RESISTING EMPLOYER SANCTIONS: A STRATEGY FOR CIVIL DISOBEDIENCE

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ABSTRACT

The Deferred Action for Childhood Arrivals (DACA) program is on a death march in the federal courts. Ending DACA would mean that 600,000 individuals would lose their work permits. That means that about 22,000 DACA recipients would lose employment authorization every month for two years, roughly 1,000 per business day.

The Development, Relief, and Education for Alien Minors Act (DREAM Act) would resolve the situation for DACA recipients and other Dreamers by granting them lawful permanent residence status.

Businesses have been loud supporters of the DREAM Act. Statements of support from Google, Facebook, Apple, Cisco, Uber, Ikea, Adobe, Hilton, Best Buy, Levi Strauss, and many others are easy to find. In 2018, when DACA was under threat by the Trump administration, I urged supportive employers to stand behind their DACA employees if DACA was terminated and to engage in civil disobedience. I argued that giving in to the threat of employer sanctions would turn employers into a "weapon of oppression and dehumanization" and that defying employer sanctions would be the "right moral answer."

This article is a follow up to my 2018 call for employer civil disobedience to support DACA recipients and the DREAM Act. I will describe efforts that businesses have engaged in to support the DREAM Act, as well as efforts that some have taken on to help their undocumented employees obtain lawful immigration status. I will also describe efforts by my students and me to convince corporate businesses to play a bigger role in support of the DREAM Act and DACA employees. Our efforts have included three different asks: 1) to do more to publicly support the passage of the DREAM Act; 2) to pay the legal fees necessary to have DACA employees screened by immigration lawyers to determine if a path to immigration status exists for an individual under existing law, and 3) to seriously reflect on what the employer will do if DACA is terminated and what civil disobedience or an alternative employment plan would look like.

I call on all employers to engage in civil disobedience if DACA is terminated. However, my focus here is on big business. I believe that the voice of big business can have great impact in the halls of Congress. I also know that big business has the resources to battle any attempt by the government to punish, plus these companies can afford the fines if any are imposed.

DOI: https://doi.org/10.15779/Z38VX0644K

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INTRODUCTION

The Deferred Action for Childhood Arrivals (DACA) program is on a death march in the federal courts.[1] Ending DACA would mean that 600,000 individuals would lose their work permits.[2] That means that about 22,000 DACA recipients would lose employment authorization every month for two years, roughly 1,000 per business day.[3] Another 400,000 more individuals would qualify for DACA but are currently prohibited from doing so because of pending litigation.[4] In addition, "more than 1.3

1. *See generally* Stuart Anderson, *The Next News Could be Bad for DACA Recipients,* FORBES (Sept. 15, 2022, 12:07 AM), https://www.forbes.com/sites/stuartanderson/2022/09/15/the-next-news-could-be-bad-news-for-daca-recipients/?sh=797274e85d91; *see also* Marlene Herrera, *Future of DACA Remains Uncertain,* THE CORSAIR (Oct. 14, 2022), https://www.thecorsaironline.com/corsair/2022/10/14/future-of-daca-remains-uncertain; Adam Liptak & Michael Shear, *Supreme Court Tie Blocks Obama Era Immigration Plan,* THE N.Y. TIMES (June 23, 2016), https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html (describing how in 2016, a divided Supreme Court in a 4-4 tie affirmed a Fifth Circuit decision striking down a similar Obama-era effort. Given the current composition of the Supreme Court, I believe the outcome of the DACA case before the court would be 6-3 against presidential authority to grant employment authorization to Dreamers).

2. *See* Camilo Montoya-Galvez, *Republican-led states ask judge to shut down DACA program for immigrant "Dreamers,"* CBS NEWS (Jan. 31, 2023, 11:15 PM), https://www.cbsnews.com/news/immigration-daca-lawsuit-republican-states-federal-judge-dreamers/.

3. *Coalition Statement on Potential Bipartisan Framework to Protect Dreamers, Provide Permanent Legislation Solution to DACA*, COAL. FOR THE AM. DREAM (Dec. 6, 2022), https://www.coalitionfortheamericandream.us/wp-content/uploads/2022/12/12.22-Coalition-Statement.pdf; *see also* Phillip Conner, *What happens if DACA ends?,* FWD.US (Aug. 22, 2022), https://www.fwd.us/news/what-if-daca-ends/.

4. *See also* Phillip Conner, *What happens if DACA ends?*, FWD.US (Aug. 22, 2022), https://www.fwd.us/news/what-if-daca-ends/.

million people live with a DACA recipient, including 300,000 U.S.-born children who have at least one parent with DACA."[5] In short, the termination of DACA would be a disaster for millions.

The Development, Relief, and Education for Alien Minors Act (DREAM Act) would resolve the situation for DACA recipients and other Dreamers by granting them lawful permanent residence status.[6] Although the DREAM Act has been introduced over and over again since 2001, it has never passed both chambers of Congress in the same session.[7] But Dreamers will not give up fighting and pushing Congress to do the right thing.[8]

While the DACA recipients and their families would suffer the most from the death of DACA, their employers, the economy, and all of our lives would be hard hit as well. More than three-quarters of DACA recipients—343,000 workers—are employed in essential jobs, including 34,000 who provide patient care and another 11,000 who work in health care settings.[9] Another 20,000 are teachers and 100,000 work in the food supply chain.[10] DACA households pay $6.2 billion in federal taxes and $3.3 billion in state and local taxes each year.[11] Beyond taxes, these households hold $25.3 billion in spending power; they own 68,000 homes, making $760 million in mortgage payments and $2.5 billion in rental payments annually.[12]

For these reasons, businesses have been loud supporters of the DREAM Act. Statements of support from Google, Facebook, Apple, Cisco, Uber, Ikea, Adobe, Hilton, Best Buy, Levi Strauss, and many others are easy to find.[13] Groups such as the National Retail Federation, Idaho Dairymen's Association, American Hotel & Lodging Association, and the Texas Nursery & Landscaping Association have also advocated for the legislation.[14]

Senator Robert Menendez, D-N.J., a leading sponsor and supporter of the DREAM Act, believes that the business community could play a major role in shaping the immigration debate. "At some point, the business community will wake up and say: 'Hey, we need immigration in order to meet our labor challenges. We have 11 million jobs that are going unfilled."[15]

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5. Nicole Prchal Scajlenka & Trinh Truong, *The Demographic and Economic Impacts of DACA Recipients: Fall 2021 Edition*, THE CTR. FOR AM. PROGRESS (Nov. 24, 2021), https://www.americanprogress.org/article/the-demographic-and-economic-impacts-of-daca-recipients-fall-2021-edition/.

6. *See* Erin Blakemore, *Why DACA-and Dreamers-are forever in a state of limbo,* NAT'L GEOGRAPHIC (Dec. 7, 2022), https://www.nationalgeographic.com/culture/article/what-is-daca-who-are-dreamers.

7. *See* Kevin Appleby, *Congress Must Finally Act on the DREAM Act,* CTR. FOR MIGRATION STUD. (Dec. 7, 2022), https://cmsny.org/congress-dream-act-120722/.

8. *See, e.g.*, Jose M., *ICYMI: IN NYT OP-ED UWD'S GREISA MARTINEZ ROSAS DENOUNCES CONGRESS' FAILURE TO PROTECT IMMIGRANT YOUTH,* UNITED WE DREAM (Dec. 22, 2022), https://unitedwedream.org/press/icymi-in-nyt-op-ed-uwds-greisa-martinez-rosas-denounces-congress-failure-to-protect-immigrant-youth/.

9. Prchal Savjlenka & Truong, *supra* note 5.

10. *Id.*

11. *Id.*

12. *Id.*

13. *See, e.g.*, COAL. FOR THE AM. DREAM, https://www.coalitionfortheamericandream.us/.

14. *See, e.g.*, *Alliance for New Immigration Consensus*, NAT'L IMMIGR. FORUM, https://immigrationforum.org/article/the-alliance-for-a-new-immigration-consensus/ (Apr. 23, 2023).

15. Julia Ainsley et al., *With DACA on life support, Microsoft, Apple and other big U.S. firms launch ad campaign to protect 'Dreamers'*, NBC NEWS (Oct. 20, 2022, 1:30 AM),

In 2018, when DACA was under threat by the Trump administration, I urged supportive employers to stand behind their DACA employees if DACA was terminated and to engage in civil disobedience.[16] I argued that giving in to the threat of employer sanctions would turn employers into a "weapon of oppression and dehumanization"[17] and that defying employer sanctions would be the "right moral answer."[18]

In June 2020, the Supreme Court saved employers from having to make the decision on civil disobedience when the Court ruled that the Trump administration had to follow the Administrative Procedures Act if DACA was going to be terminated.[19] However, the threat of DACA's termination is very real again with a lawsuit filed by Texas. Employers will have to confront the decision of what to do with their DACA employees once DACA is ended by the Supreme Court as expected.

As the Texas case against DACA proceeded, those who were familiar with my 2018 call for disobedience began to contact me. In August 2022, a former program officer for the Ford Foundation, who is now at another philanthropic organization, contacted me. I met with her and a colleague who wanted to provide support for more information gathering and for entities that intend to ignore employer sanctions. Leaders of a Dreamer organization reached out and asked me to meet with the staff to discuss ideas on avoiding employer sanctions and on providing information to employers. Employees of an immigrant rights organization, including some DACA employees, requested my input on how the organization should best proceed with its own path forward. A regional immigrants rights collaborative, members of which were familiar with my article, asked me for any information about whether "civil disobedience was being planned or organized if DACA" was terminated.[20] I reached out to a policy person on the staff of a collaborative that included many businesses to gauge his reaction to potential civil disobedience. He was confident that many in the group would at least want to learn more about what civil disobedience would entail, including the potential for actual sanctions being imposed.

This article is a follow up to my 2018 call for employer civil disobedience to support DACA recipients and the DREAM Act. I will describe efforts that businesses have engaged in to support the DREAM Act, as well as efforts that some have taken on to help their undocumented employees obtain lawful immigration status. I will also describe efforts by my students and me to convince corporate businesses to play a bigger role in support of the DREAM Act and DACA employees. Our efforts have included three different asks: 1) doing more to publicly support the passage of the DREAM Act; 2) paying the legal fees necessary to have DACA employees screened by immigration lawyers to determine if a path to immigration status exists for an individual under existing law, and 3) seriously reflecting on what the employer will

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https://www.nbcnews.com/politics/immigration/microsoft-apple-meta-big-us-firms-run-ads-urging-congress-protect-drea-rcna52123.

16. *See generally* Bill Ong Hing, *Beyond DACA—Defying Employer Sanctions Through Civil Disobedience*, 52 UC Davis L. Rev. 299 (2018).

17. *Id.* at 340.

18. *Id.* at 341.

19. *See generally* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

20. Email from TL, Deputy Director, [Immigrant Rights Organization], San Francisco, CA, to Bill Ong Hing, Professor of L. & Migration Stud., Univ. of S.F., Sch. of L., (Jan. 8, 2023, 8:11 PM) (on file with author).

do if DACA is terminated and what civil disobedience or an alternative employment plan would look like.

I call on all employers to engage in civil disobedience if DACA is terminated. However, the focus of this article is on "big business."[21] The voice of big business can have great impact in the halls of Congress. Big business has the resources to battle any attempt by the government to punish, and these companies can afford any potential imposed fines.

The DREAM Act was first introduced in Congress in 2001 by a bi-partisan group of legislators that included Dick Durbin, Orrin Hatch, Luis Gutierrez, and Richard Lugar.[22] Various versions of the legislation would provide conditional lawful permanent residence status to certain undocumented individuals (up to age thirty or thirty-five, depending on the legislative version) of good moral character who graduate from U.S. high schools, arrived in the United States as minors, and lived in the country continuously for at least five years prior to the bill's enactment. If they completed two years in the military or two years at a four-year institution of higher learning,[23] they would obtain temporary residency for a six-year period. Eventually, the individuals could qualify for lawful permanent residence and ultimately U.S. citizenship.

The DREAM Act reached the Senate floor in mid-September 2010 with support from both parties and the White House. At a September 21st press conference, Secretary of Education Arne Duncan declared, "It is no surprise that a common-sense law like the DREAM Act has always been supported by both Democrats and Republicans. There is no reason it shouldn't receive that same bipartisan support now."[24] As Congress became hyper-politicized during the first two years of the Obama presidency, the DREAM Act suffered from an erosion of bipartisan support. When Senate Majority Leader Harry Reid (D-Nev.) included the DREAM Act in the defense authorization bill in September, the bill failed the cloture vote 56-43 without garnering a single Republican in favor of its passage.[25] Republican Senators Orrin Hatch and Bob Bennett, both of Utah, voted in favor of adding the DREAM Act to the defense authorization bill in 2007, but voted against the measure in 2010.[26] Likewise, Senator John McCain (R-Ariz.), who co-sponsored the DREAM Act in 2005, 2006, and 2007, voted against it in 2010.[27]

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21. I use the term "big business" to describe major U.S. corporations like Apple, Microsoft, IBM, Oracle, and Amazon, as opposed to small companies, small family-owned businesses, and nonprofit organizations.

22. Elise Foley, *Obama Administration to Stop Deporting Younger Undocumented Immigrants and Grant Work Permits*, HUFFINGTON POST (June 15, 2012, 9:41 AM), http://www.huffingtonpost.com/2012/06/15/obama-immigration-order-deportation-dream-act_n_1599658.html.

