No. 15-674

In The
Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., *Petitioners,*
v.
STATE OF TEXAS, ET AL., *Respondents.*

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

AMICI CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE AND THE COMMITTEE TO DEFEND THE SEPARATION OF POWERS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI*

The American Center for Law & Justice ("ACLJ") is an organization dedicated to defending constitutional liberties secured by law. ACLJ attorneys have argued before this Court, lower federal courts, and state courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). The ACLJ has also participated as amicus curiae in numerous cases involving constitutional issues before this Court and lower federal courts. *E.g.*, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Van Orden v. Perry*, 545 U.S. 677 (2005).

The ACLJ has been active in advocacy and litigation concerning the need for strong and secure borders in addition to immigration reform passed by Congress, as Article I of the Constitution requires. The ACLJ has previously filed an amicus curiae brief defending the constitutional principles of federalism and separation of powers in the realm of immigration law in *Arizona v. United States*, 132

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* The Petitioners have filed a statement of blanket consent to amicus briefs. Respondents have provided written consent to the filing of this brief. No counsel for any party in this case authored in whole or in part this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

S. Ct. 2492 (2012); and participated as amici in both lower courts below.

The ACLJ's Committee to Defend the Separation of Powers represents more than 337,400 Americans who have stood against Petitioners' actions as an affront to the integrity of the Constitution. These individuals are also, as the district court held, negatively impacted by Petitioners' action.

Amici are dedicated to the founding principles of separation of powers. They believe that the laws of this nation do not empower Petitioners to unilaterally "change the law" against the will of Congress, and that the challenged Directive abrogates the President's obligation to "take Care that the Laws be faithfully executed."

SUMMARY OF ARGUMENT

The "Deferred Action for Parents of Americans and Lawful Permanent Residents" (DAPA), Pet. App. 411a (DHS Memorandum of Nov. 20, 2014); 244a and 382-85a (discussing nomenclature for the challenged action), injures Respondents. The district court made certain findings of fact — that DAPA will increase the number of unlawfully present aliens and the costs to the States for the services they demand — that support standing *and* illustrate how DAPA contradicts Congress's immigration laws with devastating humanitarian consequences.

To be sure, DAPA violates the Constitution and Congress's expressed intent in its immigration laws. The Constitution vested in Congress the exclusive authority to make law and set immigration policies. Congress has created a comprehensive immigration scheme — which authorizes case-by-case exceptions while delineating certain categorical treatment of specified classes of immigrants, *infra* p. 25 — but the class identified by DAPA for categorical relief is not one authorized by Congress. Thus, DAPA, at the admission of the President, changes the law and sets a new policy, exceeding the Executive's constitutional authority and disrupting the delicate balance of powers.

The Government also exceeded the bounds of its prosecutorial discretion and abdicated its duty to faithfully execute the law. Instead of setting enforcement priorities, it created a class-based program that establishes eligibility requirements that, if met, grant unlawful immigrants a renewable lawful presence in the United States and substantive benefits. The lack of individualized review or guidelines by which an immigration officer could deny relief to those who meet the eligibility requirements further demonstrates categorical nonenforcement and violates this Court's precedent.

For the reasons stated, and in addition to the other grounds advanced by Respondents, this Court should affirm.

ARGUMENT

This brief focuses first on an aspect of Respondent's standing, and then the States' constitutional Take Care Clause claim and how DAPA is contrary to pertinent immigration statutes duly enacted by Congress. DAPA creates a new class — the over 4 million parents of U.S. citizens (and lawful permanent residents) who are unlawfully in the United States — and grants members of the class deferred removal (among other benefits) if they meet the basic eligibility requirements. R. 235; Pet. App. 258-62a. Petitioners' creation of a categorical, class-based program is neither moored in constitutional authority nor in authority delegated by a statute passed by Congress.

By contradicting Congress's express and implied intent, DAPA violates the test articulated in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Furthermore, by enacting a sweeping new program under the guise of prosecutorial discretion, Petitioners violated controlling precedent and abdicated their constitutional duty to faithfully execute the law.

This Court should affirm.

I. THE DISTRICT COURT'S FINDINGS THAT DAPA WILL INCREASE THE NUMBER OF UNAUTHORIZED ALIENS SUPPORT STANDING *AND* SHOW HOW DAPA VIOLATES CONGRESS'S IMMIGRATION LAWS WITH GRIM HUMANITARIAN CONSEQUENCES.

While both lower courts correctly concluded that the increased costs to the States for driver licenses caused by DAPA satisfy this Court's standing jurisprudence, the district court, in a different context, made additional important findings of fact that support standing, as well. The district court found that, with respect to healthcare, law-enforcement, and education costs, "[t]he States rightfully point out that DAPA will increase their damages with respect to the category of services discussed above *because it will increase the number of individuals that demand them*." Pet. App. 311a (emphasis added).

