IN THE COURT OF APPEALS
STATE OF GEORGIA

C. DEAN ALFORD, W. PAUL BOWERS, LORI DURDEN, LARRY R. ELLIS, RUTLEDGE A. GRIFFIN, JR., JAMES M. HULL, DONALD M. LEEBURN, JR., WILLIAM H. NESMITH, JR., DOREEN STILES POITEVINT, NEIL L. PRUITT, JR., SACHIN SHAILENDRA, E. SCOTT SMITH, KESSELL D. STELLING, JR., BEN J. TARBUTTON, III, RICHARD L. TUCKER, THOMAS ROGERS WADE, LARRY WALKER, DON L. WATERS, and PHILIP A. WILHEIT, SR., in their individual capacities as members of the University System of Georgia's Board of Regents

Appellants,

vs.

RIGOBERTO RIVERA HERNANDEZ, SANDRA PAOLA SERVIN LARA, MARIA GUADALUPE CARRILLO GARCIA, YAEL JUVENTINO HERNANDEZ JOSE, JUAN FRANCISCO ORELLANA CASTRO, IVAN ALEXANDER MORALES RAMIREZ, ORLANDO RODRIGUEZ, JOSAFAT SANTILLAN, DULCE GUERRERO, and ALDO MENDOZA GUERRA,

Appellees.

Appeal No. A17A1124

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BRIEF OF APPELLANTS

The members of the Board of Regents of the University System of Georgia, (individual members referred to as "Regent" or collectively as the "Regents" and the Board referred to as the "Board" or the "Board of Regents"), by and through counsel Christopher M. Carr, Attorney General for the State of Georgia, appeal a December 30, 2016, Final Order of the Superior Court of Fulton County (R-629) that granted mandamus relief in error against the Regents who were sued only in their individual capacity. The trial court's ruling denying the Regents' motion to dismiss and granting the Appellees summary judgment should be reversed because mandamus is not a viable cause of action against a government official sued solely in that official's individual capacity. Furthermore, mandamus is not the proper vehicle by which the Appellees could seek a change to the Board of Regent's prior determination that they are not entitled to in-state tuition. Finally, mandamus can be used only to undo prior acts; thus, the trial court improperly imposed obligations on the Regents that govern their continuing and future conduct. Accordingly, this Court should reverse the trial court's Final Order denying the Regents' motion to dismiss and granting summary judgment in favor of the Appellees.

This case has been flawed from the outset. The Appellees are current and prospective students at Georgia universities and colleges who are not United States citizens but to whom the Department of Homeland Security ("DHS") has granted temporary relief from deportation through a program commonly referred to as Deferred Action for Childhood Arrivals ("DACA"). The Appellees (referred to as the "DACA Recipients") sued the Regents to force them, in their capacities as individuals, to provide the DACA Recipients with in-state tuition at certain Georgia universities and colleges. The type of relief the DACA Recipients requested, however, requires an official act that the members of the Board of Regents have no authority to perform as individuals. By suing the Regents for mandamus in their individual capacities, the DACA Recipients have requested relief that the trial court did not have subject matter jurisdiction to provide, and the Final Order granting this relief must be reversed.

Even apart from this fundamental flaw, the Final Order should also be reversed because (1) the trial court misinterpreted the applicable statutes, rules, and policies at issue; and (2) the trial court improperly applied the standard for granting a writ of mandamus.

PART ONE: STATEMENT OF THE CASE

The trial court granted the DACA Recipients summary judgment on their Amended Petition for Writ of Mandamus, even though they sought to force the Regents as individuals—and not in their official capacities as members of the University of System of Georgia's Board of Regents—to allow the DACA Recipients to pay in-state tuition rates. (R-166). Although the Regents believe that the trial court's Final Order is directly appealable, in light of the Supreme Court of Georgia's recent decision in *State of Ga. v. Int'l Keystone Knights of the Ku Klux Klan, Inc.*, 299 Ga. 392 (2016), and out of an abundance of caution, the Regents filed an Application for Discretionary Appeal contemporaneously with this direct appeal. *Alford, et al. v. Hernandez, et al.*, Application No. A17D0237 (Ga. Ct. App. 2017).

I. Parties

The DACA Recipients are not United States citizens. (R-629). All of the DACA Recipients claim that DHS has granted them a deferred-action deportation decision under the DACA program, a resources-based, prosecutorial-discretion program announced by then-Secretary of Homeland Security Janet Napolitano in a June 15, 2012, internal policy memorandum to officials overseeing agencies within

DHS ("Napolitano Memo"). (R-284).[1]

The Regents are the members of the Georgia Board of Regents.[2] The Board, in its current form, was created by the Georgia Constitution of 1983. GA. CONST. Art. VIII, Sec. IV, Para. I. Pursuant to the Georgia Constitution, "[t]he government, control, and management of the University System of Georgia and all of the institutions in said system shall be vested in the Board of Regents . . . ." *Id.* The Georgia General Assembly codified this power and provided that the Board of Regents shall have the power to "make such reasonable rules and regulations as are necessary for the performance of its duties . . . ." O.C.G.A. § 20-3-31(1). The "rules and regulations [of the Board of Regents] are included in the Board's Policy

[1] June 15, 2012, Memo from Janet Napolitano, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, available at http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf, last accessed March 29, 2017.