23. *The DREAM Act and National Security*, WASH. INDEP.: ARCHIVE (July 30, 2020), https://washingtonindependent.com/97571/the-dream-act-and-national-security/ (The bill originally required students to attend college or complete two years of community service, but the latter option was replaced with a military service option with pressure from the Pentagon).

24. Kathy Lee, *DREAM Deferred*, HARV. POLITICAL REV. (Oct. 30, 2010), https://harvardpolitics.com/dream-deferred/.

25. Igor Volsky, *With Just 40 Votes, Republicans Block Debate Over Defense Authorization Bill*, THINKPROGRESS (Sept. 21, 2010, 7:18 PM), https://archive.thinkprogress.org/with-just-40-votes-republicans-block-debate-over-defense-authorization-bill-f7fe5ed7a0eb/.

26. *Hatch, Bennett Say They'll Vote 'No' On DREAM Act*, WASH. INDEP.: ARCHIVE (July 30, 2020), https://washingtonindependent.com/97608/hatch-bennett-say-theyll-vote-no-on-dream-act/.

27. Andrea Nill Sanchez, *Former Sponsor of the DREAM Act John McCain Accuses Reid Of 'Playing Politics' With Immigration*, THINKPROGRESS SECURITY (Sept. 16, 2010, 3:25 PM),

Although some immigrant rights advocates had hoped for broad reform in 2010,[28] after the November 2010 elections, the prospects for comprehensive immigration reform grew dimmer. Democrats lost their majority in the House of Representatives in the next Congress. In the lame duck Congressional session after the elections, the House passed the DREAM Act with a 216-198 vote on December 8th.[29] With Republicans (most of whom opposed the bill), taking over the House, and increasing their number of seats in the Senate from 42 to 47, the chances of the bill being passed were slim for at least the next two years.[30] The DREAM Act became a top priority for Senate Majority Leader Harry Reid, who won a tough re-election fight with the help of Nevada's large Latino community which strongly supported the DREAM Act.[31] The bill garnered a majority of Senate votes, 55-41, but failed to advance because 60 votes were required to overcome a filibuster.[32]

After Barack Obama was re-elected in 2012, an effort at broad immigration reform was resurrected by a bipartisan group in the Senate. In 2013, the Senate passed the "Border Security, Economic Opportunity, and Immigration Modernization Act," or S. 744, that provided a pathway to citizenship for 11 million immigrants without lawful status in the United States.[33] The DREAM Act was incorporated into S. 744 and provided a faster road to lawful permanent resident status for Dreamers. However, the House of Representatives, under Republican control, never voted on the legislation.[34]

With little serious support for the DREAM Act during the Trump administration,[35] Democrats tried a different strategy after the 2020 election of Joe Biden and Democrats achieved a 50-50 split in the Senate. In the waning days of the 2021 legislative session, the Democrats believed that an immigration reform proposal could be inserted in the budget reconciliation process without the need to deal with a Senate filibuster.[36] Under the immigration provision, undocumented immigrants who arrived in the United States prior to 2011 would be given temporary protection for five years and allow an estimated 7 million individuals to get renewable employment

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https://web.archive.org/web/20111201170835/http://thinkprogress.org/security/2010/09/16/176276/mccain-dream-act/.

28. Lee, *supra* note 24.

29. Cesar Vargas, *Howard Berman: A Standard of Leadership on the DREAM Act*, HUFFPOST (Jan. 23, 2014), https://www.huffpost.com/entry/dream-act_b_2061565.

30. Naftali Bendavid, *Dream Act Fails in Senate*, WALL ST. J. (Dec. 19, 2010, 9:36 AM), https://www.wsj.com/articles/SB10001424052748704368004576027570843930428

31. *See* Pema Levy, *Living the DREAM: Dems Push To Get The Act in Party Platform*, TALKING POINTS MEMO (Aug. 9, 2012, 11:31 AM), https://talkingpointsmemo.com/election2012/living-the-dream-dems-push-to-get-the-act-in-party-platform (discussing how Senator Harry Reid made the DREAM Act the focal point of his re-election campaign, and "won with crucial help from the Latino community.").

32. Bendavid, *supra* note 30.

33. IMMIGR. POLICY CTR., AM. IMMIGR. COUNCIL, A GUIDE TO S. 744: UNDERSTANDING THE 2013 SENATE IMMIGRATION BILL 3 (2013), https://www.americanimmigrationcouncil.org/research/guide-s744-understanding-2013-senate-immigration-bill.

34. Christopher Parker, *The (Real) Reason Why the House Won't Pass Comprehensive Immigration Reform,* BROOKINGS (Aug. 4, 2014), https://www.brookings.edu/blog/fixgov/2014/08/04/the-real-reason-why-the-house-wont-pass-comprehensive-immigration-reform/.

35. Anita Kumar, *Trump is still looking for a DACA deal*, POLITICO (July 10, 2020, 8:40 PM), https://www.politico.com/news/2020/07/10/trump-daca-deal-356789 (The House passed the DREAM Act in 2020, but the Republican-controlled Senate ignored the legislation, and President Trump backed away from support after facing opposition from immigration hawks).

36. Claudia Grisales, *Senate parliamentarian rejects immigration reform in Democrats' spending bill*, NPR (Dec. 16, 2021, 7:52 PM), https://www.npr.org/2021/12/16/1061030363/senate-parliamentarian-rejects-immigration-reform-in-democrats-spending-bill.

authorization.[37] The process required convincing the Senate parliamentarian that the legislation has a significant impact on the budget and is not extraneous to the deficit reduction goals of the reconciliation process.[38] But the parliamentarian rejected the attempt, ruling that the proposal violated Senate rules and involved "substantial policy changes with lasting effects [that] outweigh the budgetary impact."[39]

Hopes for the DREAM Act were raised again in late 2022. Supporters of the DREAM Act, including hundreds of DACA recipients, descended on Capitol Hill right after the 2022 midterm elections, hoping to make a deal during the lame-duck session of Congress before Republicans would take control of the House of Representatives on January 4, 2023. With the DACA program in jeopardy, advocates acknowledged they would likely have to make concessions on border security or asylum processing to bring enough Republicans on board before the end of the session.[40] The absence of a "red wave" of GOP victories in Congress gave some advocates some hope that Republicans would come to the table. But in spite of securing only a slim majority in the House beginning in 2023, GOP leaders pledged to prioritize border security and reject new pathways to citizenship for immigrants.[41]

Enter Senators Thom Tillis (R-NC) and Kyrsten Sinema (I-AZ).

On December 5, 2022, the Washington Post broke a story that Senators Tillis and Sinema would be introducing a bill imminently that included a pathway to citizenship for Dreamers.[42] The timeline as to when Senators Tillis and Sinema began discussing and drafting the bill was unclear. Many news outlets reported that the bill discussions were in "very early stages,"[43] while others reported that Sinema and Tillis had been in talks about the immigration framework for months.[44]

Reports of the bipartisan proposal garnered support but also questions from many Dreamers. One proclaimed: "My future is in the hands of Sen. Kyrsten Sinema and Thom Tillis. With their help, we can find a national solution that takes my life

37. Rebecca Morin & Mabinty Quarshie, *Senate parliamentarian rejects latest immigration proposal in reconciliation bill*, USA TODAY (Dec. 16, 2021, 9:52 PM), https://www.usatoday.com/story/news/politics/2021/12/16/senate-parliamentarian-rejects-immigration-reform-reconciliation-bill/8800085002/.

38. Daniel Costa, *Immigration reform would be a boon to U.S. economy and must be part of the $3.5 trillion budget resolution*, ECON. POLICY INST. (Sept. 15, 2021, 10:19 AM), https://www.epi.org/blog/immigration-reform-would-be-a-boon-to-u-s-economy-and-must-be-part-of-the-3-5-trillion-budget-resolution-senate-parliamentarian-would-be-wrong-to-rule-otherwise/.

39. Marianne Levine, *Senate parliamentarian rejects latest Dem proposal on immigration*, POLITICO (Dec. 16, 2021, 8:46 PM), https://www.politico.com/news/2021/12/16/senate-parliamentarian-rejects-latest-dem-proposal-on-immigration-525195.

40. Ellen M. Gilmer, *Immigration Fights Flare Up as Midterms Yield Uneven Results*, BLOOMBERG L. (Nov. 10, 2022, 1:32 PM), https://news.bloomberglaw.com/immigration/immigration-fights-flare-up-as-midterms-yield-uneven-results.

41. *Id.*

42. Greg Sargent, *Finally, a bipartisan deal to help the 'dreamers' is within reach*, THE WASH. POST (Dec. 5, 2022, 2:00 PM), https://www.washingtonpost.com/opinions/2022/12/05/finally-bipartisan-deal-help-dreamers-is-within-reach/.

43. *See* Alayna Treene, *Bipartisan duo targets immigration reform during lame-duck*, AXIOS (Dec. 5, 2022), https://www.axios.com/2022/12/06/bipartisan-immigration-reform-sinema-tillis.

44. Andrea Castillo, *Immigration reformers' hopes dashed as Senate fails to act*, L.A. TIMES (Dec. 22, 2022, 12:18 PM), https://www.latimes.com/politics/story/2022-12-22/immigration-reform-hopes-all-but-dashed-as-congress-nears-end-of-session; *see also* Caroline Coudriet & Suzanne Monyak, *Immigration deal for 'Dreamers' appears to run out of time,* ROLL CALL (Dec. 15, 2022, 5:52 PM), https://rollcall.com/2022/12/15/immigration-deal-for-dreamers-appears-to-run-out-of-time/.

plans out of limbo and allows me to pursue my ambitions without fear and anxiety."[45] Understandably, some wanted more details,[46] while others were concerned about what tradeoffs would be included in the final package. However, the bottom line from United We Dream, one of the leading Dreamer organizations in the country, was that Congress had to deliver on the promise of the DREAM Act that has been pending for twenty years.[47]

With the release of little concrete language, the following overarching proposals within the framework were reported:

1) a pathway to citizenship for Dreamers;[48]
2) $25 billion for border security including a pay raise for border patrol agents;[49]
3) increased funding specifically focused on the asylum process, including the hiring of more asylum officers and immigration judges, and the development of new processing centers which would act as temporary detention centers. These provisions were meant to speed up the asylum process;[50]
4) provisions that would allow for the quick removal of migrants who were not eligible for asylum;[51]
5) harsh penalties for those who miss an asylum hearing;[52]
6) extension of Title 42 for at least a year based on the belief that there would be a temporary increase in asylum applications once the application of Title 42 was rescinded;[53]

45. Gloria Rebecca Gomez, *Advocates urge Sinema, Tillis to move Dream act forward*, AZMIRROR (Dec. 8, 2022, 4:23 PM), https://www.azmirror.com/2022/12/08/advocates-urge-sinema-tillis-to-move-dream-act-forward/.

46. Ariana Figueroa, *Talks over protecting Dreamers pick up in Congress, but agreement still elusive*, N.J. MONITOR (Dec. 6, 2022, 5:47 PM), https://newjerseymonitor.com/2022/12/06/talks-over-protecting-dreamers-pick-up-in-congress-but-agreement-still-elusive/.

47. Jassiel, *With the Clock Ticking to Pass Citizenship This Year, Targeted Ads Push Senators to Deliver Citizenship for Immigrant Youth*, UNITED WE DREAM (Dec. 13, 2022), https://unitedwedream.org/press/with-the-clock-ticking-to-pass-citizenship-this-year-targeted-ads-push-senators-to-deliver-citizenship-for-immigrant-youth/.

48. Ellen M. Gilmer, *Sinema Says Immigration Talks 'Coming Back Strong' Next Year (1)*, BLOOMBERG L. (Dec. 21, 2022, 12:54 PM), https://news.bloomberglaw.com/social-justice/sinema-says-immigration-talks-coming-back-strong-next-year.

49. Nicole Narea, *A Senate breakthrough on immigration might still be a long shot*, VOX (Dec. 6, 2022, 7:00 PM), https://www.vox.com/policy-and-politics/2022/12/6/23497262/immigration-reform-sinema-tillis-bill-border.

50. Sargent, *supra* note 42.

51. *Id.*

52. Caroline Coudriet, *Senators pitch deal to protect 'Dreamers,' boost border security*, ROLL CALL (Dec. 5, 2022, 2:52 PM), https://rollcall.com/2022/12/05/senators-pitch-deal-to-protect-dreamers-boost-border-security/; *see also* Camilo Montoya-Galvez, *Last-minute push to pass bipartisan immigration deal fails, dooming yet another reform effort*, CBS NEWS (Dec. 15, 2022, 10:01 AM), https://www.cbsnews.com/news/immigration-sinema-tillis-bipartisan-deal-congress-reform/.

53. *See* Narea, *supra* note 49.

7) expansion of immigration detention;[54] and

8) employment visa provisions that would help alleviate the backlog.[55]

Given the lack of progress on immigration reform for many years and the political divisiveness over the southern border, immigration policy, and enforcement, the bipartisanship demonstrated by the Tillis-Sinema proposal raised hope that their legislation might actually succeed. The legislation was viewed as a potential "win for both parties."[56] This "single bipartisan stroke" could rehabilitate "the government's reputation."[57] By "seizing the moment," passage would end a "political stalemate" and "build public confidence."[58]

Within days of the Tillis-Sinema announcement, however, discussions regarding the bill apparently had not progressed into actual legislation for other senators to review before a vote on the bill would take place.[59] And by December 15, 2022, Roll Call reported that the discussions around the framework had concluded for the year.[60] Apparently, unable to lock down the 60-vote supermajority needed to end an inevitable filibuster in the Senate, Tillis and Sinema concluded that they would not be able to include the bill in year-end appropriations legislation.[61]

Sinema vowed to come back strong in the new legislative session and push for bipartisan immigration reform that would include the DREAM Act.[62] Interestingly, in the middle of the lame-duck session, she announced that she would be leaving the Democratic party and would register as an independent.[63]

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54. Caroline Coudriet & Suzanne Monyak, *Immigration deal for 'Dreamers' appears to run out of time*, ROLL CALL (Dec. 15, 2022, 5:52 PM), https://rollcall.com/2022/12/15/immigration-deal-for-dreamers-appears-to-run-out-of-time/.