This critical finding, and others, by the district court demonstrates standing regardless of the nature of costs incurred, because it goes to *why* DAPA would increase costs across the board. Amici focuses primarily on increased healthcare, law-enforcement, and education costs as these costs cause injury and establish standing independently and without regard to the driver licenses costs.

A. The District Court Made Findings of Fact Regarding the States' Healthcare, Law-Enforcement, and Education Costs.

The district court had no trouble finding that "[t]he record in this case provides many examples of these costs." Pet. App. 301a. "Texas' undocumented population is approximately 1.6 million, and Plaintiffs' evidence suggests that at least 500,000 of these individuals will be eligible for deferred action through DAPA." Pet. App. 272a. "Evidence shows that Texas pays $9,473 annually to educate each illegal alien child enrolled in public school." Pet. App. 301a. "This figure presumes the provision of bilingual services. If bilingual services are not required, the cost is $7,903 annually per student." Pet. App. 301a, n.36. "Evidence in the record also shows that in 2008, Texas incurred $716,800,000 in uncompensated medical care provided to illegal aliens." Pet. App. 302a.

The district court also found that "[t]hese costs are not unique to Texas, and other states are also affected. Wisconsin, for example, paid $570,748 in unemployment benefits just to recipients of deferred action." Pet. App. 302a. "Arizona's Maricopa County has similarly estimated the costs to its law enforcement stemming from those individuals that received deferred action status through DACA. That estimate, which covered a ten-month period and included only the law enforcement costs from the prior year, exceeded $9,000,000." Pet. App. 302a; R. 2925; *see* Pet. App.

247-48a ("This influx, for example, is causing the States to experience severe law enforcement problems.").[1]

More generally, the district court found that "there can be no doubt that the failure of the federal government to secure the borders is costing the states — even those not immediately on the border — millions of dollars in damages each year." Pet. App. 300a. "While the Supreme Court has recognized that states 'have an interest in mitigating the potentially harsh economic effects of sudden shifts in population,' the federal government has effectively denied the states any means to protect themselves from these effects." Pet. App. 300a (quoting *Plyler v. Doe*, 457 U.S. 202, 228 (1982)).

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[1] DAPA implicates other costs to the States as well. *See* Declaration of Walt Neverman, Director of the Crime Information Bureau within the Division of Law Enforcement Services of the Wisconsin Department of Justice, R. 2095 (explaining that DAPA lawful presence recipients will qualify for Wisconsin concealed carry license; and concealed carry fees will not cover the costs thus requiring expenditure of other state funds); Declaration of Finis Welch, Ph.D, R. 2284-85 (explaining conclusion that DAPA "gives employers a financial incentive to hire an undocumented immigrant who is newly authorized to work instead of an identically skilled citizen" as employers are not required to provide insurance, otherwise required pursuant to the Affordable Care Act (ACA), to DAPA recipients); *id.* at 2285 ("[A]s a result of the interaction between [DAPA] and the ACA, there will be relatively less hiring of U.S. citizens and relatively lower wages on average for those who are hired.").

The district court continued: "The States lose badly needed tax dollars each year due to the presence of illegal aliens—a clear drain upon their already-taxed resources." Pet. App. 304a. And, "[i]t has been recognized that the resources of states are drained by the presence of illegal aliens—these damages unquestionably continue to grow." Pet. App. 308a; *see* Pet. App. 247a (finding States are "concerned about their own resources being drained by the constant influx of illegal immigrants into their respective territories").

The district court "agree[d] to the actual existence of the costs being asserted by Plaintiffs," Pet. App. 304a, noting that "[e]ven the Government makes no serious attempt to counter this argument, considering that the Government's lack of border security combined with its vigilant attempts to prevent any state from protecting itself have directly led to these damages." Pet. App. 304-05a. Importantly, the district court concluded that "[c]ausation here is more direct than the attenuated causation chain patched together and accepted by the Supreme Court in *Massachusetts* [*v. EPA*, 549 U.S. 497 (2007)]." Pet. App. 305a.

B. The District Court Found That DAPA Would Cause Costs for Services to Increase "Because it Will Increase the Number of Individuals That Demand Them."

As noted above, the district court agreed with the States "that DAPA will increase their damages" concerning healthcare, law-enforcement, and education costs "because it will increase the number of individuals that demand them." Pet. App. 311a.[2] This is true because, as the district court found, with respect to the "many [unlawfully present] individuals each year that self-deport from the United States and return to their homeland," "*DAPA will incentivize these individuals to remain in the United States*." Pet. App. 311a (emphasis added) (footnote omitted).[3] The court's finding is supported by the Record.[4]

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[2] This conclusion is supported by the Record. *See*, *e.g.*, Declaration of Richard Allgeyer, Ph.D., R. 1252 ("[T]he total costs to the State of providing such services and benefits to undocumented immigrants will continue to rise in the future to the extent that the number of undocumented immigrants residing in Texas increases.").