Manual . . . ." *Bd. of Regents of the Univ. Sys. v. Doe*, 278 Ga. App. 878, 886 (2006).

II. Procedural History

After a short period of discovery, the trial court held a hearing on the Regents' motion to dismiss and the DACA Recipients' motion for summary judgment on December 1, 2016. On December 30, 2016, the trial court issued an order denying the motion to dismiss and granting the motion for summary judgment, ordering the Regents to grant the DACA Recipients in-state tuition status. Regents sought an order of supersedeas in the trial court on January 1, 2017, which was denied on January 11, 2017. (R-676) Regents contemporaneously sought an order of supersedeas in this Court on January 9, 2017, which was granted on January 13, 2017, thus staying the enforcement of the

[2] Although Larry R. Ellis, is no longer a member of the Board of Regents, he is still a party to this action and appeal. The position on the Board Ellis previously occupied was filled by Sarah-Elizabeth Reed on February 10, 2017. *See* https://gov.georgia.gov/press-releases/2017-02-10/deal-appoints-25-boards, last accessed March 29, 2017. Ms. Reed is not a party to this action. Needless to say, as a former Regent sued in his individual capacity, Mr. Ellis cannot effectuate the relief sought by the DACA Recipients here. That alone should bar any grant of mandamus relief against former-Regent Ellis as a matter of law. *See* Section III.A, *infra*. Moreover, the provisions of O.C.G.A. § 9-11-25(d), which pertain to the automatic substitution of parties for public officials who resign or otherwise cease to hold office, do not apply because that provision relates only to actions in which the public officer is named as a party in his or her official capacity.

Final Order "pending the ultimate disposition of this Court upon appellate review of the merits of the Final Order." (R-741). This Court transferred the appeal to the Georgia Supreme Court on February 16, 2017, based on jurisdictional grounds, but the Supreme Court determined that jurisdiction lay in this Court by order dated February 27, 2017. *C. Dean Alford, et al. v. Rigoberto Rivera Hernandez, et al.*, Case No. S17A1071, Supreme Court of Georgia (2017). This Appeal follows.

III. Preservation of Enumeration of Errors

Enumeration one is an argument that the trial court lacked subject matter jurisdiction over the case, and, therefore, can be raised on appeal. *DOT v. Kovalcik*, 328 Ga. App. 185, 190 (2014) ("[A] court's lack of subject-matter jurisdiction cannot be waived and may be raised at any time either in the trial court, in a collateral attack on a judgment, or in an appeal.") (citation omitted); O.C.G.A. § 9-11-12(h)(3). The Regents preserved enumerations two and three by raising the legal issues underpinning the enumerations in their motion to dismiss. (R-272–80).

PART TWO: ENUMERATION OF ERRORS

The trial court committed the following errors:

1. Under Georgia case law and the Georgia Constitution' provision of official immunity, a petition for a writ of mandamus cannot be brought against

government officials in their individual capacities; therefore, the Final Order should be reversed because the DACA Recipients sued the Regents in their individual capacities.

2. The trial court misinterpreted the federal government's position on the legal classification of DACA Recipients, the relevant Regents' policies, and applicable state law. The Final Order forces the State to adopt and implement policies in contravention of the statutory framework enacted by the General Assembly and the policies that the Board of Regents is constitutionally authorized to promulgate.

3. The trial court incorrectly applied the mandamus standard. The court improperly granted the DACA Recipients a writ of mandamus compelling the Board of Regents to substitute and apply the federal usage of "lawful presence" in an online FAQ when the Board makes in-state tuition determinations. The Board currently makes these determinations using related but legally distinct terms from Georgia statute and Regents policy that were promulgated prior to the federal website being published. Moreover, the Final Order requires the Regents to grant the DACA Recipients in-state tuition status, but the official policy determination and interpretation at issue was a prior act the Regents made pursuant to their discretionary authority.

I. Statement of Jurisdiction

The Court of Appeals has jurisdiction to hear this appeal because the Regents filed their notice of appeal after the January 1, 2017, the effective date of 2016 Ga. Laws 865, § 3-5/HB 927 (Act. No. 626), which shifted appeals concerning the extraordinary writ of mandamus in O.C.G.A. § 9-6-28 from the Supreme Court to the Court of Appeals. *See* 2016 Ga. Laws 865, § 6-1/HB 927 (setting the effective date for the legislative change). In addition, the Court of Appeals has jurisdiction over this appeal because it does not involve issues reserved exclusively to the jurisdiction of the Supreme Court of Georgia. *See* GA. CONST. Art. VI, Sec. VI, Para. II and III.

PART THREE: ARGUMENT AND CITATION OF AUTHORITIES

I. Standard of Review

This Court reviews both the trial court's ruling on the motion to dismiss for failure to state a claim and its ruling on the motion for summary judgment *de novo*. *See Georgiacarry.Org, Inc. v. Atlanta Botanical Garden, Inc.*, 299 Ga. 26, 28 (2016) (motion to dismiss); *9766, LLC v. Dwarf House, Inc.*, 331 Ga. App. 287, 288 (2015) (summary judgment).