55. Kevin Stone, *Sen. Kyrsten Sinema explains details of bipartisan immigration bill*, KTAR NEWS (Dec. 15, 2022, 11:03 AM), https://ktar.com/story/5384132/sen-kyrsten-sinema-explains-details-of-bipartisan-immigration-bill/.

56. The Editors, *Congress Can't Waste This Immigration Opportunity*, BLOOMBERG (Dec. 15, 2022, 5:00 AM), https://www.bloomberg.com/opinion/articles/2022-12-15/sinema-tillis-immigration-proposal-is-a-deal-congress-should-take?leadSource=uverify%20wall.

57. George F. Will, *How the Tillis-Sinema immigration bill would right two glaring wrongs*, THE WASH. POST (Dec. 11, 2022, 7:00 AM), https://www.washingtonpost.com/opinions/2022/12/11/pass-tillis-sinema-immigration-bill-dreamers/.

58. The Editorial Board, *A Rare Opening for Immigration Compromise*, WASH. ST. J. (Dec. 6, 2022, 6:38 PM), https://www.wsj.com/articles/a-chance-for-immigration-compromise-congress-daca-dreamers-kyrsten-sinema-thom-tillis-11670368746.

59. Richard Cowan & Ted Hesson, *Effort In U.S. Congress to protect 'Dreamer' immigrants stalling*, REUTERS (Dec. 15, 2022, 2:43 PM), https://www.reuters.com/world/us/window-closing-deal-us-congress-protect-dreamer-immigrants-2022-12-15/; *see also* Greg Sargent, *The untimely, infuriating death of the deal to save 2 million 'dreamers'*, THE WASH. POST (Dec. 15, 2022, 11:42 AM), https://www.washingtonpost.com/opinions/2022/12/15/dreamers-tillis-sinema-framework-dead-trump-immigration-gop/.

60. Coudriet & Monyak, *supra* note 54.

61. Star Tribune Minneapolis, *Congress misses another chance to reform immigration,* THE TELEGRAPH (Dec. 20, 2022), https://www.thetelegraph.com/opinion/article/Congress-misses-another-chance-to-reform-17667346.php.

62. Gilmer, *supra* note 48.

63. Rachel Treisman & Deirdre Walsh, *Here's what Sinema's switch from Democrat to independent could mean for the Senate*, NPR (Dec. 9, 2022, 12:18 PM), https://www.npr.org/2022/12/09/1141827943/sinema-leaves-democratic-party-independent.

The Tillis-Sinema proposal did not save the day for Dreamers. DACA recipients, other Dreamers, and their allies were disappointed that nothing got done.[64] Among those who had been encouraged by the Tillis-Sinema compromise were large business groups like the American Hotel and Lodging Association, the National Restaurant Association, the Chamber of Commerce,[65] and FWD.us, the immigration reform group founded by Mark Zuckerberg.[66] And when the legislative session ended without a deal, organizations like the American Business Immigration Coalition voiced frustration, reminding Congress that "Over 90% of DACA recipients are employed, in school or serve in the military, and bringing 2 million Dreamers out of the shadows would create more than 1.4 million jobs for Americans and $46 billion in economic spending."[67]

The DACA program is in trouble. Ten years after President Barack Obama established the program, a coalition of nine states, led by Texas, challenged its legality, and prevailed. In July 2021, federal judge Andrew Hanen ruled that the creation and implementation of DACA violated the Administrative Procedure Act (APA) and that DACA was inconsistent with federal law. The Biden Administration appealed the decision to the federal Fifth Circuit Court of Appeals, but in October, the appellate court agreed with Judge Hanen. However, because the Biden Administration has promulgated a new DACA rule, the appeals court sent the matter back to Judge Hanen to consider the new version of DACA.[68] The substance of the new DACA rule differs little from the Obama version, promising not to deport recipients for two years and granting employment permission. In the meantime, current DACA holders (about 600,000) can continue to work and obtain extensions, but no new applications are being accepted.

The legality of DACA is likely to go to the Supreme Court sometime in the next two years. Judge Hanen is widely expected to rule that Biden's attempt to rehabilitate DACA is also improper and the Fifth Circuit Court of Appeals will probably agree with Judge Hanen again. After that, the Supreme Court is expected to agree that at least with respect to employment authorization, the President is on a weak footing, in contrast to forbearance from removal authority.[69] That expectation is based on two prior decisions of the Supreme Court.

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64. Gabe Ortiz, *Republicans Dust Off 'Border First' Excuses to Derail Immigration Framework*, DAILY KOS (Dec. 19, 2022, 12:55 PM), https://www.california-mexicocenter.org/republicans-dust-off-border-first-excuses-to-derail-immigration-framework/.

65. Shannon Pettypiece & Scot Wong, *Business groups optimistic Congress may finally strike immigration deal*, NBC NEWS (Dec. 10, 2022, 5:00 AM), https://www.nbcnews.com/politics/economics/business-groups-optimistic-congress-may-finally-strike-immigration-dea-rcna60760.

66. *FWD.us Statement on Potential Framework for Dreamer Legislation*, FWD.US (Dec. 5, 2022), https://www.fwd.us/news/fwd-us-statement-on-potential-framework-for-immigration-legislation/; Taylor Delandro & Tom Dempsey, *Bipartisan duo drafts last-minute plan for immigration deal*, NEWSNATION (Dec. 6, 2022, 8:07 AM), https://www.newsnationnow.com/us-news/immigration/bipartisan-duo-drafts-last-minute-plan-for-immigration-deal/.

67. *ABIC Action Disappointed in Congress for Failing Farmers, Farm Workers, Dreamers, and U.S. Consumers,* Am. Bus. Immigr. Coal. Action (Dec. 22, 2022), https://abicaction.org/abic-action-disappointed-in-congress-for-failing-farmers-farm-workers-dreamers-and-u-s-consumers/.

68. Uriel J. Garcia, *DACA remains intact as appeals court sends case challenging its legality back to lower court in Texas*, TEXAS TRIBUNE (Oct. 5, 2022, 7:00 PM), https://www.texastribune.org/2022/10/05/texas-daca-appeals-court-ruling/.

69. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1912 (2020) (noting the difference between "forbearance" and employment authorization); *see also* Peter Margulies, *The Fifth*

In 2016, the Supreme Court deadlocked 4-4 over an expanded DACA (DACA+) and a version of the program for parents of U.S. citizens or lawful permanent residents—Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).[70] Texas successfully sued the Obama administration to prevent the implementation of DACA+ and DAPA. Judge Hanen was the judge in that case as well, siding with Texas. In that case, the Fifth Circuit affirmed Judge Hanen's ruling that Obama acted illegitimately in announcing DACA+ and DAPA. When the case got to the Supreme Court, the Court only had eight members; the Republican-controlled Senate prevented President Obama from replacing deceased Justice Antonin Scalia, leading to the 4-4 decision which served to let stand the Fifth Circuit's ruling against DACA+ and DAPA.[71] Since that time, the Supreme Court's composition has changed, and a decision on DACA will likely result in a 6-3 decision against DACA.

In 2020, the high court ruled 5-4 that the Trump administration failed to follow proper procedures in its attempt to terminate DACA, so DACA remained in place.[72] Trump could have terminated DACA by following the procedures outlined in the 2020 decision, but he did not do so before he was voted out of office. Significantly, the majority opinion by Chief Justice Roberts in the 2020 decision emphasized that the APA needed to be followed in order to rescind DACA because "DACA is not simply a non-enforcement policy."[73] Obama's Department of Homeland Security (DHS) "created a program for conferring affirmative immigration relief," and the elements of the policy that went beyond non-enforcement included work authorization and government benefits.[74] Ironically, those benefits that go beyond non-enforcement are the basis for Judge Hanen's most recent ruling that Obama had no right to confer such substantive benefits in the first place. Thus, the authority for the employment part of DACA is questionable, even though the promise not to deport may be fine.

This means that when DACA is finally terminated by the Supreme Court, the President likely still has the power to refrain from deporting DACA recipients, but their employment authorization will no longer be renewable. Under Judge Hanen's reasoning, only Congress can grant employment authorization. Therefore, if DACA recipients or Dreamers in general are to be employed properly, Congress has to pass legislation such as the DREAM Act.

Despite their disappointment, Dreamers and their supporters are not giving up. Once again they are calling on "President Biden and members of Congress to come together and meet this moment with the urgency it requires."[75] They argue that the situation is "dire for an estimated 2 million Dreamers brought to this country as children. They have lived, gone to school, and worked under the threat of being forced

Circuit Holds That DACA Exceeds Executive Authority, LAWFARE (Oct. 7, 2022, 8:01 AM), https://www.lawfareblog.com/fifth-circuit-holds-daca-exceeds-executive-authority.

70. Dara Lind, *A Supreme Court tie all but kills Obama's plans to protect millions of immigrants*, VOX (June 23, 2016, 10:41 AM), https://www.vox.com/2016/6/23/11916632/united-states-texas-daca-dapa.

71. *Id.*

72. *See generally* Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

73. *Id.* at 1906.

74. *Id.*

75. Greisa Martinez Rosas, *Greisa Martinez Rosas: Congress has once again failed immigrant youth*, THE SALT LAKE TRIBUNE (Dec. 25, 2022, 10:00 AM), https://www.sltrib.com/opinion/commentary/2022/12/25/greisa-martnez-rosas-congress/.

to leave the only homeland most of them remember. It is beyond cruel to consign them to a lesser-than status for so long."[76]

As efforts to support the DREAM Act continue, Dreamers and their allies are recalibrating their strategies as they move forward. The business community is comprised of many important current and potential allies. The question is, what will the business community do to help?

I. CORPORATE SUPPORT

Support for the DREAM Act and the DACA program from businesses nationwide is widespread. For example, when Trump tried to terminate DACA, Microsoft urged Congress to make the Dream Act its top priority — even above tax reform. Microsoft President Brad Smith stated: "We say this even though Microsoft, like many other companies, cares greatly about modernizing the tax system and making it fairer and more competitive. But we need to put the humanitarian needs of these 800,000 [DACA recipients] on the legislative calendar before a tax bill."[77] Smith said all companies must also be prepared should Congress not step in. He wrote that Microsoft planned to defend the 39 employees that the companies knew to be beneficiaries of the program at the time. In the vein of resistance, he wrote: "If Congress fails to act, our company will exercise its legal rights properly to help protect our employees. If the government seeks to deport any one of them, we will provide and pay for their legal counsel."[78] Similarly, Apple's Tim Cook tweeted: "#Dreamers contribute to our companies and our communities just as much as you and I. Apple will fight for them to be treated as equals."[79]

In joining an amicus brief challenging Trump's attempt to revoke DACA, IBM issued this statement: "IBM employs more than 30 Dreamers working in a variety of roles, from software engineering to analytics and technical support. They contribute to our company and help to drive innovation and excellence at IBM. In fact, one of our Dreamers recently worked around-the-clock remote shifts to ensure the continuity of IBM services when Hurricane Harvey devastated Houston. IBM is actively urging Congress to find a permanent legislative solution to enable Dreamers to stay in the United States."[80]

Joining the same amicus brief, Verizon stated: "As our nation's leaders in Washington debate immigration reforms this week, Verizon extended its support today to an effort that seeks a permanent bi-partisan legislative solution to protect Dreamers, undocumented immigrants who were brought to the United States by their parents as children. The Dreamers are hundreds of thousands of young people who are currently working, studying, and pursuing the American Dream in cities and towns

76. Star Tribune Minneapolis, *supra* note 61.

77. Brad Smith, *Urgent DACA legislation is both an economic imperative and humanitarian necessity,* MICROSOFT ON THE ISSUES (Sept. 5, 2017), https://blogs.microsoft.com/on-the-issues/2017/09/05/urgent-daca-legislation-economic-imperative-humanitarian-necessity/.

78. *Id.*

79. @tim_cook, TWITTER (Sept. 5, 2017, 11:33 AM), https://twitter.com/tim_cook/status/905136795645501440.