[3] A second category of cost-causing aliens is also implicated here—"the individuals that would have been deported without the legal status granted by DAPA." Pet. App. 311-12a. The States "alleg[ed] that their continued presence in this county will increase state costs," as "in the absence of the DAPA program, the DHS in its normal course of removal proceedings would have removed at least some of these individuals. Thus DAPA will allow some individuals who would have otherwise been deported to remain in the United

The court found that "many individuals voluntarily return to their homeland," Pet. App. 311a & n.41 (citing John F. Simanski, Dep't of Homeland Sec., *Immigration Enforcement Actions: 2013*, at 1 (2014), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf), and that "in the years 2007 through 2009, more illegal immigrants self-deported back to Mexico than immigrated into the United States." *Id.* Specifically, "[i]mmigration experts estimate that 178,000 illegal aliens self-deport each year." Pet. App. 312a (citing Simanski, *supra*, at 1). Notwithstanding Petitioners' likely ability but failure to calculate the number of so-called "self-

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States." Pet. App. 312a. As the district court observed, "[t]he Government has made no cogent response to this argument." Pet. App. 312a. However, as Respondents are not challenging the forbearance of removal aspect of DAPA, the cost-damages caused by this group is, perhaps, less relevant to this Court's analysis. Yet the reality is that DAPA will cause an increase in cost-damages to the States with respect to this second group, as well, as the district court agreed with the States and found "that there are a number of individuals that fall into each category." Pet. App. 312a.

[4] *See* J.A. 334. Karl Eschbach, Ph.D., opined that "DACA and DAPA will have a positive effect on increasing the size of the unauthorized population" because "[t]hese policies, which offer deferred action status and work authorization to eligible unauthorized individuals, encourage those eligible to stay in the United States and incentivizes other ineligible unauthorized immigrants to remain in the United States with the hope that they will be the beneficiaries of a future adjustment of status." *Id.* "As a result, the number of unauthorized immigrants will increase in the United States by making self-deportation a less attractive option." *Id.*

deporters" that would have otherwise qualified for DAPA relief, the court found it "reasonable to conclude, however, that some of these individuals would have self-deported or been removed from the country." Pet. App. 312a. And, the court found, "[t]he absence of these individuals would likely reduce the states' costs associated with illegal immigration." Pet. App. 312-13a.

Two things, then, are readily apparent from the district court's findings: (1) DAPA will cause an increase in unlawfully present aliens remaining in the United States; and (2) DAPA will injure the States because the increased number will cause an increase in costs to the States.[5] The States have articulated an injury caused by DAPA that, but for

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[5] Addressing the Government's only response — a "suggest[ion]" that economic benefits arising from the increase in illegal aliens caused by DAPA would offset the undisputed costs to the states — to the States' contention, the court concluded the damages/offset calculation was too speculative to support a finding of redressability. Pet. App. 313a. But a favorable ruling would certainly redress the States' injury, just as it did concerning the increase in driver license costs: But for DAPA, the costs to the States would not increase as the number of illegals incentivized by DAPA to remain in the United States would not increase. Moreover, the Fifth Circuit rejected the notion that offset analysis was proper in determining standing unless "those off-setting benefits" "are of the same type and arise from the same transaction as the costs." Pet. App. 22a (citing *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 656-59 (9th Cir. 2011); *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 570-75 (6th Cir. 2005); and *Markva v. Haveman*, 317 F.3d 547, 557-58 (6th Cir. 2003)).

DAPA, would not occur. Petitioners concede the increased costs, but simply argue that those costs are offset. But Petitioners' suggestion of a disconnected and uncalculated offset changes nothing: "Our standing analysis is not an accounting exercise." Pet. App. 22a (quoting *NCAA v. Governor of N.J.*, 730 F.3d 208, 223 (3d Cir. 2013)). The States' standing is plain.

C. Beyond Standing, the District Court's Findings Demonstrate DAPA's Contradiction of Congress's Immigration Laws.

These district court findings — undisputed by Petitioners, do more than buttress the States' standing to challenge DAPA. Indeed, they highlight yet another aspect of DAPA's unlawfulness. Congress has found that programs granting benefits function as a magnet. 8 U.S.C. § 1601(2) (2012) ("It continues to be the immigration policy of the United States that . . . (B) the availability of public benefits not constitute an incentive for immigration to the United States."); *id.* § 1601(6) ("It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits."). And Congress sought to end the magnetic draw of these programs with the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (enacting comprehensive ban on unauthorized aliens

working) and in 1996 with the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996), and Title V of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009, 3009–670 to -89 (1996) (limiting benefits like Medicare and Social Security to lawfully present aliens). Recognizing that deportation was not the only way to enforce its immigration laws, Congress acted to disincentivize unlawful presence by restricting the availability of work permits and other benefits. 8 U.S.C. § 1601(2), (6) (2012).