II. Statutory and Regulatory Background

A. Federal Regulatory Background

On June 15, 2012, then-DHS Secretary Napolitano issued a memorandum "setting forth how, in the exercise of [the Department's] prosecutorial discretion, the Department [] should enforce the Nation's immigration laws against certain young people . . . ." (R-284). In particular, she directed the immigration enforcement agencies of the federal government to exercise their prosecutorial discretion to abstain from removing certain undocumented persons from the United States who met criteria set forth in the memo. The resulting implementation of that prioritization of immigration enforcement resources is what has come to be referred to as DACA. Secretary Napolitano made clear that the "memorandum confers no substantive right, immigration status or pathway to citizenship" and that "[o]nly the Congress, acting through its legislative authority, can confer these rights." (R-286).

To clarify eligibility for deferment of deportation as well as to address what a grant of deferment entailed, U.S. Citizenship and Immigration Services ("USCIS"), an agency within DHS, published a Frequently Asked Questions webpage ("USCIS FAQ") on its official government website. (R-288).[3] The

[3] A current copy of the FAQ, which was last updated on October 27, 2015, is available at https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions, last accessed March 29, 2017.

USCIS FAQ explicitly states that "*deferred action does not confer any lawful status*." *USCIS FAQ* at A1, A5 (R-289–90) (emphasis added). The USCIS FAQ also provides that an individual "is not considered to be unlawfully present during the period in which deferred action is in effect" and does not "accrue unlawful presence (for admissibility purposes) during the period of deferred action." *Id.*[4] Notably, USCIS never directly defines the term "lawful presence." Instead, the term "lawful presence" is derived from the fact that DACA recipients will not be accruing "unlawful status" during the deferral period:

> [A]lthough deferred action does not confer a lawful immigration status, your period of stay is authorized by the Department of Homeland Security while your deferred action is in effect and, for admissibility purposes, you are considered to be lawfully present in the United States during that time.

Id. at A5 (R-290) (emphasis added). The USCIS FAQ webpage specifically states, however, that the terms "lawful presence," "lawful status," and similar terms "are used in various other federal and state laws" and advises that information on how those laws affect DACA recipients should come from the appropriate federal, state, or local authority. *Id.*

[4] This refers to the statutory 3 and 10 year reentry bar for individuals who accrue unlawful presence prior to their removal or voluntary departure. 8 U.S.C. § 1182(a)(9)(B).

B. State Statutory and Regulatory Background

Although the Board of Regents is granted broad authority to govern itself and enact its own policies, the General Assembly has provided some statutory guidelines. In determining in-state resident status for students for tuition or fees, O.C.G.A. § 20-3-66(d) proscribes certain categories of noncitizens from receiving in-state tuition and gives the Board of Regents the discretionary ability to extend in-state tuition to a limited set of specific categories of noncitizens:

> Noncitizen students shall not be classified as in-state for tuition purposes unless the student is legally in this state and there is evidence to warrant consideration of in-state classification as determined by the board of regents. *Lawful permanent residents, refugees, asylees, or other eligible noncitizens as defined by federal Title IV regulations may be extended the same consideration as citizens of the United States in determining whether they qualify for in-state classification.* International students who reside in the United States under nonimmigrant status conditioned at least in part upon intent not to abandon a foreign domicile shall not be eligible for in-state classification.

(emphasis added). No other statutory limitation or direction applies to the Board of Regents with regard to the determination of in-state tuition status.

As part of its policymaking authority, the Board of Regents has created a policy manual to govern the operations of the system. Two of the rules in the

manual are relevant to the questions at issue here. Policy 4 (R-320) governs Student Affairs, and Policy 7 (R-326) governs Finance and Business.[5] The Board of Regents adopted the language of O.C.G.A. § 20-3-66(d) wholesale as Policy 4.3.2.3, CLASSIFICATION OF STUDENTS FOR TUITION PURPOSES, NON-CITIZENS, which dictates that:

> A non-citizen student shall not be classified as in-state for tuition purposes unless the student is legally in this state and there is evidence to warrant consideration of in-state classification as determined by the Board of Regents. *Lawful permanent residents, refugees, asylees, or other eligible noncitizens as defined by federal Title IV regulations may be extended the same consideration as citizens of the United States in determining whether they qualify for in-state classification.*
>
> International students who reside in the United States under non-immigrant status conditioned at least in part upon intent not to abandon a foreign domicile shall not be eligible for in-state classification.

(R-322) (emphasis added).

An additional, rather than alternative, requirement exists in Regents' Manual Policy 4.3.4, VERIFICATION OF LAWFUL PRESENCE, which requires that each University System institution must verify the lawful presence of students who are admitted to the school:

[5] The Board's Policies are available at http://www.usg.edu/policymanual/, last accessed March 29, 2017.

> Each University System institution shall verify the lawful presence in the United States of every successfully admitted person applying for resident tuition status, as defined in Section 7.3 of this Policy Manual, and of every person admitted to an institution referenced in Section 4.1.6 of this Policy Manual.

(R-322). Regents' Manual Policy 7.3.1.1, DEFINITIONS, provides that "Out-of-State Tuition shall be defined as the rate paid by students who do not meet the residency status requirements as provided in Section 4.3 of this Policy Manual." (R-326–27).