80. Christopher Padilla, *IBM Statement on Joining Amicus Curiae Brief in Support of Case Challenging Revocation of DACA Program*, IBM (Nov. 1, 2017), https://www.ibm.com/policy/daca-amicus-brief/.

nationwide. These young people now potentially face deportation unless Congress acts."[81]

Soon after Joe Biden came into the White House, a group of corporate CEOs like Chuck Robbins of Cisco and Jeff Bezos of Amazon urged Congress to turn its attention to the DREAM Act.[82] Robbins argued that Congress should give "Dreamers" the "legal status and certainty they deserve."[83] In his opinion, this part of immigration reform "is the simplest one that we should get done."[84]

The list of big-name companies continues. On the ten-year anniversary of DACA in 2022, many illustrious members of the Business Roundtable, like General Motors, Bechtel, United Airlines, American Express, Walmart, and JP Morgan Chase, called for the passage of the DREAM Act.[85] In announcing its support for the DREAM Act and other needed immigration reforms, in 2021, Google provided a $250,000 grant to United We Dream to cover the DACA application fees of over 500 Dreamers.[86] The website for the Coalition for the American Dream, a group of leading US companies committed to defending DACA and Dreamer, includes their advocacy letters, ads, as well as a toolkit for employers of DACA recipients.[87] The coalition includes businesses like Cisco, Adobe, Hilton, Best Buy, Marriott, Hewlett Packard, Ikea, Intel, Levi Strauss, Uber, Lyft, Intuit, Dropbox, Hewlett Packard, and Coca-Cola.[88] In the public resources section of that website, Netflix expressed strong support for the DREAM Act and contributed a piece on "10 Ways to Support your Immigrant Coworkers in the U.S."[89]

Of course, small businesses have also expressed support for the DREAM Act. The Alliance for New Immigration Consensus, a bipartisan coalition sponsored by the National Immigration Forum, includes a diverse group of entities such as the U.S. Chamber of Commerce, the National Retail Federation, the Idaho Dairymen's Association, the American Hotel & Lodging Association, church groups, and business executives.[90] The coalition has urged Congress to provide permanent legal protections and other needed reforms for Dreamers, agricultural workers, and Temporary Protected Status (TPS) holders.[91] Based on a number of conversations I have personally had with its leaders, a vast array of nonprofit organizations that employ DACA recipients are also among the strong supporters of the DREAM Act.

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81. *Verizon joins other companies to support Dreamers*, VERIZON: NEWS CENTER (Jan. 10, 2018), https://www.verizon.com/about/news/verizon-and-other-corporate-giants-support-dreamers.

82. Pamela Granda, *Cisco CEO joins Apple, Amazon in backing 'Dreamers' immigration reform: 'This is the only place they've ever known'*, YAHOO! FINANCE (Apr. 2, 2021), https://finance.yahoo.com/news/cisco-ceo-backs-dreamers-immigration-reform-134112216.html.

83. *Id.*

84. *Id.*

85. *Business Roundtable Observes DACA's 10th Anniversary, Urges Congress to Pass Bipartisan Permanent Solution*, BUS. ROUNDTABLE (June 15, 2022), https://www.businessroundtable.org/business-roundtable-observes-dacas-10th-anniversary-urges-congress-to-pass-bipartisan-permanent-solution.

86. Kent Walker, *Our continuing support for Dreamers*, GOOGLE: THE KEYWORD (Jan. 13, 2021), https://blog.google/outreach-initiatives/public-policy/our-continuing-support-dreamers/.

87. COAL. FOR THE AM. DREAM, *supra* note 13.

88. *Id.*

89. *Id*; Pawan Zenda, *10 Ways to Support your Immigrant Coworkers in the U.S.*, LINKEDIN (Oct. 15, 2020), https://www.linkedin.com/pulse/10-ways-support-your-immigrant-coworkers-us-pawan-zenda/.

90. NAT'L IMMIGR. FORUM, *supra* note 14.

91. *Id.*

Significantly, for example, even though the state of Texas is leading the challenge to the legality of the DACA program, businesses represented by the likes of the Texas Restaurant Association, the San Antonio Chamber of Commerce, the Texas Retailers Association, and the Texas Nursery & Landscaping Association voiced concern over the 2022 Fifth Circuit Court of Appeals decision against DACA:

> [The ruling would] leave a devastating impact on Texas' workforce, economy, and communities without a permanent legislative solution from Congress that allows Dreamers to continue living, working, and studying in the Lone Star State and nation as a whole. Since DACA was enacted a decade ago, more than 100,000 Texas immigrants have launched businesses, established careers, and built families that help our communities and state succeed. While this decision allows the current policy and renewals for existing DACA recipients to remain, it is another step closer to the termination of the DACA policy altogether. Further, it draws out uncertainty for hundreds of thousands of DACA recipients while failing to support the future generation of Dreamers.
>
> We have witnessed the vital role Dreamers play in our state's key industries as workers, leaders, and entrepreneurs who have helped shape Texas' society, culture, and the economy into the global leader we are today. During an already challenging time for Texas' workforce and economy, Texas businesses can't afford any further setbacks to building a robust workforce. We urge Congress to establish a permanent legislative solution for Dreamers to allow these immigrants to live free of fear and continue contributing to our state's prosperity.[92]

The small business support for the DREAM Act and DACA recipients includes nonprofit organizations as well. Organizations like the American Civil Liberties Union (ACLU), Mexican American Legal Defense and Education Fund (MALDEF), Immigrant Legal Resource Center, Asian Americans Advancing Justice, and CodePink have all urged passage of the DREAM Act and the fortification of DACA.[93] Many inquiries that I have received about how to deal with employer sanctions if DACA is terminated have come from nonprofit organizations that employ DACA recipients. That is not surprising since large numbers of DACA recipients are employed in the arts, education, health, and social services.[94]

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92. *Texas Business Leaders Urge Congress to Provide Permanent Protections for Dreamers*, FWD.US (Oct. 6, 2022), https://www.fwd.us/news/texas-business-leaders-urge-congress-to-provide-permanent-protections-for-dreamers/.

93. *See, e.g.*, Martha Ramirez, *These Are the Top Organizations that Support DACA*, BLUE TENT, https://bluetent.us/articles/policy-advocacy/top-organizations-that-support-DACA/; *MALDEF Statement in Support of the Dream And Promise Act*, MALDEF (Mar. 13, 2019), https://www.maldef.org/2019/03/maldef-statement-in-support-of-the-dream-and-promise-act/; *Dreamers Need Your Help*, CODEPINK, https://www.codepink.org/dreamers (Apr. 23, 2023).

94. JIE ZONG ET AL., A PROFILE OF CURRENT DACA RECIPIENTS BY EDUCATION, INDUSTRY, AND OCCUPATION 6 (Migration Policy Inst., 2017), https://www.migrationpolicy.org/sites/default/files/publications/DACA-Recipients-Work-Education-Nov2017-FS-FINAL.pdf (finding that, in 2017, 23% of DACA recipients were employed in the arts, entertainment, recreation, accommodations, and food services, and 11% of DACA recipients were employed in education, health, and social services).

II. THE CORPORATE STRATEGY

After the October 5, 2022 decision of the Fifth Circuit upholding the lower court's reasoning that DACA's work permits were not lawfully granted by President Obama,[95] my students helped create a list of more than 175 companies that support the DREAM Act.[96] The information was gathered from amicus briefs that were filed in cases involving DACA, websites of groups that support the DREAM Act, and news sources.[97] We then set about trying to find contact information for sympathetic individuals from the companies through various sources that students had at different companies. One student suggested many companies have various teams, such as social justice teams, diversity, equity, and inclusion teams, giveback teams, policy teams, employee resource teams, culture teams, and ESG (environment, social, and governance) teams that can be located on their websites.[98] These teams often can be found directly on social media (such as Twitter, Instagram, Facebook) and companies have accounts on these platforms, and there is usually always a message feature.[99] A more targeted approach was also used, looking for employees who have authored blogs and who are likely the leaders of those teams.[100]

From a handful of contacts made through that process and my own personal contacts with individuals at companies on the list, I reached out and had many conversations.

A. Business Immigration Lawyers

One step that I took in the corporate strategy was to reach out to several friends who are immigration lawyers specializing in business and employment visas. These particular attorneys represent large and small companies in the San Francisco Bay Area, including Silicon Valley tech firms. I am sure that some of their clients are on the list of 175+ companies my students created, but some likely are not. I approached them asking: (1) whether their business clients had gone on record in support of the DREAM Act, and if not, whether they might be inclined to do so, (2) whether their business clients might be willing to pay expenses for determining whether their DACA employees may have some immigration remedy under existing law, and finally, (3) whether their clients have given much thought to what they would do with their DACA employees if DACA is terminated. In follow-up conversations with these attorneys, I turned the discussion of the third topic into a discussion of the possibility of civil disobedience in the face of possible employer sanctions. I also asked to be connected with one or two of their business clients about the DREAM Act.

Thus far, my discussions with employment immigration attorneys have been universally positive on the first two issues. They believe that their clients will continue speaking out to support the DREAM Act or will likely speak out in favor or endorse

95. Texas v. United States, 50 F. 4th 498 (5th Cir. 2022).

96. Email from Neha Nayak, J.D. Candidate, Univ. of S.F., Sch. of L., to Bill Ong Hing, Professor of L. & Migration Stud., Univ. of S.F., Sch. of L., (Oct. 31, 2022, 10:46 PM) (on file with author).

97. Email from Neha Nayak, J.D. Candidate, Univ. of S.F., Sch. of L., to Bill Ong Hing, Professor of L. & Migration Stud., Univ. of S.F., Sch. of L., (Jan. 18, 2023, 10:09 AM) (on file with author).

98. Email from TG, Country Digitization Program Manager, [Major Multinational Digital Communications Corporation], San Jose, CA, to Bill Ong Hing, Professor of L. & Migration Stud., Univ. of S.F., Sch. of L., (Nov. 4, 2022, 4:27 PM) (on file with author).

99. *Id.*

100. *Id.*

sign on letters for the first time. They also believe that their business clients would be willing to pay to have DACA employees screened for potential immigration relief. In fact, one attorney has been providing consultations for DACA employees for a particular, large business client on a regular basis for some time now, and another has screened DACA employees occasionally for different clients when requested. Whether their clients will pay the legal fees for necessary visa work is a different issue, but at least those two attorneys believe that their business clients will pay for the services if asked.

I point out to business attorneys and company representatives that Amazon has been public about assisting its employees with figuring out potential immigration relief. Amazon has pledged to pay legal fees for their employees' employment authorization renewals and other possible immigration applications. Through its Welcome Door Program,[101] Amazon noncitizen employees have access to several resources, including:

- Reimbursement for Employment Authorization Document (EAD) renewal fees.
- A new Citizenship Assistance Portal that will fully support U.S. citizenship applications for all eligible employees.
- Ongoing communications that will highlight policy changes that may impact an employee's immigration status.
- Free legal resources to help navigate immigration-related questions and the ability to connect with immigration experts.
- Access to skills training benefits including free college tuition and ESL proficiency through Amazon's Career Choice program.
- Customized mentorship.[102]

Amazon's actions are consistent with what can be found on the Coalition for the American Dream website. In its public resources website section, businesses are urged to provide financial assistance for DACA renewals for employees and immigration legal assistance for immigration-impacted employees, contractors, and family members of employees, including spouses, parents, and siblings; the idea is that screening with an attorney could help determine if an employee already qualifies for a legalization pathway even if they don't know about it yet.[103]

Whether the clients of business immigration attorneys have given much thought to what they will do with their DACA employees if DACA is terminated is more complicated. According to the attorneys I interviewed, their guess is that their business clients either have not given the possibility much thought, or they assume that their clients will have to terminate their DACA employees. One attorney (SL) was

101.*Amazon Welcome Door Program*, AMAZON, https://www.aboutamazon.com/workplace/amazon-welcome-door (last visited Apr. 23, 2023).

102.Amazon Staff, *Amazon Launches Employment Support Program for Refugees*, AMAZON (Mar. 24, 2022), https://www.aboutamazon.com/news/workplace/amazon-launches-employment-support-program-for-refugees.

103.COAL. FOR THE AM. DREAM, *supra* note 13.

adamant that she would not want to have a conversation with her business clients about potential civil disobedience, because SL would strongly advise against violating the employer sanctions laws.[104]Another attorney (LT) says that she is not sure what her business clients would do at that point, but would be willing to present information on the I-9 audit process with clients who are interested.[105] A third attorney asked me to draft something for her firm's website about the threat to DACA, and said that she would refer her business clients to me if they are interested.[106] A fourth attorney (MD) says that at least one of their clients would seriously consider violating employer sanctions laws without announcing that publicly.[107] Another attorney (JS) intends to urge her clients to strongly consider at least quiet civil disobedience and would be willing to work with clients on ways to defend their actions if it should ever come to that.[108] In other words, JS is willing to work with me (and other interested attorneys) in developing a defense to employer sanctions charges through a social justice lens. JS also asked me to draft a letter that she would send out on my behalf.[109]

MD also informed me that she and others at her firm are preparing "an employer/employee specific DACA termination preparation 'handout' with suggested steps, strategies, and discussions that we think will be helpful to employers and DACA holders as we continue to monitor the status of DACA. We're also gathering publicly available information regarding company advocacy for DACA holders to include within these handouts as well."[110]

B. Company Representatives

I reached out directly to a handful of individuals I know personally who work for companies – some with a record of support for the DREAM Act, and some with no public record of support. For example, I have had conversations with the Vice President for Public Policy (VP) at a major media company that also works with the Dream Employee Resource Group. I have met with the general counsel at a major technology corporation known for its software products. A longtime friend is now chief of staff to the vice chairman of a major company dealing with payment innovation and technology. One official I spoke with is very familiar and sympathetic with DACA recipients and Dreamers more broadly. She had gone through the immigration process herself, from a European country, and thought the entire process was unnecessarily complex.

My conversations with corporate officials and in-house counsel have been fruitful. On the matters of more public support for the DREAM Act and paying legal fees for DACA employees to determine eligibility for existing immigration remedies

104.Telephone Interview with LS, Partner, [Large International Law Firm], (Jan. 10, 2023).

105.Telephone Interview with LT, Partner, [Small San Francisco Immigration Law Firm], (Jan. 5, 2023).

106.*See Weaver Schlenger Thoughts on DACA and How Employers can Help*, WEAVER SCHLENGER LLP (Jan. 25, 2023), https://www.wsmimmigration.com/immigration-law-insights/2023/weaver-schlenger-thoughts-on-daca-and-how-employers-can-help/.

