would be unlikely to lawfully adopt DACA through rulemaking.\(^4\) The court ruled that

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\(^4\) Id.
DACA is both procedurally and substantively invalid under the Administrative Procedures Act, and would not survive scrutiny under *Chevron* analysis.\(^5\) As a result, the substantive violations of the INA render DACA a nullity and preclude DHS from promulgating a rule to maintain the program.\(^6\)

*Chevron* requires a two-step inquiry in determining whether an agency’s interpretation of a statute may receive deference.\(^7\) The first step applies general rules of statutory construction and to determine whether Congress has directly spoken to the precise question at issue.\(^8\) “If the intent of Congress is clear…the agency … must give effect to the unambiguously expressed intent of Congress.”\(^9\) The second step asks, if Congress has not directly spoken and Congress’s intent is ambiguous, whether the agency has employed a reasonable interpretation of the statute.\(^10\)

Through the enactment of the federal immigration statutes, however, Congress has foreclosed the adoption of DACA and the proposed rule fails scrutiny under both *Chevron* steps.\(^11\) First, Congress has directly spoken on whether DACA is permissible. In addition to consistently and expressly rejecting legislation that would substantively enact the program or otherwise legalize DACA’s intended beneficiaries,\(^12\) Congress has also thoroughly articulated an immigration scheme to regulate the employment of aliens in the United States, prohibit the employment of unauthorized aliens, and require the removal of certain illegal aliens.

DACA is more than, as DHS purported in litigation, an exercise of prosecutorial discretion resulting from limited agency resources.\(^13\) By implementing DACA, the proposed rule ignores statutorily mandated removal proceedings and goes further to provide immigration benefits to aliens with no lawful access to immigration benefits. “Against the background of Congress’ ‘careful plan,’ DHS may not award lawful presence and work authorization to approximately 1.5 million aliens for whom Congress has made no provision.”\(^14\) Congress has expressly not authorized DACA.

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\(^6\) See 5 U.S.C. §706(2)(B)-(C); *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936) (holding that a “regulation [that] … operates to create a rule out of harmony with the statute, is a mere nullity” because an agency’s “power … to prescribe rules and regulations … is not the power to make law” but rather “the power to adopt regulations to carry into effect the will of Congress as expressed by the statute”).

\(^7\) See *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013).


\(^9\) *Id.* at 842-43.

\(^10\) *Id.*

\(^11\) *Texas II*, at 74.

\(^12\) See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. at 1919 n.2 (Thomas, J., dissenting).


\(^14\) *Texas II*, at 96.
Additionally, the proposed rule does nothing to cure the defects created by DHS allowing DACA recipients to receive advance parole. Advance parole is a privilege that allows aliens to leave the United States and then lawfully re-enter the country without being turned away at a port of entry. It is designed to be awarded only on a case-by-case basis for urgent humanitarian reasons or significant public benefit. As discussed in detail by the court in *Texas II*, by allowing DACA recipients to receive advance parole the proposed rule directly contradicts Congress’ scheme to restrict adjustment of status (green card) eligibility from aliens who have not been “lawfully admitted or paroled into the United States” and subverts the three- and ten-year bars Congress inserted into the INA to prohibit aliens who have been unlawfully present in the United States for 180 days or 365 days, respectively, from reentering the country in three or ten years.

FAIR disagrees with DHS’s rationalization that because DACA recipients are subject to the same “urgent humanitarian or significant public benefit” analysis required by the advance parole statute, the proposed rule is authorized by Congress. Applying the same standard to DACA recipients says nothing about whether Congress intended to create a class-based exception to the adjustment of status restriction or the bars to reentry, as this proposed rule and the original DACA program both do. To the contrary, the proposed rule directly undermines Congress’s plan by offering immigration benefits and work authorization eligibility, thereby rewarding unlawful conduct that Congress sought to eliminate.

Further, in addition to consistently and expressly rejecting DACA legislation, Congress has not implicitly ratified DACA. Ratification requires: “‘a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned’” “can ‘raise a presumption that the [action] had been [taken] in pursuance of its consent.’”