DAPA undoes what Congress so carefully did. As the district court found, and as remains undisputed by Petitioners, DAPA will increase the number of unauthorized aliens because "DAPA will incentivize these individuals to remain in the United States." Pet. App. 311a (footnote omitted). Moreover, "the DAPA program will likely make it more attractive for unauthorized immigrants to migrate to the United States" in the first place. J.A. 334 (expert opinion of Karl Eschbach, Ph.D.); *see* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-180, UNACCOMPANIED CHILDREN, HHS CAN TAKE FURTHER ACTIONS TO MONITOR THEIR CARE 4 (2016), http://www.gao.gov/assets/680/675001.pdf (finding "the decision to migrate to the United States is also influenced by a desire for family reunification, educational opportunities, [and] perception of U.S. immigration policy").

D. Lawless Executive Policies Like DAPA Hurt, Rather Than Help, Vulnerable Immigrants.

Lawless executive policies like DAPA have devastating, even if unintended, humanitarian consequences. Such programs contribute to the irresistible magnetic draw of the access to benefits they provide. The government has recognized as much: "the decision to migrate to the United States is also influenced by . . . perception of U.S. immigration policy." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-180, 4; *see* J.A. 334. Even if an immigrant's perception of DAPA's scope is inaccurate, the perception is real, and the perception is the magnet. The consequences are disastrous — especially for children. The recent (and ongoing) unaccompanied minor crisis serves as a cogent and tragic example.

"The U.S. faced a crisis in 2014 when as many as 10,000 children a month, and another 16,000 adults with children, began arriving at the southwestern border." Evan Perez, *U.S. Sees New Spike in Number of Children, Families Crossing Border*, CNN (Sept. 21, 2015), http://www.cnn.com/2015/09/21/politics/us-children-crossing-border-spike/. In 2015, the Washington Post reported that "[u]naccompanied minors are crossing the U.S. Southwest border in growing numbers again," as "[i]n October and November [of 2015], more than 10,500 children crossed the U.S.-Mexico border by themselves." Jerry Markon & Joshua Partlow,

Unaccompanied Children Crossing Southern Border in Greater Numbers Again, Raising Fears of New Migrant Crisis, WASH. POST (Dec. 16, 2015), https://www.washingtonpost.com/news/federal-eye/wp/2015/12/16/unaccompanied-children-crossing-southern-border-in-greater-numbers-again-raising-fears-of-new-migrant-crisis/.

"The number of unaccompanied children apprehended by Department of Homeland Security (DHS) officials and subsequently placed in the care of the Department of Health and Human Services' (HHS) Office of Refugee Resettlement (ORR) increased from nearly 6,600 in fiscal year 2011 to nearly 57,500 in fiscal year 2014, the highest number of children on record." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-180, 4. The number of children actually apprehended is higher, as only a certain percentage of the children are transferred to HHS. *Id.* A total of 17,109 children were apprehended in fiscal year 2011; 27,868 in 2012; 42,349 in 2013; and 73,741 in 2014. *Id.*

HHS Secretary Sylvia Burwell acknowledged that "[t]his sharp increase in children entering this country is a result of many factors." Markon & Partlow, *supra*. But the Government Accountability Office went further:

> We previously reported that children from El Salvador, Guatemala, and Honduras often leave their home country due to crime, violence, and lack of economic opportunity, *among other reasons. In particular, the*

> *decision to migrate to the United States is also influenced by a desire for family reunification, educational opportunities, perception of U.S. immigration policy, and the role of smuggling networks that encourage migration*.

U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-180, 4 (emphasis added). "Some of these children are fleeing from poverty and violence in their home country, *seeking to rejoin family members already here, and/or hoping to find work to support their families in their home countries*." Statement by Mark Greenberg, Acting Assistant Secretary, Administration for Children and Families, U.S. Dept. of Health and Human Servs., before the Permanent Subcommittee on Investigations 3 (Jan. 28, 2016) (emphasis added).

Even migrants who know they do not qualify for DAPA as it stands today could reasonably hope that its scope could be expanded in the future. Petitioners, after all, claim the unreviewable power to do so — and have already expanded DACA from its original scope. Either way, by contributing to the perception of access to benefits, which Congress expressly meant to foreclose, DAPA encourages unlawful aliens to migrate across the Southern border to the United States. These migrants, many of which are unaccompanied children, are subjected

to grave danger and inhuman conditions.[6] En route, innumerable individuals suffer the perils of abuse, trafficking, and exploitation.[7] For example, the GAO found that "some children disclosed harrowing stories of their journeys to the United States, including incidents such as being tied to a tree for several days, experiencing a sexual assault, and watching a fellow train rider's execution by beheading." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-180, 39.[8] And sadly, the abuse and trafficking continue even after they've crossed the border.[9]

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[6] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-180, 4 ("Many traveled hundreds or thousands of miles under dangerous conditions, such as atop trains or on foot through deserts, to reach the U.S. border."); R. 2892 (noting that of a group of 140 migrants who recently crossed in Texas, "10 children were taken to local hospitals, though it's unclear why," and that "[s]even more were diagnosed with active scabies.").