Furthermore, the Board of Regents' Bylaws and Regents' Manual provide the exclusive remedy for students or applicants who are aggrieved by a Board of Regents decision. According to Regents Manual Policy 8.6, APPLICATION FOR DISCRETIONARY REVIEW, any student aggrieved by the final decision of the president of an institution, including decisions of admissions and residency, may apply for review of the decision. Regents Manual Policy 4.7.1, STUDENT APPEALS, gives a right of appeal to any student who is aggrieved by a final decision of a university president concerning the student's tuition status. (R-324). ("Any University System student aggrieved by a final decision of the president of an institution . . . may apply to the Board's Office of Legal Affairs for a review of the

decision, in accordance with Policy 8.6 Applications for Discretionary Review . . . .") (internal Board minutes citations omitted).

III. Enumeration of Errors

A. Enumeration of Error One: The Final Order should be reversed because a mandamus suit cannot be brought against the Regents in their individual capacities.

1. Mandamus is, by its very nature, an action brought against officials only in their official capacities.

A cause of action for the extraordinary writ of mandamus is available by statute under O.C.G.A. § 9-6-20. Fundamentally, mandamus is a remedy for "government[al] inaction—the failure of a *public official* to perform a clear legal duty." *Southern LNG, Inc. v. MacGinnitie*, 294 Ga. 657, 661 (2014) (emphasis added). To succeed on a claim for mandamus, the petitioner must show (1) that the public official has a clear legal duty to perform the official act requested; (2) that the requesting party has a clear legal right to the relief sought or that the public official has committed a gross abuse of discretion; and (3) that there is no other adequate legal remedy. *See Bland Farms, LLC v. Georgia Dept. of Agriculture*, 281 Ga. 192, 193 (2006); *see also SJN Props., LLC v. Fulton County Bd. of Assessors*, 296 Ga. 793, 800 (2015) (petitioner must show that no other adequate legal remedy is available and that it has a "clear legal right" to the relief sought); *Trip Network, Inc. v. Dempsey*, 293 Ga. 520, 522 (2013) ("Mandamus will issue

against a public officer under two circumstances: (1) where there is a clear legal right to the relief sought, and (2) where there has been a gross abuse of discretion."); *Goldman v. Johnson*, 297 Ga. 115, 116 (2015) (mandamus relief is not available if petitioner has an adequate legal remedy).

The Supreme Court of Georgia has made clear that mandamus relief can *only* be sought against officials for their failure to perform official duties. *See Southern LNG*, 294 Ga. at 661; *see also City of Hoschton v. Horizon Cmtys.*, 287 Ga. 567, 568 (2010) (holding that a suit for mandamus requires naming the official required by law to perform the official act sought in their official capacity); *SJN Props.*, 296 Ga. at 799 ("Our mandamus statute expressly authorizes claimants to seek relief against a *public official* 'whenever . . . a defect of legal justice would ensue from [the official's] failure to perform or from improper performance' of '*official duties*.'" (emphasis added) (quoting O.C.G.A. § 9-6-20)).

In sum, it is axiomatic that mandamus actions can only be brought against public officials sued in their official capacities to perform official duties. *See SJN Props.*, 296 Ga. at 799 n.6. ("[M]andamus actions . . . by their very nature may be sought only against public officials."); O.C.G.A. § 9-6-20 (mandamus used to compel performance of official duties). As the Court in *SJN Properties* noted, the viability, as well as the availability, of a mandamus claim depends on the existence

of a waiver of *sovereign* immunity, which governs claims against the state, an agency or department of the state, or an official sued in his official capacity. *See SJN Props.*, 296 Ga. at 799 n.6 ("Were we to hold otherwise, mandamus actions, which by their very nature may be sought only against public officials, would be categorically precluded by *sovereign* immunity." (emphasis added)); GA. CONST. Art. I, Sec. II, Para. IX(e); *Dep't of Natural Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 599 (2014) ("the plain language of Paragraph IX(e) explicitly bars suits against the State or its officers and employees sued in their official capacities, until and unless sovereign immunity has been waived by the General Assembly" (internal footnote omitted)); *Cameron v. Lang*, 274 Ga. 122, 126 (2001) ("Sovereign immunity applies to public employees sued in their official capacities because these are in reality suits against the state." (internal quotation marks omitted)).

Furthermore, improperly naming the capacity of a defendant is not a "mere misnomer." *See Bd. of Comm'rs v. Johnson*, 311 Ga. App. 867, 873 n.5 (2011). This Court has repeatedly recognized that there is a substantial difference between a suit brought against a government official in his or her official capacity and one brought in an individual capacity. *See, e.g. id.* at 871–72 (citing *City of Atlanta v.*

Harbor Grove Apts., 308 Ga. App. 57, 58 (2011); *Ward v. Dodson*, 256 Ga. App. 660, 662 (2002); & *Colvin v. McDougall*, 62 F3d 1316 (11th Cir. 1995)).

Here, the DACA Recipients sued each member of the Board of Regents in his or her individual capacity in an attempt to force these individuals to perform an official act; namely, to grant the DACA Recipients in-state tuition. A member of the Board of Regents, sued in his or her individual capacity, does not have the authority to grant the DACA Recipients in-state tuition. Thus, it was legally impossible for the trial court to order each member of the Board of Regents to take official action in each member's individual capacity.

