IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

MERCEDES ROURKE-RODRIGUEZ, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF EDUCATION, and LINDA MCMAHON, in her official capacity as Secretary, United States Department of Education, Defendants.	))))))))))))	Case No. 8:25-CV-738 (ABJ/DJS) **BRIEF OF AMICUS CURIAE MOHAWK COUNCIL OF AKWESASNE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

ARGUMENT 1

I. Certain American Indians Born in Canada Have a Right to Pass the Border Under 8 U.S.C. § 1359 and Are Permanent Residents Under 8 C.F.R. § 289.2 1

II. Plaintiffs Cannot Be Required to Obtain Green Cards for Any Purpose. 6

III. The Department of Education's Regulations Cannot Require American Indians Born in Canada to Register With or Obtain Documentation From Federal Immigration Agencies. 9

CONCLUSION 12

Amicus curiae the Mohawk Council of Akwesasne ("MCA"), hereby files this amicus brief in support of Plaintiffs' Motion for Summary Judgment, Dkt. No. 34.[1] Below, MCA explains the background leading to the enactment of 8 U.S.C. § 1359, and why Defendants' interpretation of that provision and other laws and regulations are incorrect. MCA explained its identity and interest in this case on pages 2-3 of its memorandum in support of motion for leave to file.

ARGUMENT

Defendants' attempt to require Plaintiffs to submit to federal immigration registration requirements violates Plaintiffs' rights, protected by statute, 8 U.S.C. § 1359, to pass the borders of the United States. And it is contrary to the United States Citizenship and Immigration Services ("USCIS") regulation, which specifies that Plaintiffs are *ipso facto* permanent residents of the United States, 8 C.F.R.§ 289.2.

I. Certain American Indians Born in Canada Have a Right to Pass the Border Under 8 U.S.C. § 1359 and Are Permanent Residents Under 8 C.F.R. § 289.2.

8 U.S.C. § 1359 codified an unusual and pre-existing right that had been judicially explained immediately before Congress passed the statute. It is implemented by 8 C.F.R. § 289.2. We describe the history behind both provisions here.

Before colonization, there were no international borders in North America. The imposition of the U.S.-Canada border was of great concern to the Haudenosaunee—the nation of which MCA is a part—as it could have prevented them from traveling freely through their own territory. *See McCandless v. United States ex rel. Diabo* ("*Diabo II*"), 25 F.2d 71, 72 (3d Cir. 1928). This issue

---

[1] No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief. *See* Local Rule 7.2(d).

was resolved in the Article 3 of the Jay Treaty, *see* Treaty of Amity, Commerce, and Navigation, U.S.-U.K., Nov. 19, 1794, 8 Stat. 116. It provides, in relevant part, that

> it shall at all Times be free to . . . the Indians dwelling on either side of the said Boundary Line [between the United States and what is now Canada] freely to pass and repass by Land, or Inland Navigation, into the respective Territories and Countries of [the United States and Canada] on the Continent of America.

For over a century thereafter, Indians travelled freely between and within Canada and the United States without being subject to immigration restrictions. However, after the United States passed new immigration laws in the early 1920s, *see* Immigration Act of 1924, ch. 190, 43 Stat. 153, some federal officials began to impose immigration laws on Indians from Canada who were within the United States. *See Akins v. Saxbe*, 380 F. Supp. 1210, 1219-20 (D. Me. 1974).

This issue was litigated in the *Diabo* case, *see United States ex rel. Diabo v. McCandless* ("*Diabo I*"), 18 F.2d 282 (E.D. Penn. 1927), *aff'd* 25 F.2d 71 (3d Cir. 1928). *Diabo* concerned a Haudenosaunee man, born in Canada, who regularly worked in the United States as an ironworker. *Diabo II*, 25 F.2d at 71.[2] He was arrested for entering the United States without complying with immigration laws and sought a writ of habeas corpus. *Id.* The District Court ordered him released, reasoning that immigration laws did not apply to his passage through the border:

> [t]he boundary line to establish the respective territory of the United States and of Great Britain was *clearly not intended to, and just as clearly did not, affect the Indians*. It made no division of their country. The Jay Treaty of 1794 recognized this fact in the provision that the Indians residing on either side of the line, which as between the United States and Great Britain was established as a boundary line, should be unaffected in their right to pass this line at will.