[7] Statement of Mark Greenberg, *supra*, at 4 (noting children are "especially vulnerable to human trafficking, exploitation, and abuse on their way to the United States").

[8] *See also, e.g.*, R. 2865 (noting statements of South Texas citizens recounting discovery of dead bodies of migrants and concern DAPA will cause "more traffic, more illegal smuggling, [and] more dead bodies in Brooks County").

[9] Senator Claire McCaskill, ranking member of a bipartisan Senate investigation, recently recounted the sickening stories of two such children who were sexually abused and trafficked in labor by their HHS-selected sponsors, and found that "[s]imilar examples fill the case files reviewed by the Subcommittee: vulnerable and traumatized minors abused by their sponsors, or forced to engage in backbreaking labor for little or no pay, while being housed in unsanitary and

II. DAPA VIOLATES THE DUTY TO FAITHFULLY EXECUTE THE LAW AND THE SEPARATION OF POWERS BECAUSE IT VIOLATES CONGRESS'S EXPRESS AND IMPLIED INTENT.

Few enumerated powers are more fundamental to the sovereignty of the United States than the control of the ingress and egress of immigrants. The Constitution vested in Congress "[a]ll legislative Powers," U.S. CONST. art. I, § 1, and particularly vested in Congress the exclusive authority to "establish an uniform Rule of Naturalization," *id.* § 8, cl. 4. In 1817, this Court recognized Congress's exclusive authority over naturalization. *Chirac v. Lessee of Chirac*, 15 U.S. (2 Wheat.) 259, 269 (1817). Beyond naturalization, this Court has recognized that Congress has plenary power over immigration,[10] and has said

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dangerous conditions." *Adequacy of the Department of Health and Human Services' Efforts to Protect Unaccompanied Alien Children from Human Trafficking*, Permanent Subcommittee on Investigations, 114th Cong. (Jan. 28, 2016) (statement of Sen. McCaskill). Indeed, investigations by both the Government Accountability Office and the Senate Permanent Subcommittee on Investigations found that "children were released to sponsors who subjected them to sexual abuse, labor trafficking, or neglect." Josh Siegel, *The Immigration Crisis of Unaccompanied Minors Never Really Ended*, THE DAILY SIGNAL (Feb. 22, 2016), http://dailysignal.com/2016/02/22/the-unaccompanied-minor-children-immigration-crisis-never-really-ended/.

[10] *See, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 201 (1993) ("Congress . . . has plenary power over

that "over no conceivable subject is the legislative power of Congress more complete" than it is over immigration. *Reno v. Flores*, 507 U.S. 292, 305 (1993).

Similarly, this Court has recognized that it is Congress's exclusive authority to dictate policies pertaining to immigrants' ability to enter and remain in the United States. As Justice Frankfurter aptly said:

> Policies pertaining to the entry of aliens and *their right to remain here* are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the *formulation of these policies is entrusted exclusively to Congress* has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.

Galvan v. Press, 347 U.S. 522, 531 (1954) (emphasis added) (internal citations omitted). While the President has a constitutional obligation to faithfully execute the laws, U.S. CONST. art. II § 3, the function of devising general laws and policies

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immigration matters."); *INS v. Chadha*, 462 U.S. 919, 940-41 (1983) ("The plenary authority of Congress over aliens under Art. I, §8, cl. 4, is not open to question."); *Boutilier v. INS*, 387 U.S. 118, 123 (1967) (same).

for implementation belongs solely to Congress. "The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935). Indeed, "[t]he sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there." *Id.* at 630. When a president changes the law, his actions are *ultra vires*, an exercise of powers not his own. In so doing, he violates Article II, Section 3. Changing the law is anything but faithfully executing it.

"The Constitution, in distributing the powers of government, creates three distinct and separate departments — the legislative, the executive, and the judicial." *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933). The objective of separation of powers transcends any one president or any particular issue of the day. "This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands." *Id.* (internal citation omitted).

The founders intentionally separated these powers among the branches, fearing that a concentration of power in any one branch, being unchecked, would become tyrannical. Their

conscious design to strengthen the government through this separation of powers is articulated in *The Federalist Papers*[11] and visible in the structure of Articles I, II, and III of the U.S. Constitution. As Justice Brandeis put it, their purpose was to create friction, not avoid it. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."). In this design, the powers were not separated to ensure governmental efficiency, but to restrain the natural tendency of men to act as tyrants. *See id.* ("The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."). In the words of Justice Frankfurter:

> A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from

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[11] *See* THE FEDERALIST NO. 47, at 269 (James Madison) (Clinton Rossiter ed., rev. ed. 1999) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").

> which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford.

Youngstown, 343 U.S. at 613 (Frankfurter, J., concurring).