107.Telephone Interview with MD, Associate Attorney, [Large Employment Immigration Law Firm], (Jan. 13, 2023).

108.Telephone Interview with JS, Partner, [Medium-size San Francisco Immigration Law Firm], (Jan. 21, 2023).

109.*Id.*

110.Email from MD, Associate Attorney, [Large Employment Immigration Law Firm], to Bill Ong Hing, Professor of L. & Migration Stud., Univ. of S.F., Sch. of L., (Jan. 31, 2023, 1:56 PM) (on file with author).

there is enthusiasm. On the matter of figuring out independent contractor strategies[111] for continued employment and direct contravention of employer sanctions laws, the conversations have yielded mixed results. Some want more information, while others fear being sanctioned.

I have also spoken with many DACA employees: most are from nonprofit organizations, but a handful are from major corporations. All are stressed about the prospect of losing their jobs. Even those who work for nonprofit organizations have not been given clear signals about their future with the organization. Those who work for large corporations are even less confident and are seeking allies in the corporate hierarchy.

The big lesson up to this point is that even sympathetic employers need more information. They want to know more about the audit process. They want to know what penalties they might face. They are curious about alternative employment avenues. And with a sign of hope for civil disobedience, a handful of employers want to know what defenses are available if they are indeed audited and found out that they are continuing to employ DACA recipients after employment permits have expired.

III. BACKGROUND INFORMATION FOR DEVELOPING A STRATEGY FOR RESISTING EMPLOYER SANCTIONS

In the fall of 2022, I contacted Andrew Moriarty, a policy consultant at FWD.us. Andrew reiterated that FWD.us is very supportive of comprehensive immigration reform that would provide a pathway to citizenship to the undocumented population, especially, Dreamers and TPS holders.[112] FWD.us is in regular communication with many large and small businesses nationwide, including big tech companies. I specifically reached out to Andrew to get his views on the prospects that any of the businesses with whom he is in communication might consider civil disobedience if DACA is terminated.

My conversation with Andrew was encouraging. He felt that some employers might be open to the idea of continuing to hire DACA employees if the program was terminated, but he felt that the companies would want to know a lot more about what was at stake from an employer-sanction perspective. He suggested that I prepare a description of the process by which an employer might face penalties for hiring a person who was not authorized to work and what kind of penalties they might face. In other words, what is the likelihood of auditing employment records? What is the likely penalty? Is a criminal penalty—including prison time—likely or even possible? Once I gathered that information, Andrew agreed that we would discuss how to start contacting some employers for further discussions.

This section is derived from some of the background information that I gathered for Andrew to distribute to employers who are sympathetic to the challenge that lies ahead for their DACA employees. It is certainly understandable that employers—even those who are strongly inspired to engage in civil disobedience on behalf of Dreamers—want to know what to expect. What is the law? What is covered and what is not? What is the process involved in being sanctioned? And what forum is available to offer a defense or an excuse for violating the law?

111.*See infra* notes 122-25, 173-74 and accompanying text.

112.Telephone Interview with Andrew Moriarty, Policy Consultant, FWD.US (Sept. 26, 2022); *See generally* FWD.US., HTTPS://WWW.FWD.US/ (last visited Apr. 16, 2023).

A. The Basic Law

Federal law makes it "unlawful for a person or other entity . . . to hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien."[113] Employing a lawful permanent resident or a noncitizen authorized to work DHS is of course fine.[114] And until DACA is terminated, DACA recipients with valid employment authorization documents are eligible to work, and their employment satisfies employment verification requirements.[115]

Because an unauthorized noncitizen may not be employed by an employer, an employer that violates this provision is subject to potential sanctions. The standard sanctions are civil penalties that can range from a few hundred dollars to thousands of dollars depending on the offenses.[116] Criminal penalties can be imposed if the employer engages in a pattern of hiring unauthorized noncitizens.[117] Criminal penalties range from $3,000 for each unauthorized worker to possible imprisonment of the employer.[118]

Federal law also establishes an "extensive 'employment verification system,' designed to deny employment to noncitizens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States."[119] Known as the I-9 system, employers are required to verify the identity of their employees and ensure they are authorized to work in the United States by examining certain specified documents.[120] A list of permissible verification documents is provided, enabling employees to prove eligibility by supplying specified documents on the list.[121] An employer can be sanctioned for failing to complete I-9 forms properly, even though supporting documents have been copied and attached to the I-9 and without regard to whether employees are authorized to work.[122]

Thus, the basic employer sanctions law only applies to employment and only penalizes employers for hiring undocumented immigrant employees. Excluded from the definition of employee under the law is "independent contractor" and excluded from the definition of employer is a "person or entity using contract labor."[123] So if an

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113.Unlawful Employment of Aliens, 8 U.S.C. § 1324a(h)(3) (Westlaw through Pub. L. No. 117-262).

114.*Id*.

115.Classes of Aliens Authorized to Accept Employment, 8 C.F.R. § 274a.12(c)(33) (Dec. 15, 2022) ("An alien who has been granted deferred action pursuant to 8 CFR 236.21 through 236.23, Deferred Action for Childhood Arrivals, if the alien establishes an economic necessity for employment.").

116.Unlawful Employment of Aliens, 8 U.S.C. § 1324a(e)(4) (Westlaw through Pub. L. No. 117-262); Penalties, 8 C.F.R. § 274a.10(b) (Jan. 13, 2023) (describing civil penalties).

117.Unlawful Employment of Aliens, 8 U.S.C. § 1324a(f) (Westlaw through Pub. L. No. 117-262).

118.Penalties, 8 C.F.R. § 274a.10(a) (Jan. 13, 2023) (describing criminal penalties).

119.Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 138 (2002) (in-text citations omitted).

120.Verification of Identity and Employment Authorization, 8 C.F.R. § 274a.2(b) (June 18, 2020) (describing employment verification requirements).

121.Verification of Identity and Employment Authorization, 8 C.F.R. § 274a.2(b)(1)(v)(A) (June 18, 2020).

122.*See, e.g.*, Ketchikan Drywall Servs., Inc. v. Immigr. and Customs Enforcement, 725 F.3d 1103 (9th Cir. 2013).

123.8 C.F.R. § 274a.1(f) (Nov. 28, 2009) ("employee . . . does not mean independent contractor"); 8 C.F.R. § 274a.1(g) (Nov. 28, 2009) ("employer shall . . . not [mean] the person or entity using the contract labor").

undocumented noncitizen is engaged by a business as an independent contractor, that relationship would not subject the business to employer sanctions.[124]

1. Independent Contractor Strategy

The independent contractor exemption from employer sanctions piques the interest of many employers. In my conversations with many employers, unsurprisingly, they think that they might simply move their DACA employees from the employee category to a contracted independent contractor to avoid employer sanctions. While that instinct is natural, lawmakers anticipated the ruse. Although employers need not complete employment verification checks for independent contractors, an employer cannot hire independent contractors if they are aware that the person is not authorized to work in the United States.[125] Under 8 USC §1324a(a)(4); "a person or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended . . . to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien . . . with respect to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of [the law]." Similarly, under 8 CFR § 274a.5, any employer "who uses a contract, subcontract, or exchange entered into, renegotiated, or extended . . . to obtain the labor or services of an alien in the United States knowing that the alien is an unauthorized alien with respect to performing such labor or services, shall be considered to have hired the alien for employment in the United States in violation of . . . the Act."

Another challenge with the independent contractor strategy is whether the person is actually an independent contractor. Under 8 C.F.R. § 274a.1(j),

> The term ***independent contractor*** includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis. Factors to be considered in that determination include, but are not limited to, whether the individual or entity: supplies the tools or materials; makes services available to the general public; works for a number of clients at the same time; has an opportunity for profit or loss as a result of labor or services provided; invests in the facilities for work; directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done. The use of labor or services of an independent contractor are subject to the restrictions in section 274A(a)(4) of the Act and § 274a.5 of this part . . .

124.*See* 26 C.F.R. § 301.6109-1(d)(3) (As an independent contractor, an undocumented worker is still required to report and pay income taxes. For Internal Revenue Services purposes, individuals who do not have and are not eligible to obtain a social security number may apply for an Individual Tax Identification Number (ITIN)).

125.Adina Appelbaum, *Hiring Undocumented Immigrants: What You Need to Know*, CAMINO FINANCIAL (Dec. 10, 2022), https://www.caminofinancial.com/hiring-undocumented-immigrants-what-you-need-to-know/.

So, an employer could be challenged for classifying a noncitizen unauthorized to work as an independent contractor if the noncitizen does not work for any other employer, and the employer directs the noncitizen's work hours and provides all the materials needed for the job.

Even though the employer's intentions may be altruistic, that sense of being helpful may violate another principle that is designed to protect the interest of employees who are being taken advantage of by employers who want to avoid the responsibilities that employers have for employees. An employer seeking to use the independent contractor route to help a DACA recipient make actually run afoul of the Fair Labor Standards Act (FLSA) which is designed to protect individuals who actually should be classified as employees; FLSA requirements relating to minimum wage, overtime, and recordkeeping apply to employees but do not apply to independent contractors.[126]

Nevertheless, given the general rule that businesses can retain independent contractors without violating the employer sanctions laws, many immigrant rights groups provide information to Dreamers and other noncitizens on being an independent contractor, starting a business, and entrepreneurship.[127] Given the threat to DACA, those initiatives have taken on more urgency. If DACA is terminated and employers lay off their DACA employees, those individuals in all likelihood will need to become entrepreneurs to make a living.

B. The Audit Process and Likelihood of Sanctions

As David Bacon and I point out, instead of armed workplace raids to arrest unauthorized workers, the Obama administration emphasized the use of I-9 audits to enforce employer sanctions against employers in order to stop the employment of unauthorized workers.[128] An I-9 audit is when federal immigration officials review an employer's I-9 forms to ensure they are accurate, complete, and that all its employees have the proper work authorization.[129]

Although an employer who engages in civil disobedience by intentionally violating employer sanctions laws by employing Dreamers with expired EADs might be the subject of a workplace raid, an I-9 audit continued to be more likely under both the Trump and Biden administrations. While officials do not need a warrant to conduct an I-9 audit, they do issue a Notice of Inspection at least three days prior to the audit. This gives the employer time to produce the I-9 forms, especially if they are stored

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126.Jim Paretti et al., *Department of Labor Proposes New Rule for Independent Contractor Status,* LITTLER (Oct. 25, 2022), https://www.littler.com/publication-press/publication/department-labor-proposes-new-rule-independent-contractor-status. Some states like California provide special protections for those classified as independent contractors. The so-called "ABC test" defines if a worker is an employee or independent contractor in California and is related to such factors as whether the person performs work outside the hiring entity's business and routinely does work in an independent occupation. *Employment Status: ABC Test*, EMPLOYMENT DEV. DEPT., STATE OF CALIF., https://edd.ca.gov/en/Payroll_Taxes/ab-5 (last visited Apr. 23, 2023). Also, California Labor Code § 2750.3 (2019), often referred to as "AB5," requires employers to classify workers as employees unless they perform work outside the usual course of the employer's business. *But see Castellanos v. State of California*, No. RG21088725, 2023 WL 2473326 (Cal. Ct. App. Mar. 13, 2023).

127.*See, e.g.*, Immigrants Rising, *#UndocuHustle Film*, YOUTUBE (Mar. 2, 2020), https://www.youtube.com/watch?v=bN1MzcQnyW0.

128.David Bacon & Bill Ong Hing, *The Rise and Fall of Employer Sanctions*, 38 FORDHAM URB. L.J. 77, 80-81 (2010).

129.*A Helpful Guide to Surviving and I-9 Audit*, JDSUPRA (Oct. 19, 2021), https://www.jdsupra.com/legalnews/a-helpful-guide-to-surviving-an-i-9-3989066/.

off-site. The employer may be asked to send records for review, or the officials may visit the workplace to conduct the audit.[130]

Employer sanctions violations are typically investigated and enforced by the U.S. Immigration and Customs Enforcement (ICE) component of DHS. According to attorneys who represent clients with I-9 problems, ICE investigations are initiated as a result of:

- Random or targeted industry audits;
- Tips from workers, competitors, and others;
- Referrals from other government agencies, such as the U.S. Department of Labor's (DOL) components (Wage and Hour Division, Office of Foreign Labor Certification, Occupational Safety and Health Administration), USCIS, the Internal Revenue Service (IRS), or other agencies that discover inconsistencies or problems in the course of their normal activities.[131]

In practice, ICE follows up on tips and referrals, and regularly examines the activities of companies and industries that are thought to be chronic violators of the employer sanctions laws.[132] Moreover, given the perception that undocumented immigration can be reduced by active enforcement targeted at the employers of unauthorized workers, ICE has indicated its intention to increase efforts to identify and prosecute employers who violate I-9 provisions.[133] Over the years, ICE has substantially increased its enforcement activities nationwide, and it is working closely with DOL and other law enforcement agencies to bring large, high profile criminal actions against employers who have multiple problems, which can include immigration violations, labor law violations, document fraud, assisting someone to enter the country unlawfully, and other offenses.[134] The number of businesses subjected to I-9 audits soared under the Obama administration from 250 in 2007 to more than 3,000 businesses audited in 2013.[135]

A former high-ranking official with U.S. Citizenship and Immigration Services agrees that audits usually take place as a result of tips, audits of targeted industries, and referrals from other government agencies.[136] According to KL, thousands of tips come into ICE that simply "don't go anywhere, unless an issue of public safety is involved or there might be great media interest in the company or situation."[137] Otherwise, there are simply not enough resources to follow up on the vast majority of tips. However, KL notes that DHS compliance standards do require occasional random audits that have nothing to do with tips; these random audits are

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130.*Id.*

131.*Employer Sanctions*, GOEL & ANDERSON CORP. IMMIGR., https://www.goellaw.com/services/compliance/employer-sanctions/ (last visited Apr. 23, 2023).