---

[2] Since the early 20th century, Haudenosaunee have traveled from upstate New York and Canada to construct skyscrapers in New York City and nearby cites. Haudenosaunee were such a significant part of this workforce in the early- to mid-twentieth century that Canadian Haudenosaunee, including those from Akwesasne, developed their own community in Brooklyn. *See* Allan Downey, *Indigenous Brooklyn: Ironworking, Little Caughnawaga, and Kanien'kehá:ka Nationhood in the Twentieth Century*, 75 Am. Quarterly 1 (2023), https://muse.jhu.edu/article/883530.

Diabo I, 18 F.2d at 283 (emphasis added). The court explained that the Jay Treaty did not create this right, but it was a "recognition of their right, which was wholly unaffected by the treaty, except that the contracting parties agree with each other that each would recognize it." *Id.* The court then concluded that, since the United States had "recognized [petitioner's] right to go from one part of his country to another unobstructed by a boundary line, which as to him does not exist," that Congress could only deny that right by clear expression of intention to do so. *Id.*

On appeal, the Third Circuit affirmed, and explained the history of the Haudenosaunee's opposition to "any boundary line through their territory which would restrict intercourse and free passage to their people," *Diabo II*, 25 F.2d at 72. It further explained that the Nation had "contended, when the Jay Treaty was being negotiated, that they should have free access to all parts of their tribal territory by consent of both nations," reflecting the pre-treaty "*modus vivendi*." *Id.* at 72. The court concluded that this right was protected by the Jay Treaty, which was still in effect, and that the United States could not deny to Mr. Diabo "passage across the boundary line." *Id.* at 73. The Third Circuit further held "the order of the court below discharging him is affirmed." *Id.*

This right, that the district court in *Diabo* traced to a still-existing aboriginal right, and that the Third Circuit further concluded was protected by the Jay Treaty, was then enshrined in statute. As the *Diabo* case was pending, two bills protecting the right were moving through the United States Senate and House of Representatives. The day after the district court ruled, the Senate Committee on Immigration reported favorably on the Senate bill, amending it to title it "A bill to exempt American Indians born in Canada from the operation of the immigration act of 1924," and further explaining that the committee "does not believe that either House of Congress had

American Indians in mind in the adoption of the [I]mmigration [A]ct of 1924." S. Rep. No. 70-568, at 1 (1928).[3]

Twenty days after the Third Circuit affirmed the district court, the House of Representatives debated the legislation. Rep. Clarence MacGregor, who sponsored the bill in the House, explained that the legislation was only necessary because federal agents had begun applying the Immigration Act to Indians born in Canada, which he explained was objectionable because "[w]e took the land away from the Indians and now we are not permitting them to even go to and fro on the land which they originally possessed." 69 Cong. Rec. 5582 (daily ed. Mar. 29, 1928).[4] Although Rep. MacGregor explained that Indians were being prevented from crossing the border, he explained the effect of the legislation in broader terms, in light of the rights described in *Diabo*. After Rep. Emanuel Celler asked rhetorically if it was correct that "the courts decreed that the Indian is not an alien," Rep. MacGregor replied that the status of Indians born in Canada was "passed upon in a case which arose in the district court in Philadelphia," which "decided . . . that the Indians are entitled to admission irrespective of the immigration act of 1924 or the Jay treaty or anything else, but the department does not recognize decisions of the United States district