The President recognized these limits on multiple occasions. *See* R. 67 ("I would be ignoring the law in a way that I think would be very difficult to defend legally. So, that's not an option."); *id.* ("If in fact I could solve all these problems without passing laws in Congress, then I would do so. But we're also a nation of laws."); *id.* at 68 ("I cannot ignore those laws any more than I could ignore, you know, any of the other laws that are on the books."); *see id.* at 230-33; Pet. App. 265a.

Yet despite this recognition, he boldly proclaimed that DAPA "change[d] the law." R. 234; Pet. App. 84a, 361a, 384-85a; Press Release, Remarks by the President on Immigration—Chicago, Ill., The White House Office of the Press Sec'y (Nov. 25, 2014) ("But what you're not paying attention to is the fact that I just took action to change the law.").

A. DAPA Fails the Constitutional Test in *Youngstown*.

"In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown*, 343 U.S. at 587. This is because "[t]he Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute." *Id.*

DAPA created a categorical deferred action program that conflicts with Congress's expressed and implied intent in existing law and its exclusive authority to legislate and set immigration policy. When the President acts within an area generally considered to be under the constitutional authority of Congress, as he has done here, courts have applied Justice Jackson's three-tier framework articulated in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). According to *Youngstown*, when the President acts pursuant to an authorization from Congress, his power is "at its maximum." *Id.* at 635-36. When Congress is silent on the matter, "there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637. Yet, when the President acts in conflict with Congress's expressed or implied intent, "his power is at its lowest ebb, for then he can rely only upon

his own constitutional power minus any constitutional powers of Congress over the matter." *Id.*

Tier one of the framework, which entails authorization from Congress, is inapplicable to the present analysis by the President's own admission. He claims that he had to act *because Congress failed to act*. R. 230-33, 234; Pet. App. 84a, 265a, 361a, 384-85a; *see also infra* II. B. (addressing lack of statutorily delegated authority). Nor is DAPA saved by the second tier — the "zone of twilight." Critically, Congress's refusal to enact the President's *preferred* policy is not "silence." Congress has enacted extensive immigration laws — just not the provisions the President prefers. Differing policy preferences do not provide license to, as the President said, "change the law."

Congress has created a comprehensive immigration scheme, which expresses its desired policy as to classes of immigrants — but the class identified by DAPA for categorical relief is unsupported by the scheme. The Supreme Court, in no ambiguous terms, has recognized Congress's "sole[] responsibility" for determining "[t]he conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, [and] the right to terminate hospitality to aliens." *Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 596-97 (1952) (Frankfurter, J., concurring)). In this same vein, Congress also has

exclusive authority to determine through legislation when hospitality should be extended to a broad class of immigrants. As Justice Frankfurter said, the Constitution "entrusted exclusively to Congress" the formulation of who has the "right to remain here." *Galvan*, 347 U.S. at 531. Importantly, Congress has elected *not* to create an avenue of immigration relief, such as deferred action, for the class defined by DAPA, and specifically legislated *against* the right of this class of individuals to remain in the United States.

Congress has been anything but silent on who has the right to remain in the United States and to whom immigration relief should be granted. Congress has created a complex scheme regarding who has the right to lawfully remain in the United States, and has expressly prescribed limited avenues for the extension of immigration relief. *See, e.g.*, 8 U.S.C. § 1182(d)(5)(A) (2012) (providing that the Attorney General may "only on a case-by-case basis" parole noncitizens into the United States for "urgent humanitarian reasons or significant public benefit"). Provisions of the Immigration and Naturalization Act (INA) also furnish immigration relief to survivors of domestic violence, *id.* § 1229b(b)(2), victims of trafficking, *id.* § 1227(d), refugees, *id.* § 1158(b)(1)(A), and for a spouse, parent, or child of certain U.S. citizens who died as a result of honorable service, National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c), (d) (2003).

In legislating these limited avenues for the exercise of discretion, Congress neither expressly nor implicitly authorized the creation of a non-statutory avenue of relief for a broad class of immigrants whom the law deems unlawfully present. *Cf. FCC v. NextWave Pers. Commc'n, Inc.*, 537 U.S. 293, 302 (2003) (holding that when Congress has intended to create an exception to a code, "it has done so clearly and expressly"). The clash between DAPA's categorical relief and the INA's comprehensive scheme eliminates Petitioners' recourse under either the first or second tier of the *Youngstown* framework.

Turning to the third tier, the creation of a new avenue for immigration relief for parents of a U.S. citizen or permanent resident conflicts with Congress's expressed and implied intent. Congress has not authorized deferred action for the class targeted by DAPA. To the contrary, Congress enacted detailed requirements for allowing these parents entry and the ability to remain in the United States. *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1182(a)(9)(B)(i), (ii), 1201(a), 1255 (2012). The Government may not "disregard legislative direction in the statutory scheme that [it] administers." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985). Finding itself in conflict with Congress's intent, under the third tier of *Youngstown*, the Government is left to rely exclusively on the powers vested in the Executive under Article II of the Constitution. Yet, this Court has consistently stressed Congress's plenary power over

immigration law and policy, except in rare cases of foreign affairs not implicated here. Importantly, case law recognizes neither executive power to alter Congress's finely calibrated balance nor Petitioners' authority to change the law, which the President has openly admitted to doing in this case. The Take Care Clause is not a license to legislate.