2. A mandamus suit brought against officers in their individual capacity is barred by the Georgia Constitution.

Suits against officials in their individual capacities are governed by Paragraph IX(d) of the Constitution, which provides that:

> Except as specifically provided by the General Assembly in a State Tort Claims Act, all officers and employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, their ministerial functions and may be liable for injuries and damages if they act with actual malice or with actual intent to cause injury in the performance of their official functions. Except as provided in this subparagraph, officers and employees of the state or its departments and agencies shall not be subject to suit or liability, and no judgment shall be entered against them, for the performance or nonperformance of their official

> functions. *The provisions of this subparagraph shall not be waived*.

GA. CONST. Art. I, Sec. II, Para. IX(d) (emphasis added).

This doctrine, commonly referred to as official immunity, "protects state employees from being sued in their personal capacities." *Shekhawat v. Jones*, 293 Ga. 468, 470 (2013). The constitutional protection found in Paragraph IX(d) makes clear that, absent the exceptions found in the Tort Claims Act, no judgment shall be entered against state public officials sued for the performance or nonperformance of their official functions. *Id*.

In short, official immunity bars all actions brought against state public officials in their individual capacities that are not explicitly under the Tort Claims Act, and the General Assembly lacks the authority under the Constitution to otherwise waive this immunity. Accordingly, the individual capacity claims brought by the DACA Recipients are barred by the Georgia Constitution. *See* GA. CONST. Art. I, Sec. II, Para. IX(d). Thus, as a threshold matter, the trial court lacked subject matter jurisdiction to even entertain the claims brought by the DACA Recipients against the Regents. *See generally Cameron*, 274 Ga. at 124–25 (discussing availability of official immunity as a defense to claims other than those challenging ministerial acts done in a negligent way or discretionary acts performed with actual malice); *Considine v. Murphy*, 327 Ga. App. 110, 114–15

(2014) (holding that official immunity barred claims based on discretionary decisions in the absence of a determination that the act was done with actual malice), *rev'd on other grounds by Considine v. Murphy*, 297 Ga. 164 (2015).

Thus, mandamus relief is available against public officers only in their official capacity. This outcome makes sense. Mandamus can compel a public official only to perform an official act. *See* O.C.G.A. § 9-6-20. A public official sued in his or her individual capacity lacks the legal authority to act on behalf of the state; a state officer can only act on behalf of the state in his or her "official" capacity.[6]

Based on the foregoing, the Regents are entitled to official immunity barring the DACA Recipients' mandamus claim against the Regents in their individual capacity.

B. Enumeration of Error Two: The trial court misinterpreted the federal government's position on the legal classification of DACA Recipients, the relevant Regents' policies, and applicable state law.

This Court should also reverse the Final Order on the merits because of the

[6] The fact that the Supreme Court of Georgia has previously referenced the possibility of individual capacity suits being available against public officials in Georgia (*see Olvera v. Univ. Sys. of Ga.'s Bd. of Regents*, 298 Ga. 425, 428 (2016) (quoting *Sustainable Coast, Inc.*, 294 Ga. at 603), is immaterial here because mandamus is by its very nature an official capacity claim.

trial court's misinterpretation of the statutes, regulations, and policies at issue in this suit. In denying the Regents' motion to dismiss and granting the DACA Recipients' motion for summary judgment, the trial court held that the individual defendants, as members of the Board of Regents of the University System of Georgia, had no discretion in enforcing a "clear and unambiguous standard" in Board of Regents' policy governing in-state tuition, despite the fact that Georgia law grants the Board of Regents the discretion to develop and adopt that policy. (R-632). Specifically, the court held that because the term "lawful presence" is referenced in Board of Regents Policy 4.3.4 and that USCIS uses "lawful presence" on a FAQ page of its website, the Regents did not have the discretion to determine whether the DACA Recipients are entitled to in-state tuition under the Regents' own policies.

First, DACA by its own terms limits the use of "lawful presence" to a narrow range of federal immigration actions and determinations—primarily a calculation of time spent in "unlawful presence" in the United States for future readmission determinations. DACA does *not* determine what subsets of students are eligible for in-state tuition at a given university or college.

Second, the trial court's ultimate conclusion is in error for the basic reason that it conflates *verification* of lawful presence with *granting in-state tuition* to

students lawfully present in the United States. *See* (R-634–35) (concluding that the Regents created and enacted a policy that tied in-state tuition to an individual's "lawful presence" in the state). The court's ruling confines the entire determination of a prospective student's tuition classification to the term "lawful presence" in Policy 4.3.4 (R-634), when that policy states only that each University System institution "shall verify lawful presence" in determining whether the student should receive "resident student status." Policy 4.3.4 (R-322). The policy goes on to state that the institutions must look to Policy 7.3 for the definition of "resident student status." *Id.* The Definition section of Policy 7.3 (R-326–27) refers back to Section 4.3 of the Policy Manual for a determination of whether a student meets the residency requirements for either in-state or out-of-state tuition:

> **In-State Tuition**
>
> **In-State Tuition** shall be defined as the rate paid by students who meet the residency status requirements *as provided in Section 4.3* of this Policy Manual.
>
> **Out-of-State Tuition**
>
> **Out-of-State Tuition** shall be defined as the rate paid by students who do not meet the residency status requirements *as provided in Section 4.3* of this Policy Manual. Out-of-state tuition at all USG institutions shall be established by the Board, taking into consideration: (1) out-of-state tuition rates of peer or comparable institutions, and (2) the full cost of instruction. The annual increase in the out-of-state tuition amount must be

> at least equal to the dollar increase amount in in-state tuition.