[3] *Available at* https://www.govinfo.gov/content/pkg/SERIALSET-08830_00_00-037-0568-0000/pdf/SERIALSET-08830_00_00-037-0568-0000.pdf. Eight of the ten members of the Senate Committee on Immigration that made this report to the full Senate had also been members of the committee when Congress passed the Immigration Act of 1924. *Compare Congressional Directory, 70th Congress, 1st Session* at 194 (1st ed. corrected Nov. 25, 1927), https://www.govinfo.gov/content/pkg/CDIR-1927-11-25/pdf/CDIR-1927-11-25.pdf, *with Congressional Directory, 68th Congress, 2d Session* at 186 (2d ed. corrected Jan. 12 1925), https://www.govinfo.gov/content/pkg/CDIR-1925-01-12/pdf/CDIR-1925-01-12.pdf. The bill as originally proposed also applied to members of certain tribes in Mexico, but the engrossed bill removed that provision, *see* S. Rep. No. 70-568, at 1.

[4] *Available at* https://www.congress.gov/70/crecb/1928/03/29/GPO-CRECB-1928-pt5-v69-14-2.pdf.

courts." *Id.* The Senate-passed bill immediately passed the House, and the proposed House version was tabled. *Id.*

The law was enacted a few days later, as the Act of April 2, 1928, ch. 308, 45 Stat. 401. The law provided, in relevant part, that "the Immigration Act of 1924 shall not be construed to apply to the right of American Indians born in Canada to pass the borders of the United States." The statute was re-enacted in Section 289 of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, 234 ("INA"). As currently codified, it provides that "[n]othing in this subchapter [i.e., 8 U.S.C. §§ 1151-1382] shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States." The statute originally exempted American Indians born in Canada "whose membership in Indian tribes or families is created by adoption." 45 Stat. 401. Section 289 of the INA modified the exception, so that 8 U.S.C. § 1359 now applies to "persons who possess at least 50 per centum of blood of the American Indian race."

In 1964, the Immigration and Naturalization Service[5] promulgated 8 C.F.R. § 289.2. *See* 29 Fed. Reg. 11493 (Aug. 11, 1964). Section 289.2, which implements 8 U.S.C. § 1359, provides that "[a]ny American Indian born in Canada who at the time of entry was entitled to the exemption provided for such person by [8 U.S.C. § 1359], and has maintained residence in the United States since his entry, shall be regarded as having been lawfully admitted for permanent residence." 8 C.F.R. § 289.2. The regulation further provides that, in the absence of documentation from USCIS of the person's entry into the United States, "other satisfactory evidence may be accepted to establish the date of entry." *Id.*

In 1974, the District of Maine, in *Akins*, considered the history of 8 U.S.C. § 1359 when deciding whether that statute exempted American Indians born in Canada from "post-entry alien

[5] Now USCIS. *See* 6 U.S.C. §§ 552(d), 557.

registration and notification requirements of" 8 U.S.C. §§ 1302(a), 1305, and 1306. *See* 380 F. Supp. at 1214. The dispute arose because the Attorney General had been requiring Canadian-born Indians to obtain green cards if they stayed in the United States more than thirty days. *Id.* The court found that "[i]mplicit in the statutory language is the recognition of an outstanding right," *id.* at 1219, and concluded that the legislative history and accepted principles of statutory interpretation showed that

> [T]he intent of Congress in enacting Section 1359 was to preserve the aboriginal right of American Indians to move freely throughout the territories originally occupied by them on either side of the America and Canadian border, and, thus, to exempt Canadian-born Indians from all immigration restrictions imposed on aliens by the Immigration and Nationality Act.

Id. at 1219; *see id* at 1220-21. Thus, the court found, they did not need green cards. *Id.* at 1220.