DHS’s argument falls short because prior instances of Executive misconduct cannot “be regarded as even a precedent, much less an authority for the present [misconduct].” Further, “[a]rbitrary agency action becomes no less so by simple dint of repetition.” There has simply not been the “unanimous holdings of the Courts of Appeals” and subsequent legislation required for Congress to have accepted and ratified DACA. Finally, even the proposed rule could survive scrutiny under *Chevron’s* first step, it

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15 INA § 212(d)(5)(A).
16 See INA § 245(a); *Texas II* at 92-97.
17 INA § 2121(a)(9)(B)(i).
would fail *Chevron’s* second test because DACA is not a reasonable manifestation of any statute and is “manifestly contrary” to the statutory scheme promulgated by Congress.\(^\text{22}\)

In making it illegal for unauthorized aliens to work here, Congress intended to discourage illegal entry and to encourage removable aliens to remove themselves, even if enforcement by removal is underfunded and slow to reach low-priority cases.\(^\text{23}\)

FAIR also disagrees with DHS’s argument that prior instances of executive non-enforcement policies justify this proposed rule.\(^\text{24}\) Unlike DACA, parole has been authorized by Congress and use of deferred action has been ratified in certain limited circumstances.\(^\text{25}\) However, the history of the parole statute and deferred action is one of increasing limitations in response to agency overreach.\(^\text{26}\) Congress’s actions have resulted in the restriction of agency discretion, not an expansion. According to the House Judiciary Committee, Congress tightened the parole authority because:

> “[t]he text of section 212(d)(5) [8 U.S.C. § 1182(d)(5)] is clear that the parole authority was intended to be used on a case-by-case basis to meet specific needs, and not as a supplement to Congressionally-established immigration policy. In recent years, however, parole has been used increasingly to admit entire categories of aliens who do not qualify for admission under any other category in immigration law, with the intent that they will remain permanently in the United States. This contravenes the intent of section 212(d)(5), but also illustrates why further, specific limitations on the Attorney General's discretion are necessary.”\(^\text{27}\)

In the case of EVD, Congress acted to reign in executive discretion through the passage of the *Immigration Act of 1990*, which expressly authorized the Attorney General (now

\(^{22}\) Texas II, at 98.


\(^{26}\) As a response to agency abuse of discretionary parole, Congress included in the 1980 Refugee Act a prohibition the discretionary exercise of parole for any “alien who is a refugee,” unless the Attorney General determined that “compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207.” 8 U.S.C. § 1182(d)(5)(B). In 1996, Congress acted again to rein in agency abuse of discretion to parole aliens into the United States by authorizing discretionary grants of parole by “only” where additional conditions had been met.

assigned to the Secretary of Homeland Security), following consultation with the Secretary of State, to designate a foreign country for Temporary Protected Status (“TPS”) in limited circumstances.  With that legislation, Congress also ratified the executive’s use of indefinite “voluntary departure” under the Family Fairness policies.

B. DHS Is Not Authorized to Grant Work Authorization to Classes of Aliens Not Expressly Authorized by Statute

DHS does not have the authority to grant employment authorization documents (“EADs”) to aliens whom the INA does not provide such benefits or for whom the INA does not expressly grant the Secretary discretionary authority, such as is the case with asylum based EADS. Rather, DHS should protect job opportunities for American workers consistent with the employment-based admission limitations passed by Congress.

Article I of the U.S. Constitution gives Congress plenary power over immigration, and Congress has established an extensive scheme for the admission of immigrant and nonimmigrant foreign workers into the United States through the creation of numerous visa programs. Congress has never conferred nor delegated the authority to DHS to create employment eligibility for classes of aliens not already provided by law. Designating new classes of eligible populations undermines the deliberate scheme created by Congress which has contemplated intricate social, economic, and foreign policies beyond the scope of DHS’s interests and mission.