132.*Id.*

133.*Id.*

134.*Id.*

135.Marsha Mavunkel, *I-9 Audit Basics and Best Practices for Employers*, RYAN, SWANSON & CLEVELAND, PLLC, 15 (Oct. 29, 2014), https://ryanswansonlaw.com/wp-content/uploads/2015/06/I-9_Audit_Basics_and_Best_Practices_for_Employers.pdf.

136.Telephone Interview with KL, Director, USCIS District ##, Dep't of Homeland Sec., (Feb. 20, 2023).

137.*Id.*

"always an element of quality assurance."[138] So in theory, any company might randomly be subject to an I-9 audit, although the chances are slim.

The employee provides information for Section 1 of the I-9 form such as name, address, birth date, and social security number.[139] The critical part of Section 1 seeks information on whether the person is a U.S. citizen, a lawful permanent resident, or an "alien authorized to work."[140] DACA recipients check the box for an "alien authorized to work" and indicate the expiration date of the work authorization.[141] In a post-DACA era, an ICE audit of the employer's I-9 forms could reveal a violation because the expiration date of the work permit will have lapsed. If the ICE audit reveals that a current employee's employment authorization has expired, ICE could issue a notice related to discrepancies, technical failures, or even a notice of intent to fine.[142] In addition to ICE audits, the Social Security Administration can play a role in finding violations by independently checking Social Security numbers against names and sending "no-match" letters of warning to employers if discrepancies are found.[143]

Legal research through Westlaw and Lexis reveals little case law on employers who have been subject to sanctions in violation of 8 U.S.C. § 1324a(a)(1). In *Egbuna v. Time-Life Libraries,* the worker was a Nigerian national on a student visa who had employment authorization.[144] When his visa and work permission expired, the employer kept him on the payroll.[145] It was not until he resigned from the position and then later re-applied that the issue of being an undocumented worker came up.[146] The employer refused to rehire the worker, who then brought a discrimination action against the employer.[147] The Fourth Circuit denied the worker's claim, and the employer did not face any sanctions for having previously employed the worker even after his work permit and visa expired.[148] Although the court noted that employers would be subject to the penalties if they continue to employ a worker after discovering that the person is not authorized to work, the court did not find that the employer, in this case, would be subject to sanctions for the period of time that the worker was still on payroll after his work permit and visa expired.[149] The implication of the court's decision is that since the employer had the correct procedures in place when the worker was initially employed, that could excuse the employer from sanctions even after the work permit expired.

Similarly, in *Salas v. Sierra Chemical Co*.,[150] several employees received letters from the Social Security Administration stating that names and Social Security numbers did not match the agency's records. The company's production manager told the workers not to worry about discrepancies in numbers because as long as the

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138.*Id.*

139.*Form I-9,* U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/sites/default/files/document/forms/i-9.pdf (last visited Apr. 23, 2023).

140.*Id.*

141.*Id.*

142.Mavunkel, *supra* note 135, at 23.

143.Bacon & Hing, *supra* note 126, at 92-93.

144.Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 185 (4th Cir. 1998).

145.*Id.*

146.*Id.* at 186.

147.*Id.*

148.*Id.* at 188.

149.*Id.*

150.59 Cal. 4th. 407, 415 (2014).

company's president was satisfied with their work they would not be terminated.[151] Although that action could be construed as evidence that the employer deliberately chose to look the other way when put on notice of employees' unauthorized status, another reasonable interpretation is that mere mismatch could have an innocent explanation and continued employment might be all right.[152]

In *Melendez v. Salls Bros. Constr., Inc*.,[153] the New Mexico Court of Appeals held that the employer reasonably relied on the employee's false documentation to support the I-9 form, and there was no reasonable basis for the employer to have knowledge that the employee was unauthorized to work. Two I-9 forms were involved—one completed in June 2006 and the other in July 2007.[154] In the first I-9 form, the employee attested that he was a lawful permanent resident, but did not enter an alien registration number.[155] His verification documents included a Colorado driver's license and a Social Security card for Section 2.[156] The employer relied on those documents that later turned out to be false.[157] For the second I-9 form, the employee did not attest to being a lawful permanent resident in Section 1, but presented a resident alien card with a number and the same Social Security card for purposes of Section 2.[158] The court held that the employer reasonably relied on the employee's false documents and could not be faulted without notice that the documents were false.[159] This outcome is consistent with the employer sanctions regulations. Under 8 C.F.R. § 274a.4, an employer who shows good faith compliance with the employment verification requirements is provided with a rebuttable affirmative defense that there is no violation of the law.[160]

Accounts of employer sanctions are more easily found in news reports and ICE accounts. In January 2020, a Texas construction company was fined $3 million dollars for a "scheme" to employ undocumented workers.[161] The fine was imposed as part of a non-prosecution agreement after five of the employers confessed to having planned the hiring scheme.[162] Later that year, a grocery store in San Diego pleaded guilty to hiring undocumented workers and was fined $500,000.[163] The store employed unauthorized workers from 2003 to 2019.[164]

Employer sanctions, when imposed, are likely to be civil, because criminal penalties require a showing of a "pattern and practice" hiring unauthorized workers.[165]

151.*Id.*

152.*Id.* at 431.

153.415 P.3d 1006, 1012 (N.M. 2018).

154.*Id.* at 1007.

155.*Id.* at 1010.

156.*Id.*

157.*Id.*

158.*Id.*

159.*Id.* at 1012.

160.Good Faith Defense, 8 C.F.R. § 274a.4 (2023).

161.*Texas Company to Pay $3 Million After Investigation Reveals Hiring Illegal Aliens*, U.S. IMMIGR. & CUSTOMS ENF'T (Mar. 22, 2022), https://www.ice.gov/news/releases/texas-company-pay-3-million-after-investigation-reveals-hiring-illegal-aliens.

162.*Id.*

163.*Grocery Store and Manager Plead Guilty to Hiring Undocumented Workers; Court Imposes $500,000 in Fines and Penalties*, U.S. ATT'Y OFFICE, S. DIST. OF CAL. (Dec. 21, 2020), https://www.justice.gov/usao-sdca/pr/grocery-store-and-manager-plead-guilty-hiring-undocumented-workers-court-imposes-500000.

164.*Id.*

165.Unlawful Employment of Aliens, 8 U.S.C.A. § 1324a(f) (West).

From April 2018 to March 2019, only eleven individuals—no companies—were prosecuted in just seven cases.[166] Since criminal penalties for employers were first enacted in 1986, few employers have ever been prosecuted under these provisions. Criminal prosecutions have rarely climbed above fifteen annually and have never exceeded twenty individuals a year except for brief periods during 2005 under President Bush, and in the first year of the Obama Administration.[167] An ICE order to pay civil penalties can be reviewed by an administrative law judge (ALJ), and the decision of the ALJ can be reviewed for the U.S. Court of Appeals.[168]

These cases present this lesson: employers can rely on documents that are presented by the new employee at the I-9 process. The employer is not required to be an immigration expert in evaluating the authenticity of documents. In fact, if the employer requests too much documentation, the employer risks committing document abuse and could be subject to a discrimination charge.[169] The employer sanctions provisions are quite clear that as long as documents establishing identity and employment permission are presented by the employee, the employer should not request any other documents:

> A person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine. If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements . . . nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such another document.[170]

Thus, in general, the likelihood of an I-9 audit is small, and even if an audit occurs, sanctions are unlikely if the employer has acted reasonably and has an I-9 procedure in place.[171] The employer is not expected to be an immigration expert. That is important in the context of the DACA program which has been the subject of political and legal battles since its inception.

Although the chance of an audit or a fine is slim, in my conversations with large and small business representatives, employment immigration lawyers, and nonprofit organization leaders, I have to concede that the landscape could be different

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166.*Few Prosecuted for Illegal Employment of Immigrants*, TRAC IMMIGR. (May 30, 2019), https://trac.syr.edu/immigration/reports/559/.

167.*Id.*

168.8 U.S.C. § 1324a(e)(8); *see, e.g*., Ketchikan Drywall Servs., Inc. v. Immigr. & Customs Enf't, 725 F.3d 1103 (9th Cir. 2013).

169.8 U.S.C. § 1324b; *See also Document Abuse (Identification Documents at Work): Things Your Should Know About Proving Your Work Status to Your Employer*, LEGAL AID AT WORK, https://legalaidatwork.org/factsheet/document-abuse-identification-documents-at-workthings-you-should-know-about-proving-your-work-status-to-your-employer/.

170.*Id.* § 1324a(b)(1)(A).

171.*See Verify Employment Eligibility (E-Verify),* Dep't of Homeland Sec. (Oct. 5, 2022), https://www.dhs.gov/verify-employment-eligibility-e-verify. (The reasonable reliance argument probably will not work for employers who are enrolled in the E-Verify program. E-Verify is a voluntary web-based system that allows enrolled employers to confirm the eligibility of their employees to work in the United States. E-Verify employers verify the identity and employment eligibility of newly hired employees by electronically matching information given by employees on the Form I-9 against records available to the Social Security Administration (SSA) and the Department of Homeland Security (DHS)).

for an employer who publicly announces an intent to defy employer sanctions laws if DACA is terminated. ICE may choose to make an example of that employer. After all, enforcement against an employer engaging in civil disobedience may bring desired media attention to the issue.[172]

IV. STRATEGIES AND DEFENSES

In an effort to avoid employer sanctions or defend against ICE charges of knowingly hiring a noncitizen unauthorized to work, here are ideas that employers might consider.

A. Retaining Dreamers as Independent Contractors

As noted above, independent contractors are not subject to employer sanctions and I-9 processes unless the employer knows that the worker is not authorized to work in the United States.[173] So if an employer shifts an employee to independent contractor status knowing that the person has just lost employment authorization, that is a problem. However, depending on how the independent contractor or business contract relationship with former DACA employees comes about, the business may be able to assert that they did not know that the independent contractor or the company with whom they are contracting has unauthorized workers involved. For example, one strategy is to enter into an independent contractor arrangement before EADs are terminated. That way, the employer can honestly assert that they do not know if the workers are authorized to work. After all, the worker could very well have continued to obtain work authorization through some means, and the employer has no I-9 duty to follow up once the worker has officially stopped being an employee of the employer. In another scenario, if the employer business needs a project or series of projects done and is presented with an independent entity that can complete the projects competently, then retaining that entity to do the work could be quite reasonable. The employer is not required to follow I-9 procedures for employees of an independent entity that is contracted to do the project.

In order for this strategy to be implemented, at least a few things are required. The employer business needs to be open to the idea. Of course, institutionalizing an open mind to that approach across the business world would be best. Getting noncitizens without work authorization or DACA recipients who face the end of DACA to learn how to become independent contractors or start their own businesses and take on the entrepreneurship challenge may not be simple. Coming up with an idea, starting a business, perhaps starting a limited liability corporation (LLC), getting a business license, setting up accounting systems, figuring out a business model, and more are needed. Outreach, training, and other resources to address those needs have to be available and expanded.

Employers who choose the independent contractor route with noncitizens should be encouraged to acknowledge the tension between hiring DACA recipients or any noncitizen as independent contractors and principles like the federal Fair Labor Standards Act that are intended to protect people who are really employees. Although employers act out of a sense of benevolence and solidarity with the workers, the independent contractor arrangement should not be used to skirt moral responsibilities

172.*See* Interview of KL, *supra* note 134.

173.*See supra* notes 122-125 and accompanying text.

for meeting fair labor standards. Therefore, I would encourage employers to provide sufficient funds in the contract to cover health care benefits and overtime pay. Employment rights attorneys often bring cases on behalf of workers against unscrupulous employers who use the independent contractor arrangement to avoid responsibilities that they might otherwise have for employees.[174] However, if workers are actually happy with the arrangement, then these attorneys would not see a reason to bring such a case. In other words, they can see how the moral justification might carry the day, and they would not second guess such a decision.[175]

B. Creative Defenses

Conversations with some sympathetic corporate leaders, in-house counsel, and business immigration lawyers have revealed a keen interest in the possibility of raising creative defenses to employer sanctions charges given the altruistic intent behind their defiance of the law if it comes to that. These are some possible arguments that I have discussed with employer representatives.

1. *Murgia* Motion

In the criminal law context, defendants can raise racial justice issues in their defense under certain circumstances. For example, in California, a Murgia motion, based on a state decision,[176] can be made requesting dismissal of a case on the grounds that the prosecution is being conducted in an arbitrary or discriminatory manner. In the *Murgia* case, six defendants who were members of the United Farm Workers were prosecuted for activities related to picketing and organizing activities.[177] The California Supreme Court said no one has a right to commit a crime such as driving without a license or malicious mischief.[178] But under equal protection principles, law enforcement authorities must enforce the criminal statutes evenhandedly.[179] Thus, discriminatory enforcement may be invoked as a defense in a criminal action.[180]

In fact, it has long been known that employer sanctions laws result in discrimination. In its final report to Congress on employer sanctions in 1990, the Government Accounting Office estimated that of 4.6 million employers in the United States, 346,000 admitted applying the employment verification requirements only to job applicants with a "foreign" accent or appearance.[181] Another 430,000 employers only hired applicants born in the United States or did not hire applicants with temporary work documents in order to be cautious.[182] And a 2009 evaluation of the

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174.Interview with Christopher Ho, Senior Staff Attorney, Legal Aid at Work, in [S.F., Cal.] Feb. 6, 2023.