II. Plaintiffs Cannot Be Required to Obtain Green Cards.

Under 8 U.S.C. § 1359, nothing in 8 U.S.C. §§ 1151-1382 shall be construed to "affect" the "right to pass the borders of the United States." To construe the "plain meaning" of this provision, the court should "draw on 'the specific context in which that language is used, and the broader context of the statute as a whole.'" *In re Soussis*, 136 F.4th 415, 427 (2d Cir. 2025) (quoting *United States v. Rowland*, 826 F.3d 100, 108 (2d Cir. 2016)); *see Merck & Co. v. Reynolds*, 559 U.S. 633, 644 (2010). The word "affect" is common. In 1928, it was defined as "[t]o act upon; influence; change; enlarge or abridge." Black's Law Dictionary 46 (2d ed. 1910),[6] and today has essentially the same meaning, i.e., "to produce an effect on; to influence in some way," Black's Law Dictionary (12th ed. 2024). However, the phrase "the right to pass the borders of the United States" is an unusual legal phrase arising in a particular context. Moreover, it codifies an existing legal right that was explained in *Diabo* just before 8 U.S.C. § 1359's enactment. *See*

[6] Available at https://law.digital.georgetown.edu/handle/10822/707743.

Akins, 380 F. Supp. at 1219, 1220. When the proper interpretive rules are applied in this context, it shows Defendants' cramped interpretation of the right to pass the borders of the United States, *see* Dkt. No. 12-1, at 13–14, is plainly wrong.

"If a word is obviously translated from another legal source, whether the common law or other legislation, it brings the old soil with it." *Sekhar v. United States*, 570 U.S. 729, 733 (2013) (quotation omitted). And courts "normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck*, 559 U.S. at 648. Relatedly, when a law "codifies a pre-existing right," the scope of the protection of that right can only be understood with reference to the "history and tradition" of the exercise of that right. *See Frey v. City of New York*, 157 F.4th 118, 127 (2d Cir. 2025); *see Borough of Duryea v. Guarnieri*, 564 U.S. 379, 403 (2011) (Scalia, J., concurring in judgment in part and dissenting in part). 8 U.S.C. § 1359 plainly does not itself create a new right: it refers to "*the* right of American Indians born in Canada to pass the borders of the United States," (emphasis added), and says that certain federal immigration laws shall not "be construed to affect" it. *Akins*, 380 F. Supp. at 1219, 1220; *cf. District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (citing *United States v. Cruikshank*, 92 U.S. 542, 553 (1875)) (statement in Second Amendment that right to bear arms "shall not be infringed" recognizes existing right, rather than creating it).

The "old soil" or "history and tradition" of this right was explained in *Diabo*, which is a "relevant judicial precedent" of which Congress was aware in 1928. In particular, the "right to pass" was a "*modus vivendi*, to be thereafter observed in the future by Canada and the United States in reference to the Indians," which entailed their right to engage in "intercourse and free passage" and "free access to all parts of their . . . territory." *Diabo II*, 25 F.2d at 72-73. Given the very close relationship between *Diabo* case and enactment of 8 U.S.C. § 1359, Congress's knowledge of this background could be safely assumed—but it is also confirmed by the legislative history, which shows members of Congress understood that they were exempting American Indians born in Canada from immigration laws, *see supra* at 3-4, and codifying a right that had just been explained in *Diabo*, *see supra* at 4-5. *Akins*, 380 F. Supp. at 1220-21.

When these principles are applied here, it is obvious that Plaintiffs cannot be required to obtain an I-551 (whether as a form or a temporary stamp, *see* Dkt. No. 34-6 at 15-16). By recognizing the right "to pass the borders of the United States," 8 U.S.C. § 1359 protects Plaintiffs' right to engage in "intercourse and free passage" and "free access to all parts of their . . . territory." *See Diabo II*, 25 F.2d at 72–73. Section 1359 then expressly says that "[n]othing" in Title 8, chapter 12, subchapter II shall be construed to "affect" that right. The statute that requires certain people to obtain an I-551 is 8 U.S.C. § 1302(a), which is found in Subchapter II. And 8 U.S.C. § 1302(a) applies to conduct beyond simply crossing the border. Specifically, it requires that certain "alien[s] now or hereafter in the United States"[7] must register with the Government—e.g., apply for a I-551—to stay in the United States for more than thirty days. Under 8 U.S.C. § 1359, this statute cannot apply to Plaintiffs if it would "affect" their right to intercourse, free passage, and free access to all parts of their territory.