The comprehensive nature of the INA and Congress's predetermination of limited avenues for immigration relief leave no room for the Petitioners' creation of a categorical avenue of relief to those designated by law as unlawfully present. To find otherwise would allow executive action to disrupt the delicate balance of separation of powers, obliterate the Constitution's Take Care Clause, U.S. CONST. art. II, § 3 (and Presentment Clause, *id.* art. I, § 7, cl. 2), and hijack the exclusive authority of Congress to set laws and policy on immigration matters. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives — or the hallmarks — of democratic government." *Chadha*, 462 U.S. at 944.

B. DAPA Conflicts with Congressional Intent and Exceeds Any Statutorily Delegated Authority.

DAPA defies Congress's exclusive authority over immigration with the intention, as the President

has admitted, of setting a new policy and creating new law. The Government has misplaced its reliance on authority generally granted to the Secretary of Homeland Security in section 103(a)(3) of the INA. *See* 8 U.S.C. § 1103(a)(3) (2012). Section 103(a)(3) specifically limits the delegated authority of the Secretary for those actions that are "necessary for carrying out [its] authority under the provisions of this chapter." *Id.* This chapter in no way gives the Government the authority to create out of whole cloth an extensive, categorical deferred action program that grants affirmative legal benefits. Nor, as the lower courts correctly held, would such a program be *necessary* to carry out the authority delegated to the Secretary.[12]

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[12] The Government also tries to justify the Guidance by relying on the history of past executive actions, but an overwhelming majority of past executive actions on immigration granting broad deferred action were *country-specific* (thus implicating the President's authority under foreign affairs) or directly implemented existing law. Only on rare occasions has the Government defined a class of individuals for non-country specific relief from removal. *See* Ruth Ellen Wasem, Cong. Research Serv., RS7-5700, Discretionary Immigration Relief 7 (2014). Notably, these past actions were never challenged or upheld by this Court and thus represent at most mere political examples — not legal precedent — and are irrelevant to the constitutional analysis. The lowers courts correctly reasoned that past action previously taken by DHS does not make its current action lawful. This Court in *Youngstown* squarely held that past executive actions could not "be regarded as even a precedent, much less authority for the present [action]." *Youngstown*, 343 U.S. at 648-49 (rejecting then-President

Similarly, while The Homeland Security Act does make the Secretary of DHS responsible for "[e]stablishing national immigration enforcement policies and priorities," 6 U.S.C. § 202(5) (2012), there is a substantial difference between priorities for enforcement, which allow the agencies tasked with carrying out the law to focus their limited resources, and creating enforcement-free zones for entire categories of unlawful immigrants. Yet, the Government maintains its authority derives from this delegation, and equates section 202 discretion with absolute authority over all immigration actions, even those inconsistent with codified law.

But as the lower courts correctly found, under the Government's rationale of its authority, nothing would prevent it from creating a similar program exempting *all* 11.3 million unlawful immigrants from removal. Such a nonsensical understanding of this delegation of discretion to enforce the law is inconsistent with a Constitution devoted to the Rule of Law — a Constitution that dedicates plenary legislative authority to Congress.[13] *See*

Truman's argument that although Congress had not expressly authorized his action the "practice of prior Presidents ha[d] authorized it"). Thus, this Court should reject these arguments.

[13] Absolute and unfettered discretion that results from Petitioners' interpretation of their authority to provide substantive benefits to any immigrant granted deferred action may also "run[] afoul of the non-delegation doctrine even in its moribund state." John C. Eastman, *Did Congress Really Give the Secretary of Homeland Security Unfettered*

Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."); *Chadha*, 462 U.S. at 945 ("But policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.").

The lower courts correctly held that this general grant of discretion cannot be read to delegate authority to rewrite the law. Section 202 of the INA cannot thus be the basis for creating a program for a class of immigrants otherwise removable that allows them a renewable period of lawful presence in the United States and "also awards over four million individuals . . . the right to work, obtain Social Security numbers, and travel in and out of the country." Pet. App. 364a.