Further, contrary to DHS’s regulatory position (which DHS even later disavowed in litigation), Congress did not confer such authority with the enactment of the definition of “unauthorized alien,” in section 1324a of the INA. Section 1324a was enacted by the Immigration Reform and Control Act of 1986 (“IRCA”) to, for the first time, criminalize and impose civil sanctions on the act of hiring an alien who is not authorized to work in the United States. Section 1324a(h)(3) defines those aliens that it is unlawful for an employer to hire. This section, however, is merely definitional and refers to the

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28 INA § 244(b).
authorities the Secretary already possesses through enactment of other provisions in the INA. It does not itself grant any authority.  

Rather, since the enactment of this position, Congress has specifically extended and limited DHS’s authority to grant work authorization to similar classes of aliens on numerous occasions. Interpreting the definition of “unauthorized alien” to confer such broad authority would also render Congress’s later enactments superfluous and violate the non-delegation doctrine as an impermissible delegation of legislative authority without sufficient intelligible principles to guide the Secretary.

Rescinding DHS’s unlawful regulations is even more critical today given the economic hardships faced by Americans during the ongoing COVID-19 and high-inflation crises. While economic activity and employment rates have recovered modestly since the beginning of the crisis in early 2020, the economic downturn has affected nearly all industries and occupations in the United States, resulting in mass layoffs and business closures. The annual inflation rate in the United States soared to 6.2% in October 2021, the highest in more than three decades, as measured by the Consumer Price Index.

The U.S. Government has both a moral and legal obligation to ensure that U.S. workers of all backgrounds are first in line for jobs as the economy reopens and are not further harmed by unfair competition and wage suppression. Utilizing agency discretion to

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34 See W. Union Tel. Co. v. FCC, 665 F.2d 1126, 1136–37 (D.C. Cir. 1981) (holding a section was “only definitional” where it began with “as used in this section” and contained only definition subsections); Texas v. United States, 787 F.3d 733, 760 (5th Cir. 2015), aff’d by an equally divided court, 136 S. Ct. 2271 (2015) (observing § 1324a(h)(3) was merely definitional).

35 For example, the Omnibus Consolidated Appropriations Act 1997 provided that “[a]n applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. Pub. L. No. 104-208, § 604, 110 Stat. 3009-693.

36 The Supreme Court “repeatedly [has] said that when Congress confers decision making authority upon agencies Congress must ‘lay down by legislative act an intelligible principle to which the person or body authorized to act’ is directed to conform.” Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 472 (2001) (quoting J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); see also Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 685(1980) (Rehnquist, J. concurring) (“[The nondelegation doctrine] ensures . . . that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.”).


provide EADs to only populations authorized by Congress is a necessary step in ensuring domestic employment opportunities are not unfairly and unlawfully diminished.

C. DHS’s Proposed DACA Regulation Violates the Take Care Clause of the U.S. Constitution

In addition violating federal law as an impermissible interpretation of the INA, further implementation of DACA would violate the Take Care Clause of the U.S. Constitution because it “dispens[es]” with certain statutes. While, at some level, any substantively or even procedurally ultra vires action represents a failure faithfully to execute the laws, it requires more to violate the Take Care Clause—a failure even to “take Care that the Laws be faithfully executed.” Id. That failure, however, would be amply present by DHS’s persistence to implement DACA through regulation.

The DACA program is a unilateral attempt by the Executive Branch to provide legal status and work authorization to certain aliens of whom Congress has expressly prohibited. Indeed, the Obama administration itself candidly acknowledged the unlawfulness of DACA numerous times before issuing DACA for political reasons when Congress did not enact the legislation that the administration sought. Presidents do not have the constitutional authority to enact legislation or adopt any policies they want. Instead, the Constitution requires presidents to see to it that the laws that Congress has passed are faithfully executed. Implementing DACA through rulemaking is an abdication of the executive branch’s duty to implement the immigration laws as Congress mandated.

Accordingly, DHS is not authorized to implement DACA through rulemaking. The proposed rule is ultra vires and an abuse of executive authority.