175.*Id.*

176.*See* Murgia v. Municipal Court*,* 15 Cal.3d 286 (1975).

177.*Id.* at 291.

178.*Id.* at 291, 303.

179.*Id.* at 297.

180.*Id.* at 290.

181.Laura C. Oliveira, *A License to Exploit: The Need to Reform the H-2A Temporary Agricultural Guest Worker Program,* 5 SCHOLAR 153, 170 (2002); *see also* Michael Fix & Frank D. Bean, *The Findings and Policy Implications of the GAO Report and the Urban Institute Hiring Audit*, 24 INT'L MIGRATION REV. 816 (1990).

182.Oliveira, *supra* note 179.

discriminatory effects of the E-Verify program revealed that discrimination was rampant.[183]

Evidence of selectively invoking employer sanctions against employers who might be employing unauthorized noncitizens who are largely Latinx, for example, is the type of racial profiling by DHS officials that could be useful in defending against sanctions. In I.N.S. v. Lopez-Mendoza, the Supreme Court refused to extend the Fourth Amendment exclusionary rule in criminal settings to the civil immigration court arena as a general matter.[184] Although the court did not extend the general rule to the immigration court setting, the court said applying the exclusionary rule might be appropriate if Fourth Amendment violations by immigration agents are "widespread" or "egregious."[185] In other words, a different approach is in order when "notions of fundamental fairness" are "transgress[ed]."[186] The U.S. Courts of Appeal for the Second and Ninth Circuits have applied the lesson of egregiousness in holding that the exclusionary rule applies in removal proceedings when immigration agents engage in racial profiling.[187] In my view, the racist enforcement of employer sanctions laws provides a basis for a Murgia-type motion to block employer sanctions because they are fundamentally unfair due to their inherent racism.

During the 2020 presidential primary season, Julián Castro, the former U.S. Secretary of Housing and Urban Development, stood out to me because he was the first Democratic candidate to announce a comprehensive immigration plan. His progressive plan called for the repeal of illegal entry, the federal criminal offense of crossing the border without authorization. Not only did Castro know that the provision was used by the Trump administration as one reason to systematically separate children from their parents at the border, but he also knew the racist origins of the law that was aimed at Mexican migrants.[188] He famously challenged all the other Democratic candidates to support his proposal on the debate stage.[189]

Consistent with Castro's argument, a group of defense attorneys has worked on a racial defense to the criminal charge of illegal entry on behalf of several defendants. Significantly, they enlisted the help of historians like Kelly Lytle Hernández, who has testified in federal court on the racist intent behind the law. Although the claim has been dismissed by some federal judges, in August 2021, federal district judge Miranda Du in Nevada agreed that the illegal entry law had been passed with racial malice and was being applied in a discriminatory manner. She dismissed the illegal entry charges against Gustavo Carrillo-Lopez as an

183.*E-Verify and Arizona: Early Experiences for Employers, Employees, and the Economy Portend a Rough Road Ahead*, Immigr. Pol'y Ctr.(May 2008), https://www.immigrationworksusa.org/uploaded/file/IPC%20—%20Early%20Experiences.pdf (E-Verify is a federal, web-based program through which U.S. businesses can attempt to verify the work authorization of new hires).

184.I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984).

185.*Id.* at 1050.

186.*Id.*

187.Almeida-Amaral v. Gonzales, 461 F.3d 231 (2d Cir. 2006); Gonzalez-Rivera v. I.N.S., 22 F.3d 1441 (9th Cir. 1994).

188.Gaby Del Valle, *The Dark, Racist History of Section 1325 of U.S. Immigration Law*, VICE NEWS (June 27, 2019, 9:41 PM), https://www.vice.com/en/article/a3x8x8/the-dark-racist-history-of-section-1325-of-us-immigration-law (last visited Sept. 21, 2022).

189.Roque Planas, Julián Castro Hammers 2020 Candidates Over Criminalization of Immigrants, HUFFPOST (June 26, 2019, 11:54 PM), https://www.huffpost.com/entry/julian-castro-immigrants-2020-democrats_n_5d143402e4b0d0a2c0ab8e74 (last visited Oct. 16, 2022).

unconstitutional violation of the Equal Protection Clause.[190] This creative, disruptive legal strategy exposing the racism of the law worked for Carrillo-Lopez.

Businesses operating within the employer sanctions system should also consider disruptive strategies to directly expose the racism that their noncitizen workers are forced to face. Raising matters of racial justice should be practiced not just in the realm of advocacy for immigration policy change but also in the employment context. When faced with employer sanctions, businesses should introduce the evidence of racism upon which the employer sanctions system was constructed.

2. Jury Nullification

Employers facing sanctions should also consider encouraging decision makers, particularly in the criminal sanctions context, to simply disregard the law and decide against imposing sanctions—in essence to engage in jury nullification. Jury nullification is the "[j]ury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness."[191]

Generally, jurors are instructed that they have the duty to apply the law as interpreted by the court and juries have no right to disregard the court's instructions. Therefore, it is generally inappropriate to instruct juries on their power to nullify the law.[192] Doing otherwise would mislead the jurors about their responsibility when deciding the case in front of them.

However, some courts agree to instruct juries about the necessity defense, which can sometimes generate acquittals; otherwise, there are few reported accounts of explicit nullification. Studies generally support the impression that most juries diligently attempt to decide cases on the basis of the evidence presented and the law as instructed by the judge. Yet, a small percentage of verdicts appear to represent jury departure from the evidence and the law in a manner suggesting that the jurors nullified the law on which they were instructed by the judge.[193] Most instances of jury nullification are in response to what the jurors perceive as unlawful government behavior, unjust laws, or the inequitable application of the law.[194] The prime example of jury nullification as a response to unjust laws are acquittals of abolitionists who were accused under the Fugitive Slave Act of 1850.[195]

190.Jesse Franzblau, Landmark Decision Finds "Illegal Reentry" Charges Are Racist in Origin, Discriminatory In Practice, Nat'l Immigr. Just. Ctr. (Aug. 26, 2021), https://immigrantjustice.org/staff/blog/landmark-decision-finds-illegal-reentry-charges-are-racist-origin-discriminatory (last visited Sept. 21, 2022); Immigration Prof, *Amicus Briefs Filed in US v. Carillo-Lopez, Challenging Illegal Re-Entry Law as Anti-Mexican and Racist*, LAW PROFESSORS BLOGS NETWORK (Apr. 20, 2022), https://lawprofessors.typepad.com/immigration/2022/04/amicus-briefs-filed-in-us-v-carillo-lopez-challenging-illegal-re-entry-law-as-ant-mexican-and-racist.html (the case is currently pending at the Ninth Circuit).

191.*Jury Nullification,* BLACK'S LAW DICTIONARY (11th ed. 2019).

192.People v. Baca, 48 Cal. App. 4th 1703, 1707 (1996); People v. Cline, 60 Cal. App. 4th 1327, 1335 (1998) (citing People v. Nichols, 54 Cal. App. 4th 21, 24-26 (1997)).

193.Robert F. Schopp, *Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience*, 69 S. CAL. L. REV. 2039, 2050 (1996).

194.Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997).

195.Aaron McKnight, *Jury Nullification As A Tool to Balance the Demands of Law and Justice*, 2013 BYU L. REV. 1103, 1107 (2013).

To achieve jury nullification, defense attorneys usually try to present arguments to the jury such as:

- It will waste taxpayer's money to imprison this defendant for this minor crime;
- The defendant caused minimal harm to others;
- The defendant is a sympathetic figure;
- The government engaged in vindictive or selective prosecution;
- The offense of which the defendant is charged should not be a crime;
- The jury should acquit this defendant to send a message to the larger community;
- The sentence or other penalties will be too harsh considering the gravity of the defendant's behavior;
- The jurors should look to their conscience;
- The defendant had a good motive in so acting.[196]

Of those types of arguments, employers facing sanctions may find a receptive audience to arguments that employing DACA recipients whose EADs have expired is a minor crime, with minimal harm to others, and that acquittal would send a moral message to the larger community—including policy makers. After all, such employers would have a good motive in continuing the DACA recipient's employment, and jurors or other decision makers should look at their conscience before deciding to punish this altruistic action. The imposition of employer sanctions may be viewed by some jurors as unjust given the circumstances surrounding DACA recipients. And some may agree that laws against hiring workers without authorization are wrong-headed.

The judge's attitude can, of course, play a big role in whether information that might lead sympathetic jurors to consider jury nullification is allowed in. An obvious way to encourage jury nullification is to instruct jurors that they can acquit even if the prosecutor proves the elements of a crime beyond a reasonable doubt.[197] Courts may also encourage jury nullification by allowing closing arguments regarding jury nullification. By allowing such arguments, the jury has the chance to hear the defense's proposed theory of jury nullification, thus giving the jury "something to 'hang their hats on' if they choose to acquit."[198]

Currently, jurisdictions are split regarding whether attorneys can address jury nullification in closing arguments.[199] However, sympathetic employers facing employer sanctions should work with their counsel in developing arguments about the unjustness of these laws in the context of DACA recipients, the intent of the employer

196.KIMBERLY J. WINBUSH, *Litigation Arising from Jury Nullification*, 172 AM. JUR. TRIALS 507 § 11(2021).

197.McKnight, *supra* note 193, at 1110.

198.*Id.* at 1110-11.

199.*Id.* at 1111.

to do the right thing in these circumstances, and the absence of societal harm in violating the laws. Jury nullification is an apt outcome in these cases.

3. Necessity Defense

Occasionally, a person faces a situation that requires doing something illegal to prevent serious harm. In such a situation, the defense of necessity, which is also called the "lesser of two evils" defense, may come into play.[200] A defendant who raises the necessity defense admits to committing what would normally be considered a criminal act but claims the circumstances justified it. Usually, to establish a necessity defense, a defendant must prove the following:

- there was a specific threat of significant, imminent danger,
- there was an immediate necessity to act,
- there was no practical alternative to the act,
- the person did not cause or contribute to the threat,
- the person acted out of necessity, and
- the harm caused was not greater than the harm prevented.[201]

Another way the necessity defense has been framed requires a showing by a preponderance of the evidence of the following elements: (1) that defendants were faced with a choice of evils and chose the lesser harm, (2) acted to prevent imminent harm, (3) reasonably anticipated a direct causal relation between their conduct and the harm to be averted, and (3) had no legal alternatives to violating the law.[202]

Thus, employers facing sanctions should argue that violating the law was less evil than terminating the employment of DACA recipients who would suffer from job loss. Termination would have caused imminent harm to the employee and their family, and there was no alternative. It is important to note, however, that defendants who engage in illegal or criminal actions intended to influence policies and to create political change will not be permitted to avail themselves of the necessity defense if there are other lawful means, such as voting and/or contacting elected representatives, to accomplish their purposes.[203]

Relatedly, employers could argue that terminating DACA recipients and having to replace these workers would be an undue burden. Employers would have to recruit, train, and employ a completely new set of employees. This would result in financial hardship for the employer, so the DACA employees should be employed until their services are no longer needed.

200.United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1991).

201.See generally id.

202.In re Eichorn, 69 Cal. App. 4th 382, 388–91 (1998); People v. Buena Vista Mines, Inc., 60 Cal. App. 4th 1198, 1202 (1998); People v. Trippet, 56 Cal. App. 4th 1532, 1538–40 (1997).

203.*See generally* ELIZABETH O'CONNER TOMLINSON, *Proof of Necessity Defense in a Criminal Case*, 115 AM. JUR. PROOF OF FACTS 3d 309 § 3 (2010).

4. Defense of Others

The notion of defense of others also appears relevant here. For example, California's criminal jurisprudence defines the affirmative defense of others as: "[a]ny other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense. The right of one person to aid another in defending against a threatened injury is defined by statute, and it does not differ substantially from the right as it existed under the common law."[204] The defendant must reasonably believe that the person being protected would be harmed, and the defendant used only the amount of force that was reasonably necessary to protect the person.[205]

Employers facing sanctions should argue that they were defending DACA recipients from the harm of forced unemployment. Keeping the DACA employee on the payroll was reasonably necessary to protect the employee. The challenge with this defense is that it customarily arises in the context of preventing physical harm. But while there is no case law in which this defense is used in non-physical harm situations, the idea of protecting DACA employees from the harm of job loss may have a strong resonance with decision-makers. Job loss certainly results in serious emotional harm.

5. Good Faith Defense

As noted above, under 8 C.F.R. § 274a.4, an employer who shows good faith compliance with the employment verification requirements is provided with a rebuttable affirmative defense that there is no violation of the law. This defense may be quite appropriate in the DACA employee situation.

In a good faith defense, the employer can argue that they did not voluntarily and intentionally violate a legal duty if they had a good faith but mistaken understanding of what its duty was under the law.[206] This includes asserting that the defendant was ignorant of the law or mistaken in its interpretation.[207] Further, the defendant's belief need not be objectively reasonable.[208] If there is sufficient evidence to raise a reasonable doubt about a good faith belief, the court has a sua sponte duty to give this instruction.[209] The prosecution will have the burden on proving beyond a reasonable doubt that the defendant did not act in good faith.

Given the complexities of immigration law and the confusing, political, and legal battles over the DACA program, an employer can easily make the claim that they have been acting in good faith by retaining DACA employees. The employer would argue that a DACA employee was not terminated because of the ambiguity of the situation and not knowing whether immediate termination is required.