(R-327) (italicized emphasis added). Thus, the trial court correctly determined that the answer to the question at issue lies in Policy 4.3, but, a reading of the entire section shows that the court analyzed the wrong subsection of that Policy.

In contrast to the trial court's incorrect conclusion, the subsection of Policy 4.3 that must be used to determine whether a student is entitled to in-state tuition is subsection 4.3.2, not 4.3.4. Regents' Manual Policy 4.3.2, CLASSIFICATION OF STUDENTS FOR TUITION PURPOSES, has two primary sections, Policy 4.3.2.2, CITIZENS, and 4.3.2.3, NON-CITIZENS, and this portion of Section 4.3 determines whether a student meets the residency requirements for either in-state or out-of-state tuition. *See* Policy 7.3.1.1 (R-327). The DACA Recipients are non-citizens; therefore, Policy 4.3.2.3 determines whether they meet the residency requirements for either in-state or out-of-state tuition. Policy 4.3.2.3 states that "[a] non-citizen student shall not be classified as in-state for tuition purposes unless the student *is legally in this state* and there is evidence to warrant consideration of in-state classification *as determined by the Board of Regents*." (R-322) (emphasis added). The policy further restricts in-state tuition to a limited subset of noncitizens, limited to "[l]awful permanent residents, refugees, asylees, or other eligible noncitizens as defined by federal Title IV regulations [who] *may* be extended the

same consideration as citizens of the United States in determining whether they qualify for in-state classification." *Id.* (emphasis added).

Thus, the trial court placed its entire focus on the wrong term. Under the plain language of the Policy, whether a non-citizen can receive in-state tuition has nothing to do with "lawful presence." Instead, that determination is based on Policy 4.3.2.3, and under that Policy, the DACA Recipients are not entitled to in-state tuition.

Moreover, both clauses of Policy 4.3.2.3 contain language that gives the Board the discretion to consider whether to provide a non-citizen with in-state tuition, with the language "as determined by the Board of Regents" and "may be extended" emphasized above. The trial court's erroneous conclusion shoehorns the discussion of the term "lawful presence" from nothing more than the USCIS online FAQ for DACA into the Regent's discretionary policies governing determinations of in-state tuition classification for non-citizens. The term "lawful presence" does not even appear in the definitional sections of either the Policy or state law. *See* Policies 4.3.2.3, 7.3.1.1 (R-322, 326–27); O.C.G.A. § 20-3-66(d).

Third, the one grouping of nonimmigrants to whom in-state tuition *may be permissively* available is a grouping within which DACA Recipients do not fall. Georgia law and its mirror image in the Regents' Policy Manual allow in-state

tuition for noncitizens only to those "legally in this state" and link the definition of this term to four recognized categories of lawful immigrant status found in Georgia law: "Lawful permanent residents, refugees, asylees, or other eligible noncitizens as defined by federal Title IV regulations may be extended the same consideration as citizens of the United States in determining whether they qualify for in-state classification." O.C.G.A. § 20-3-66(d); Policy 4.3.2.3 (R-322). None of the DACA Recipients are lawful permanent residents, asylees, or refugees. For the last remaining category of noncitizens to whom the Board has the discretion to grant in-state tuition, Georgia law and Policy 4.3.2.3 limit the extension of in-state tuition to "eligible noncitizens as defined by federal Title IV regulations." *Id.* USCIS is not the arbiter of who meets that definition, nor does USCIS have *any* authority over federal Title IV education regulations. Instead, jurisdiction for promulgating and administering those regulations falls within the purview of the United States Department of Education ("USDOE"), and, as the Regents pointed out in their argument and briefing before the trial court, USDOE has determined that recipients of deferred action under the DACA program are not eligible noncitizens under Title IV. (R-277–78, 526).

The trial court misinterpreted the statutory, regulatory, and policy schemes that govern the legal status of DACA recipients and the requirements that the

General Assembly and the Board of Regents have established for determining which students are entitled to in-state tuition. The Regents should not be bound to this erroneous interpretation and forced to comply with the inflexibility of a writ of mandamus when the Georgia Constitution grants the Board of Regents clear discretionary authority in this area.

C. Enumeration of Error Three: The trial court incorrectly applied the mandamus standard.

Finally, this Court should reverse the decision below because the trial court failed to correctly apply the standard for granting a writ of mandamus under Georgia law. First, the Regents' decision denying DACA Recipients in-state tuition is a prior act that is not addressable through mandamus. Second, the Board of Regents holds exclusive authority to regulate the grant or denial of in-state tuition; subject to the exercise of discretion that is not unreasonably arbitrary and capricious, decisions of the Board of Regents do not present judicially cognizable controversies nor do those decisions give rise to a challenge through mandamus. Thus, the trial court's Final Order imposes an impermissible course-of-conduct requirement on the Regents and improperly forces the Regents to make a discretionary decision. Third, the DACA Recipients failed to demonstrate both that they have a clear legal right to in-state tuition and that the Regents have a clear legal duty to grant the DACA Recipients in-state tuition. Finally, as the Regents

demonstrated in the trial court, the DACA Recipients have an adequate remedy at law to address the harm they are claiming by following the Board of Regents administrative review process. Based on these errors, this Court should reverse the trial court's denial of the Regents' motion to dismiss and should also reverse the court's decision to grant the DACA Recipients summary judgment.