39 U.S. Const. art. II sec. 3; Kendall v. United States, 37 U.S. 524, 613 (1838).
40 Texa II, at 78, fn. 77. (“Prior to the institution of DACA, President Barack Obama also agreed publicly that the Executive Branch could not accomplish the goals of the DREAM Act administratively: ‘With respect to the notion that I can just suspend deportation through executive order, that’s just not the case because there are laws on the books that Congress has passed ....’ Press Release, The White House Office of the Press Secretary, Remarks by the President at Univision Townhall (Mar. 28, 2011); see also Press Release, The White House Office of the Press Secretary, Remarks by the President in an Open for Questions Roundtable (Sept. 28, 2011) (answering a question about enacting the DREAM Act administratively with: ‘You have to pass bills through the Legislature, and then I can sign it. And if all the attention is focused away from the Legislative process, then that is going to lead to a constant dead-end.’”).
41 U.S. Const. art. II, § 3.
II. DACA Encourages Illegal Immigration and the Trafficking of Children Across the U.S.-Mexico Border

Promulgating this proposed rule is unconscionable while an unprecedented number of minors surge across the border – incentivized by lax enforcement policies and promises of amnesty. The creation of the DACA program is one of the strongest pull-factors that have ignited modern border crisis.\(^{42}\)

U.S. Customs and Border Protection (“CBP”) began reporting unprecedented numbers of illegal border crossing of unaccompanied alien minors (“UACs”) and family units in excess of single adult aliens after the U.S. Government began signaling an unwillingness to enforce immigration law against these populations.\(^{43}\) By 2014, the number of unaccompanied alien minors apprehended at the border has increased ten-fold. CBP reported that the number of UACs apprehended along the Southwest border increased from 15,949 in FY 2011, to 24,403 in FY 2012, to 38,759 in FY 2013, before surging to 68,541 in FY 2014.

Further troubling, the Executive Office of Immigration (EOIR) has reported large percentages of UACs in absentia orders.\(^{44}\) EOIR reported just 450 UAC in absentia orders in FY 2010. This number increased to 6,662 in FY 2018, an almost 1,500 percent increase during a period of time when the number of UACs apprehended increased about 272 percent (from 18,411 in FY 2010 to 50,036 in FY 2018). By FY 2018, half of all case completions involving UACs were in absentia orders, according to EOIR, compared to an overall in absentia average of 25 percent of all case completions.\(^{45}\) This data suggests that many illegal border crossers simply enter the United States to remain in this country illegally and wait for an administrative or legislative amnesty, and are not legitimately seeking relief under the United States’ humanitarian protection laws, applying for another immigration benefit for which they may be eligible.

The humanitarian crisis on the border continues to serve as a threat to national security, public health, wage levels and employment security, and poses unsustainable strains to

\(^{42}\) FAIR and IRLI additionally urge DHS to take action to close loopholes in federal immigration law that have also contributed to the unprecedented border crossings and change in demographics (from majority single male adults to family units and minors) and to end the Flores Settlement Agreement of 1997 through rulemaking.
\(^{45}\) *Id.*
DHS, DOJ and HHS resources.\textsuperscript{46} As a result of the Biden administration’s commitment to maintaining DACA and dismantling immigration enforcement for the majority of illegal aliens in the United States, CBP reported the greatest numbers of apprehensions at the Southwest border in FY 2021.\textsuperscript{47} CBP reported that Border Patrol apprehended 1,659,206 aliens who illegally crossed the Southwest border in FY 2021, and officials are predicting that apprehensions will exceed two million by the end of the calendar year.\textsuperscript{48} Border Patrol agents encountered nearly double the number of unaccompanied alien minors in FY 2021 as the previous record set in FY 2019.\textsuperscript{49} Further, in the time President Biden has taken office, the number of aliens who have entered the United States illegally across the Southern border has increased nearly 600 percent.\textsuperscript{50}

While the program limits eligibility to those who have resided in the United States since June 2007, the message being sent around the world is that illegal entry will be rewarded and unlawful presence will be mooted by executive action. Promulgating a DACA regulation to indefinitely delay enforcement of our immigration laws only perpetuates the problem.

This administration must impose policies to support the rule of law, discourage illegal immigration, and discourage traffickers from smuggling children into the United States. Any proposed rulemaking offering to continue the DACA program only serves to maintain the perverse incentives fueling the trafficking of minors and family units across the border. The U.S. Government must send a strong message to the world that the United States will enforce its laws and he needs to discourage parents from sending their children on a dangerous journey illegally to cross our border.