204.JILL GUSTAFSON & ALYS MASEK, *Defense of Others*, 19 CAL. JUR. 3D CRIM. L.: DEF. § 48 (2023).

205.CACI 1304 No. 1304; CALCRIM No. 2860.

206.

207.People v. Hagen,19 Cal. 4th 652, 660 (1998); Cheek v. United States, 498 U.S. 192, 201 (1991).

208.*Id.*

209.*Id.*

6. *Hobby Lobby* Defense

Pastor Noel Castellanos informs us that his faith calls him to "love my neighbors" and to welcome people whose experiences are different from his own.[210] He urges leaders in Washington to "demonstrate moral courage" by reaching across the aisle to work together to support the DREAM Act.[211] Many employers have told me that they support the DREAM Act and their DACA employees because it is the morally correct thing to do. If any of those employers are willing to defy employer sanctions due to religious beliefs like those of Pastor Castellanos, that motivation could give rise to a viable defense.

Depending on one's religion, ample authority can be found to aid non-citizens. For example, both the Hebrew Bible and the New Testament affirm—strongly and unequivocally —the obligation to treat strangers or newcomers with dignity and hospitality.[212] There are even specific references to paying "servants" and "resident aliens" in the Bible.[213] Many instances of migration by the faithful and prophets appear in the Holy Qur'an, and it provides a set of instructions for dealing with refugees and migrants, praising those who go to the assistance of people in distress and requiring the faithful to protect migrants.[214]

The question is whether the Religious Freedom Restoration Act of 1993 (RFRA) might be asserted in defense of a violation of I-9 requirements that is religiously motivated. RFRA prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person is (1) in furtherance of a compelling governmental interest; and is (2) the least restrictive means of furthering that compelling governmental interest."[215]

The Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*,[216] is instructive. Regulations promulgated by the Department of Health and Human Services (HHS) under the Patient Protection and Affordable Care Act of 2010 (ACA), require specified employers' group health plans to furnish "preventive care and screenings" for women without "any cost-sharing requirements."[217] Congress did not specify what types of preventive care must be covered; it authorized the Health Resources and Services Administration, a component of HHS, to decide.[218] Nonexempt employers are generally required to provide coverage for the twenty

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210.Noel Castellanos, *Supporting 'Dreamers' is Our Civic and Moral Duty*, THE HILL (Aug. 15, 2017, 2:55 PM), https://thehill.com/blogs/congress-blog/homeland-security/346612-supporting-dreamers-is-our-civic-and-moral-duty/.

211.*Id.*

212.Essam Saad, *What the Bible Says About Welcoming Refugees*, THE CONVERSATION (Jan. 29, 2017, 10:49 PM), https://theconversation.com/what-the-bible-says-about-welcoming-refugees-72050/.

213.*See, e.g.*, Deuteronomy 24:13-15 ("You shall not exploit a poor and needy hired servant, whether one of your own kindred or one of the resident aliens who live in your land, within your gates. On each day you shall pay the servant's wages before the sun goes down, since the servant is poor and counting on them. Otherwise the servant will cry to the Lord against you, and you will be held guilty.").

214.High Commissioner's Dialogue on Protection Challenges, *Islam and Refugees*, UNHCR ¶ 9 (Nov. 20, 2012), https://www.unhcr.org/en-us/protection/hcdialogue%20/50ab90399/islam-refugees.html/.

215.Free Exercise of Religion Protected, 42 U.S.C.A. §§ 2000bb–1(a), (b) (West).

216.Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

217.42 U.S.C.A. § 300gg–13(a)(4) (West).

218.*Id.*

contraceptive methods approved by the Food and Drug Administration, including the four that may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus. Religious employers, such as churches, are exempt from this contraceptive mandate. HHS has also effectively exempted religious nonprofit organizations with religious objections to providing coverage for contraceptive services.

Hobby Lobby and two other privately held for-profit corporations have sincere Christian beliefs that life begins at conception and argued that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point. They sued HHS and other federal officials and agencies under RFRA and the Free Exercise clause of the First Amendment, seeking to enjoin the application of the contraceptive mandate insofar as it requires them to provide health coverage for the four objectionable contraceptives. The Supreme Court agreed, holding that the regulations requiring employers to provide their female employees with no-cost access to contraception violate the RFRA.

The *Hobby Lobby* decision thus appears to provide a viable defense to violating employer sanctions laws if the employer's motivation is religiously based. The privately held nature of the companies in the case may be a limiting factor, however, the critical point is the religious motivation of the decision-makers in the company. Importantly, the Supreme Court has repeatedly warned that courts must not presume to determine the plausibility of a religious claim.[219] Employers who engage in civil disobedience over employer sanctions, should consider this religious defense.

7. International Law Arguments

Although U.S. courts are not universally receptive to international law arguments,[220] relevant international law arguments should be raised because they may ultimately affect policy change,[221] and sometimes, a court actually applies the international principles.[222] A possible avenue of support for employers challenging employer sanctions can be found in the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Article 25 of this Convention states,

> 1. Migrant workers shall enjoy treatment not less favorable than that which applies to nationals of the State of employment in respect of remuneration and: . . . 3. States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by any reason of any irregularity in their stay or employment. In particular, employers shall not be

219.*Burwell*, 573 U.S. at 725.

220.*See, e.g.*, Medellin v. Texas, 552 U.S. 491, 505 (2008) (stating that even when a treaty constitutes an international commitment, it is not binding on domestic law unless either Congress has enacted statutes implementing it or the treaty is explicitly "self-executing").

221.*See generally* Monica Hakimi, *Why Should We Care About International Law?,* 118 MICH. L. REV. 1283 (2020).

222.*See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (prohibiting the death penalty for minors and finding that international law and foreign practices, when there is near-universal support of a common doctrine or policy, may be considered in interpretations of the Eighth Amendment); I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987) (consulting international standards to determine what constitutes a "well-founded fear" of persecution for asylum purposes).

> relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.

Employers can argue that the United States has not taken "all appropriate measures to ensure that" DACA recipients are not deprived of employment rights in spite of "irregularity" of status.

Further, Article 54 of this Convention states that,

> 1. Without prejudice to the terms of their authorization of residence or their permission to work and the rights provided for in articles 25 and 27 of the present Convention, migrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of: (a) Protection against dismissal; (b) Unemployment benefits; (c) Access to public work schemes intended to combat unemployment; (d) Access to alternative employment in the event of loss of work or termination of other remunerated activity, subject to article 52 of the present Convention.

This provision could not be clearer: migrant workers should be protected against dismissal, and access to alternative employment should be made available in case of job loss. DACA-recipient employers are acting in the spirit of these international protections.

Although this Convention has not been ratified by the United States, in the landmark ruling, North Sea Continental Shelf, the International Court of Justice explained that a conventional law (binding only on those who have ratified the convention) can become a customary law (binding on all States) as the result of "widespread and representative participation in the convention."[223] Scholarship on the subject subsequently declared that ratification by a large number of parties constitutes evidence that "these provisions are generally acceptable, and that indeed they have been generally accepted."[224]

Unfortunately, as of today, countries that have ratified the Convention are primarily countries of origin of migrants (such as Mexico, El Salvador, Honduras, Guatemala, and the Philippines).[225] For these countries, the Convention is an important vehicle to protect their citizens living abroad. I would still, however, advocate asserting this international law argument in defense of employer sanctions, especially because of the United States' special relationship with many of those countries that have ratified the Convention.

CONCLUSION

When I began this project on encouraging the defiance of employer sanctions as an act of civil disobedience, my primary focus was on the big-name corporations that have spoken out in support of the DREAM Act and extolled the virtues of their DACA employees. The reason for that focus is because I believe that their voices can have a great impact in the halls of Congress. I also know they have the resources to

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223.North Sea Continental Shelf Cases, Judgment, 1969 I.C.J. Rep. 3, ¶ 73 (Feb. 20, 1969).

224.Louis Sohn, *'Generally Accepted' International Rules*, 61 WASH. L. REV. 1073, 1078 (1986).

225.*See* International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Dec. 18, 1990), 2220 U.N.T.S. 3, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&clang=_en.

battle any attempt by the government to punish them, and they can afford any fines that might be imposed. In order to have the biggest impact, I also encourage big business to engage in civil disobedience openly and loudly; attention from Congress and the media is necessary to help bring about change in the law. If firms were to employ Dreamers who have lost their permission to work, David Leopold, former American Immigration Lawyers Association President feels, "it would be an incredible statement. It would be unprecedented. The government would have to make a huge decision—are they going to go after major companies or are they going to do the right thing and reinstate DACA?"[226]

In my discussions with employers, both large and small, it is evident that some employers who lean toward keeping their DACA employees on the payroll if DACA is terminated would prefer doing so quietly. They remain very committed to their employees and to the passage of the DREAM Act, but they fear being targeted by ICE if their defiance of the law is made public. For most, this is not an easy call. They believe that solidarity with other employers who will act publicly is a principled and potentially effective way to bring about change. But company leaders want to see what other companies do first. Frankly, they also express concern over potential criminal liability, even though imprisonment for violating employer sanctions is highly unlikely.

The handful of business representatives who are open to public civil disobedience express willingness to face the consequences themselves, but they express concern over individual liability for human resources personnel, a business partner, or members of the board of directors, depending on the size and nature of the employer. With some employers, I have discussed an idea of maintaining the I-9 forms in the possession of a non-HR person so that only that person has knowledge of expiring EADs. That would foreclose HR personnel from following up with DACA recipients who have expiring EADs and needing to update I-9 forms. In other words, keeping HR out of I-9 maintenance after initial processing eliminates follow up and keeps HR in the dark about any violations.

Some officials at corporations want to take the issue of whether to risk intentionally violating employer sanctions laws to the board of directors. Others do not, thinking that having the CEO make the decision would be better. The concern is that once the matter goes to the entire board, the entire board faces liability if a decision to ignore I-9 is made.

While I would like to see dozens of big companies participate in open defiance of employer sanctions in support of DACA recipients and the DREAM Act, I understand that quiet defiance is still civil disobedience. While philosopher John Rawls described civil disobedience as a "public, non-violent" act aimed at "bringing about change," he approvingly cited Harriet Tubman's underground railroad as a "conscientious evasion."[227] Secret civil disobedience is not surprising in a nation riddled with injustice. Those acting out of religious motivation are also properly viewed as engaging in civil disobedience even absent political motive.[228]

226.Sam Levin, Airbnb Vows to Be First Company to Defy Trump and Keep Employing Dreamers, GUARDIAN (Sept. 7, 2017), https://www.theguardian.com/us-news/2017/sep/07/silicon-valley-executives-dreamers-daca-trump.

227.Daniel T. Ostas, *Civil Disobedience in a Business Context: Examining the Social Obligation to Obey Inane Laws*, 47 AM. BUS. L.J. 291, 297 (2010).

228.*Id.*

While many in big business are not ready to announce a decision on whether they will defy employer sanctions for their DACA employees, the vast majority are ready to emulate Amazon's actions.[229] They will pay legal fees for evaluating whether their DACA employees are eligible for an immigration benefit under current law and cover filing fees for relevant applications. Many big business leaders are interested in learning more about the independent contractor strategy,[230] and I suspect that at least some will explore that option. A large number of nonprofit organization leaders with whom I have met have already made a commitment to their DACA employees that they will either defy the I-9 requirements or attempt to circumvent the rules through the independent contractor route. One nonprofit organization has already arranged for consultations for its DACA employees for assistance in forming LLCs.[231] The same organization has pledged to provide sufficient funds in an independent contractor agreement to cover medical benefits, a pension plan, and paid time off to deal with these arrangements.[232]

The work of the corporate strategy on the DREAM Act is far from done. Many more conversations with employers lie ahead. I have spoken with many DACA recipients who work for big business. Some hope their employees will do the right thing based on rhetoric they have heard, but none have received any firm information. Other DACA employees are at a loss and are very nervous about what will happen. One such person works for a big company whose CEO has spoken out in favor of the DREAM Act and signed on to opinion pieces. In spite of what the CEO has said publicly, the DACA employee told me that her supervisor knew nothing about the DREAM Act or DACA, so the CEO's sentiment has definitely not filtered down the ranks.[233] I spoke with personal acquaintances who are in-house counsel and an executive assistant at two major companies who have not made statements about the DREAM Act or DACA.[234] My information was new to them, and neither had any idea about the number of DACA recipients they employ and will only now begin a conversation with others at their companies.

In spite of the challenges, one thing is clear: when forced to think about what they will do if DACA is terminated by the Supreme Court, big business employers want to support their DACA employees in some way. The test is to work with these employers to determine what avenue they may be most comfortable with. My hope is that most will come to understand what is at stake for DACA recipients and recognize that the termination of DACA without the enactment of the DREAM Act is a moral disgrace that must be resisted. That resistance should be manifested in the form of open civil disobedience and disregard of the employer sanctions laws.

229.*See supra* notes 101-102 and accompanying text.

230.*See supra* notes 122-125, 173-174 and accompanying text.

231.Telephone Interview with FD, Executive Director, [Immigrant Rights Organization], (Feb. 5, 2023).

232.*Id.*

233.Telephone Interview with EW, HR Consultant, [Major Multinational Digital Communications Corporation] (Feb. 7, 2023).

234.Telephone Interview with SL, Vice President, Financing Global Business and Financial Policies, [Major Silicon Valley Company] (Jan. 19, 2023); Telephone Interview with DL, Chief of Staff, Office of the Vice President, [Major International Financial Services Company] (Feb. 5, 2023).