1. The Regents' decision to deny the DACA Recipients in-state tuition is a prior act that cannot be addressed through mandamus.

Mandamus will not lie "to compel the undoing of acts already done or the correction of wrongs already perpetrated." *Hilton Constr. Co., Inc. v. Rockdale County Bd. of Educ.*, 245 Ga. 533, 540 (1980) (internal citations and quotations omitted); *see also Atlanta Indep. School Sys. v. Lane*, 266 Ga. 657, 660 (1996) (mandamus will not compel the undoing of acts already done); *Schrenko v. DeKalb County School Dist.*, 276 Ga. 786, 794 (2003) (mandamus not available to undo a past act). The very essence of mandamus is "government[al] *inaction* – the *failure* of a public official to *perform* a clear legal duty." *Southern LNG*, 294 Ga. at 661 (emphasis added).

Here, the Final Order uses mandamus to do exactly what the writ, by its very nature, was neither designed nor permitted to do, that is, to go back and correct some past perceived error in the actual *act* performed by governmental actors. The

prior act at issue in the case is the Regents' determination that DACA Recipients are not entitled to in-state tuition under Regents Policy. Moreover, there is no reason to believe that the Regents' Policy Manual, which was adopted in 2010 (R-177, 595), contemplated "lawful presence," as used in an online FAQ meant to explain the 2012 DACA Program, as synonymous with "legally in this state," the requisite statutory and regulatory standard for determining eligibility for in-state tuition. The law in Georgia could not be clearer that mandamus will not lie to compel such relief.

2. The trial court's Final Order imposes an impermissible course-of-conduct requirement on the Regents and improperly forces the Regents to undertake a discretionary act.

Even assuming *arguendo* that the Final Order requires that Regents must do something in the future, rather than (or in necessary concert with) undoing a past act, mandamus cannot be used to compel a particular course of conduct or to compel the performance of a discretionary act. *See Willis v. Georgia Dep't of Revenue*, 255 Ga. 649 (1986); *Gilmer County v. City of East Ellijay*, 272 Ga.774 (2000). "[N]or will [mandamus] lie where the court issuing the writ would have to undertake to oversee and control the general course of official conduct of the party to whom the writ is directed." *Solomon v. Brown*, 218 Ga. 508, 509 (1962). "Even where official action of some sort is required, however, where the action involves

the exercise of discretion, mandamus will not lie to dictate the manner in which the action is taken or the outcome of such action." *Bibb Cty. v. Monroe Cty.*, 294 Ga. 730, 736 (2014).

The Final Order imposes an impermissible course-of-conduct requirement on the Regents, which significantly curtails the Board's discretionary authority under both the Georgia Constitution and State statute to control, manage, and make policy decisions for the University System of Georgia. *See* GA. CONST. Art. VIII, Sec. IV, Para. I.; O.C.G.A. § 20-3-31(1). The order forces the Regents to adopt the trial court's interpretation of whether the DACA Recipients should receive in-state tuition, even though the Regents have plainly rejected that interpretation and decided, under their constitutional and discretionary authority, that the DACA Recipients are not entitled to in-state tuition. Notably, this adoption is not a discrete decision; it instead forces the Regents to adopt the DACA Recipients'—and now the trial court's—interpretation "from this point forward." (R-632). In other words, it compels a continuing course of conduct, and compels that conduct now and in the future. That is improper as a matter of law. *See Solomon*, 218 Ga. at 509.

Finally, all of the Regents' actions or judgments at issue, to the extent that any legal right may exist, are discretionary in nature, and, therefore, cannot be

compelled through mandamus. *See Bibb Cty.*, 294 Ga. at 736. As such, the DACA Recipients' mandamus claim failed this elemental test for the availability of mandamus relief.

3. The DACA Recipients failed to demonstrate that they have a clear legal right to in-state tuition and that the Regents have a clear legal duty to grant in-state tuition.

The essence of a writ of mandamus is to require a public official to perform *clear* official duties. The duty must be one arising by law, either expressly or by necessary implication; and "the law must not only authorize the act be done, but must also *require* its performance." *Alexander v. Gibson*, 300 Ga. 394, 395 (2016); *Bland Farms, LLC*, 281 Ga. at 19; *see also James v. Montgomery County Bd. of Educ.*, 283 Ga. 517, 518 (2008) (the plain language of the statutory provision at issue imposed no clear legal duty on the board and therefore mandamus properly was denied). The right to mandamus relief "exists only when the person seeking it has a clear legal right to have the particular act performed"; where the act sought comes with no clear, concomitant duty to perform the particular way that a plaintiff seeks, mandamus is not available. *Lansford v. Cook*, 252 Ga. 414, 414–15 (1984). Mandamus is "an available legal remedy . . . only for the purpose of compelling an officer to perform a specific act where his duty to do

so is *clear* and well-defined." *Moore v. Robinson*, 206 Ga. 27, 36–37 (1949) (emphasis added).