III. DACA Diverts Limited Agency Resources From Legitimate Immigration Programs

As an unauthorized and unfunded program, costs stemming from implementing DACA diverts attention and resources from lawful immigration programs, which only increase costs and delays for legal immigrants and nonimmigrant beneficiaries and petitioners.


\textsuperscript{47} CBP reported the total number of apprehensions (including all border sectors) in FY 2021 to be 1,659,206. U.S. Customs and Border Protection, Southwest Land Border Encounters (Nov. 2021), \textit{available at} \url{https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters} (last visited Sept. 22, 2021).

\textsuperscript{48} \textit{Id.}

\textsuperscript{49} \textit{Id.}

\textsuperscript{50} \textit{Id.}
As you are likely aware, U.S. Citizenship and Immigration Services (“USCIS”) is experiencing enormous backlogs and historic delays for nearly all visa categories. Accordingly to a Government Accountability Office report, USCIS’s total backlog increased 85% between 2015 and 2020, with the backlog of naturalization applications more than doubling during that period.\textsuperscript{51} Between October 2020 and September 2021, naturalization applications took an average of 11.5 months to adjudicate, and required applicants for some visa categories to wait multiple years for their cases to be considered.\textsuperscript{52} As of June 2021, USCIS reported over a 900,000 case backlog for just naturalization (citizenship) applications.\textsuperscript{53}

USCIS also disclosed to Congress in 2018 that in order to fund DACA processing, the agency dipped into funds paid by the fees paid by lawful visa applicants and their sponsors for the costs of their application processing, thereby increasing the overall costs of their adjudications.\textsuperscript{54} USCIS reported that the agency increased staffing and diverted officers from their portfolios to help process DACA applications.\textsuperscript{55}

Further, FAIR finds that the application fee proposed in this rule for the Form I-821D is woefully insufficient to cover the costs associated with adjudicating a DACA application. In response to an inquiry from the Congressional Research Service, USCIS disclosed that the cost of processing an initial DACA application is $446.\textsuperscript{56} The cost of processing a DACA renewal is $216.\textsuperscript{57} This proposed rule, however, only requires DACA applicants to pay a $85 fee to cover the cost of fingerprinting, essentially making the cost the adjudication free to the applicant.\textsuperscript{58}

Legal immigrants should not have to bear the costs associated with of implementing DACA. If Congress decides to create an amnesty program for those with DACA, it is

\textsuperscript{52} See U.S. Citizenship and Immigration Services, \textit{Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year, Fiscal Year 2017 to 2021 (up to October 31, 2021)} (Oct. 2021), available at \url{https://egov.uscis.gov/processing-times/historic-pt}.
\textsuperscript{55} Id.
\textsuperscript{57} Id.
\textsuperscript{58} 86 Fed. Reg. 53736, 53739 (Sept. 28, 2021).
only fair that these applicants should pay the full cost of adjudicating their cases. In addition, all initial DACA and renewal applicants should be charged a surcharge on to fund enforcement and restitution initiatives.

Even with the imposition of a reasonable application fee, a proposed rule to continue the DACA program would be an unlawful distraction from the agency’s mission to administer a lawful immigration system, of which applicants for legitimate immigration programs must experience hardship as the result of longer wait times. FAIR urges USCIS to devote its limited resources to lawful immigration programs that have been authorized by Congress instead of diverting manpower, office space, and agency funds to amnesty programs benefiting aliens without any lawful immigration status, as well as those who profit off of continuous illegal immigration into the United States.

IV. Conclusion

FAIR strongly urges DHS to withdraw the proposed rule and, instead, implement reforms that will discourage illegal immigration into the United States, remove incentives to submit fraudulent or frivolous asylum claims, and regain order on the U.S.-Mexico border. DACA is not authorized by Congress and violates the Take Care Clause of the U.S. Constitution. Moreover, the issuance of EADs to DACA beneficiaries and other classes of aliens not expressly authorized by statue is an abuse of agency discretion and should be immediately rescinded.

Sincerely,

Dan Stein
President
Federation for American Immigration Reform (FAIR)