Application of this registration requirement would surely affect that right, which is why the court in *Akins* found it inapplicable under 8 U.S.C. § 1359, *see* 380 F. Supp. at 1220-21. If Plaintiffs must register and obtain immigration documentation in order to carry on with their lives in the United States—including, for instance, seeking financial support to obtain an education—that necessarily affects their rights to intercourse, free access, and free passage in their territory.

[7] Federal law defines "alien" in this context to mean "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3).

Defendants cannot downplay that impact, as the very purpose of 8 U.S.C. § 1302(a) is to regulate people's movement and activities into and within the United States. 8 U.S.C. § 1302(a) would therefore "affect" Plaintiffs' pre-existing right to "pass the borders of the United States," as recognized and described in *Diabo*. Section 1359 prevents that result.

Finally, if there were any question about application of these principles, any ambiguities in 8 U.S.C. § 1389 would have to be construed in "liberally in favor of the Indians" and "to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *accord Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior*, 228 F.3d 82, 92-93 (2d Cir. 2000); *Akins*, 380 F. Supp. at 1221. Ambiguities concerning the right "to pass the borders of the United States" would thus have to be interpreted in favor of the Indians, to benefit them. The interpretation that achieves that result, is to interpret the right consistent with how it was exercised by the Indians for hundreds of years before 8 U.S.C. § 1359 was enacted, as explained in *Diabo*. And that right cannot be affected by 8 U.S.C. § 1302(a).

III. The Department of Education's Regulations Cannot Require Plaintiffs to Obtain Green Cards.

Defendants have argued that submission to immigration registration—i.e., obtaining a green card—is simply a requirement to obtain federal financial aid under 20 U.S.C. § 1091(a) and 34 C.F.R. §§ 668.33 and 668.130. Dkt. No. 12-1 at 8. But these provisions do not, and cannot, require Plaintiffs to obtain green cards.

First and foremost, Defendants have no power to require anyone to comply with immigration requirements. Congress expressly assigned that authority to other officials and imposed limits on that authority which Defendants cannot alter. Congress defined the duty of "aliens" to register in 8 U.S.C. § 1302(a), which is administered and enforced only by the Secretary of Homeland Security, *see* 8 U.S.C. § 1103(a)(1). Defendants cannot exercise these powers, as "an agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Congress then directed that federal officials *cannot* implement 8 U.S.C. § 1302(a) in a way that would "affect" the right to pass the borders of the United States held by Plaintiffs, *see* 8 U.S.C. § 1359. As just shown, applying immigration registration requirements to Plaintiffs would "affect" their right to pass, and so these laws *do not* apply to Plaintiffs. Defendants cannot eliminate these congressionally-imposed limitations and establish new immigration requirements by bootstrapping laws and regulations dealing with other regulatory schemes, like financial aid for higher education.

Nor does 20 U.S.C. § 1091 require Plaintiffs to submit to immigration registration or provide evidence of such registration to obtain federal financial aid. Under 8 C.F.R. § 289.2, American Indians born in Canada who qualify under 8 U.S.C. § 1359 are *ipso facto* permanent residents, and do not need to provide any documentation from USCIS to establish that. Now consider 20 U.S.C. § 1091(a)(5), which describes when a student is eligible to receive a "grant, loan, or work assistance" under Title IV of the Higher Education Act ("Title IV HEA"). She can receive such aid if she is a citizen, a national, or a permanent resident of the United States. Or, she can receive aid if she is "able to provide evidence" from USCIS that she "is in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident." Section 1091(a)(5) does not require permanent residents to register with the government in any particular way or even to provide any particular documentation to demonstrate permanent resident status. *A fortiori*, Section 1091(a)(5) neither expands the power of the Defendants over immigration registration, nor does it limit 8 U.S.C. § 1359 in any way.