First, nothing in Georgia law, Regents Policy, or the USCIS FAQ webpage establishes that the DACA Recipients have a clear legal right to in-state tuition or that the Regents have a clear legal duty to provide the same. The trial court effectively determined that an internet FAQ from the federal government establishes a clear legal duty and clear legal right under Georgia law. This is an untenable result for a suit brought entirely as a mandamus action.

Second, Georgia law actually bars the DACA Recipients from receiving in-state tuition. O.C.G.A. § 20-3-66(d) serves as a statutory bar that prevents the classification of noncitizen students "as in-state for tuition purposes unless the student is legally in this state." While this statutory bar is absolute and mandatory, the only exception is both limited and discretionary, *permitting* but not requiring the Regents to extend in-state tuition to a narrowly defined group of "eligible noncitizens" if they are also Georgia residents. The statute limits the Regents to a discretionary grant of in-state tuition status to "[l]awful permanent residents, refugees, asylees, or other eligible noncitizens as defined by federal Title IV regulations" on the same basis as citizens of the United States; i.e., they are Georgia residents in addition to being in that narrowly defined category of eligible

noncitizens. O.C.G.A. § 20-3-66(d). The DACA Recipients do not fall into any of these categories of eligible noncitizens, which the trial court failed to address entirely. Moreover, as USDOE made clear when then-Education Secretary Arne Duncan stated that "[u]ndocumented students, including DACA recipients, are currently ineligible for Federal student financial assistance authorized under Title IV of the Higher Education Act of 1965."[7] (R-345).

Third, even assuming *arguendo* that the DACA Recipients fell into one of the categories of eligible noncitizens, the trial court's grant of a writ of mandamus was still erroneous because "the law must not only authorize the act to be done, but must *require* its performance." *Alexander*, 300 Ga. at 395 (emphasis added). The General Assembly vested discretionary latitude with the Regents to grant or withhold in-state tuition to noncitizens in these categories; neither state statute nor Board of Regents policy *requires* the Regents to grant in-state tuition to noncitizens in these categories. *See* O.C.G.A. § 20-3-66(d); Policy 4.3.2.3 (R-322).

Finally, this case involves an issue of comity between federal and state interpretations of the term "lawfully present" in the DACA program that

[7] October 20, 2015, Guidance Letter by Secretary Arne Duncan to College and University Leaders, available at

undermines the trial court's conclusion that the Regents have a *clear* legal duty to provide the relief that the DACA Recipients sought. Not only do the Regents and the State maintain a different interpretation of the term "lawful presence" than that of the DACA Recipients and the trial court, but the federal government itself has been unable to reach a settled determination of that term's meaning and effect. The current state of the law on what deferred deportation means under the internal agency directive referred to as DACA—including USCIS's determination of whether to treat one's undocumented presence in the United States as lawful or unlawful—is a matter of substantial uncertainty. *See, e.g., Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd per curiam*, *United States v. Texas*, 136 S. Ct. 2271 (2016) (issued by an equally divided court) (upholding nationwide injunction against creation of the DAPA program, an expansion of the original DACA program also implemented by executive order by the head of the Department of Homeland Security, because an agency's determination violated the requirement that a determination of who was to be considered lawfully present for USCIS purposes had to comply with the federal APA's notice-and-comment rule promulgation framework).

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http://www2.ed.gov/print/policy/highered/guid/secletter/151020.html, last accessed March 29, 2017.

Even if Board of Regents' policy turned exclusively on the proper definition to be given to the phrase "lawful presence," the USCIS FAQs do not provide clarity on that point but rather inject additional uncertainty regarding the legal effect, if any, of a website description in the absence of any substantive APA rulemaking or Congressional action. The uncertainty that has roiled the federal courts since the initial DACA directive issued by Secretary Napolitano, including an equal division on the United States Supreme Court, does not satisfy the requisite "clear duty" test for mandamus relief in Georgia, namely that the relief sought must be for a clear duty to perform a particular act in the particular way that the DACA Recipients seek. *See Lansford*, 252 Ga. at 414–15.

4. The DACA Recipients have an adequate remedy at law.

Finally, the trial court erroneously held that the DACA Recipients do not have an adequate remedy at law, and "mandamus cannot be issued where an adequate remedy at law exists." *Voyles v. McKinney*, 283 Ga. 169, 170 (2008). Regents' policy is clear that an individual aggrieved by a decision concerning denial of in-state tuition classification may appeal that decision first to the president of the applicable Regents institution then, if still aggrieved, to the Board of Regents through its Office of Legal Affairs. *See* Policy 4.7.1 (R-324). The trial court was concerned that the grievance process is discretionary on the part of the

Office of Legal Affairs and involves more procedural steps than filing the original petition at issue here. (R-637). Nevertheless, the DACA Recipients presented no evidence showing that the Office would use its discretion to bar a complaint from a DACA recipient or that the Regents' administrative review process operates any differently than any number of different state agency administrative review processes that are viable legal alternatives to mandamus. In granting summary judgment, the trial court likewise failed to rely on or cite to any evidence to support its conclusion that this alternative legal remedy would not be an adequate alternative here.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court Final Order.

Respectfully submitted this 4th day of April, 2017.

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This submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing **BRIEF OF APPELLANTS** by electronically filing it with Court of Appeals' eFaST system and by depositing a copy of the same to be delivered via United States Mail, addressed as follows:

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This 4th day of April, 2017.

/s/Josiah B. Heidt
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