Defendants have argued that Department of Education regulations, *see* 34 C.F.R. §§ 668.33(a)(2)(i), 668.130(b), require Plaintiffs to obtain green cards to obtain federal financial aid. Dkt. No. 12-1 at 13–14. Regardless of what these regulations say, they cannot confer power on the Department of Education that Congress has not conferred by statute, since "[a]n agency's regulation cannot 'operate independently of' the statute that authorized it. *FEC v. Cruz*, 596 U.S. 289, 301 (2022) (quoting *California v. Texas*, 593 U.S. 659, 679 (2021)). Since Congress has said that immigration registration requirements *do not* apply to Plaintiffs, no regulation can allow that result.

For that reason, it is unnecessary to look at the text of the Department of Education's regulations. But even if the Court were to look to them, the rules of regulatory interpretation lead to the same result. *See Kisor v. Wilkie*, 588 U.S. 558, 575 (2019) (courts interpret regulations by "carefully consider[ing]" the "text, structure, history, and purpose of a regulation"). Defendants' *post hoc* litigation positions on the meaning of these regulations are not based on any reasoned agency decisionmaking, and so the court should not defer to them. *Garcia v. Garland*, 64 F.4th 62, 74 (2d Cir. 2023) (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)). In any event, though, Defendants' read of those regulations is plainly wrong.

When it comes to regulations, "normally the specific governs the general." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007). Section 289.2 is a *very specific* regulation that defines how certain American Indians born in Canada, including Plaintiffs, establish and demonstrate permanent residency. Under Section 289.2, American Indians born in Canada who satisfy 8 U.S.C. § 1359 do not have to obtain any evidence or documentation from USCIS to be permanent residents. In contrast, the two provisions on which Defendants have relied are *general* regulations dealing with all permanent residents in the country, not people like Plaintiffs. The first regulation, 34 C.F.R. § 668.33(a)(2)(i), requires non-citizen students to provide "evidence from [USCIS] that she or she . . . [i]s a permanent resident of the United States" to be eligible for receive program assistance under Title IV HEA. The second, 34 C.F.R. § 668.130(b), requires noncitizen students to show Title IV HEA eligibility when requested by the Secretary of Education or the institution at which they are enrolled or accepted, by "provid[ing] documentation from the [USCIS] of immigration status." Both regulations, which address broad categories of noncitizen students, assume that USCIS will have "evidence" or "documentation" of noncitizen students' permanent residency. But because Plaintiffs are expressly not required under the *extremely specific* 8 C.F.R. § 289.2 to obtain "evidence" or "documentation" from USCIS, they cannot be required to do so by *more general* Department of Education regulations.

Finally, Defendants' interpretation produces a fractured and self-defeating result. In their view, although Plaintiffs do not need a green card to be permanent residents, Plaintiffs nevertheless need to apply for a green card to access the benefits of being permanent residents. That interpretation should be rejected because it does not produce a "symmetrical and coherent regulatory scheme" and effectively voids portions of 8 U.S.C. § 289.2. *See In re Grand Jury Investigation*, 315 F. Supp. 3d 602, 633 (D.D.C. 2018) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)); *Leigh v. Raby*, 726 F. Supp. 3d 1207, 1216 (D. Nev. 2024).

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment.

//

//

//

//

//

//

Respectfully submitted

Dated: February 11, 2026

By: */s/ Frank S. Holleman*

Frank S. Holleman, NDNY Bar No. 700910
Rosalind Cuneo, AK Bar No. 2412171
Attorneys for Amicus Curiae the Mohawk Council of Akwesasne
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K St NW, Suite 600
Washington, DC 20005
Telephone: 202-682-0240
Fax: 202-682-0249
E-mail: fholleman@sonosky.com
rosalind@sonosky.net

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing using the Court's CM/ECF system on February 11, 2026, which will serve all counsel of record in this matter.

/s/ Frank S. Holleman

Frank S. Holleman