The removal of unlawful immigrants carries enormous importance to the overall statutory scheme, but DAPA does not just articulate

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Discretion Back in 1986 to Confer Legal Immigrant Status on Whomever He Wishes?, Engage Vol. 15, Iss. 3 (Jan. 14, 2015), at 27, 30, http://www.fed-soc.org/publications/detail/did-congress-really-give-the-secretary-of-homeland-security-unfettered-discretion-back-in-1986-to-confer-legal-immigrant-statu status-on-whomever-he-wishes.

priorities for removal,[14] it grants legal benefits on a categorical basis to current unlawful immigrants.[15] As the district court recognized, DAPA grants "legal presence" in the United States during the duration of the deferral. Pet. App. 336a, 342a. Legal (or lawful) presence is a change in the codified law on how the Government calculates an immigrant's unlawful presence for purposes of future admissibility.[16] Thus, while this status is allegedly revocable and temporary, DAPA granted lawful presence to an entire class of immigrants otherwise deemed unlawfully present by law. This grant of lawful presence runs contrary to *expressed*

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[14] Neither Petitioners' expressed enforcement priorities nor their authority to set these priorities has been challenged in this suit. The district court enjoined only the DAPA and modified "Deferred Action for Childhood Arrivals" (DACA) programs, expressly preserving Petitioners' authority to set enforcement priorities. Pet. App. 44a, 185a, 187a, 207a.

[15] Petitioners and their Amici ignore the causal relationship between DAPA and the substantive benefits granted (work authorization, travel benefits, social security, and lawful presence for the purpose of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I)). Pet. Br. 8-9. DAPA *is* the causal link: It effectively legislates that a new class of immigrants, which the INA otherwise deems removable, is lawfully present for the duration granted and eligible for these substantive benefits. Such action is akin to the Executive legislating a new non-immigrant work visa that allows a foreign national to remain in the United States for a specified duration.

[16] Petitioners concede as much. *See* Pet. Br. 9, n.3 (conceding DAPA beneficiaries cease accruing "unlawfully present" time for purposes of 8 U.S.C. § 1182(a)(9)(B) because DHS treats deferred action as a period of stay authorized by the Secretary (internal quotation marks, brackets, and citation omitted)).

limits on Petitioners' discretion provided in the INA. Further, because of the daunting administrative realities of immigration, it is clear that many of the immigrants within the scope of DAPA could receive unlimited, *de facto* permanent residence, an obvious insult to Congressional intent. And the increase in the numbers of immigrants has created administrative confusion and has exposed ill-equipped processes for proper updating and planning for these populations.[17] Tracking and data deficiencies hamper the Government's ability to follow and access illegal immigrants.[18] These problems are only compounded by the overwhelming of federal judicial resources tasked with reviewing the status of these immigrants. *See* Lomi Kriel, *Houston*

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[17] The unaccompanied minor crisis plainly illustrates the Government's unpreparedness and lack of planning. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-180 ("Highlights") ("The number of children needing [Office of Refugee Resettlement (ORR)]'s care . . . began increasing again toward the end of the summer. Given the inherent uncertainties associated with planning for capacity needs, ORR's lack of a process for annually updating and documenting its plan inhibits its ability to balance preparations for anticipated needs while minimizing excess capacity.").

[18] *See, e.g.*, *id.* at 35 (determining that, although the ORR has "some information" on the post-release from custody status of immigrant children receiving services, it "does not have processes to ensure that all of these data are reliable, systematically collected, and compiled in summary form to provide useful information about this population for its use and for other government agencies.").

Immigration Courts Overwhelmed as Backlog Quintuples, HOUSTON CHRONICLE (Mar. 15, 2016), http://www.houstonchronicle.com/news/Houston-texas/houston/article/Houston-immigration-courts-overwhelmed-as-backlog-6892204.php.

By granting unlawful immigrants lawful presence (for purposes of 8 U.S.C. § 1182(a)(9)(C)(i)(I) (2012)) during the deferred period, Petitioners violate the express and implied intent of Congress. Congress expressly limited Petitioners' ability to grant waivers of grounds of inadmissibility for any unlawful immigrant present in the United States for over a year and who has been previously removed. *Id.* § 1182(a)(9)(B)(v), (C)(iii). Thus Petitioners' blanket grant of "lawful presence" to immigrants who would otherwise be inadmissible for the prescribed time exceeds the Executive's authority and contravenes Congress's intent.

Petitioners' lawful presence via deferred action framework conflicts with immigration laws and Congress's clear intent in yet another way. Recall that DAPA is modeled after DACA. Pet. App. 416a-17a. It is undisputed that deferred action beneficiaries under DACA qualify for and have received "advance parole": "According to U.S. Citizenship and Immigration Services (USCIS), in the first two years of DACA implementation, over 6,400 DACA recipients requested advance parole. And out of the 4,566 cases decided by that time, only 566 had been denied. That is an advance parole grant rate of 88%." Press Release,

Congressman Bob Goodlatte, *Goodlatte: Change to Unilateral Immigration Program Provides Pathway to Citizenship* (Feb. 13, 2015), http://goodlatte.house.gov/press_releases/662 (citing information provided by USCIS). This is no coincidence, as USCIS announced "DACA requestors will now be able to file applications for advance parole at the same time they file their DACA application." *Id.* (citing "USCIS 'Congressional Update and Teleconference' regarding the expanded DACA program").

As immigration practitioners are well aware, accomplishing parole removes a bar to adjusting to lawful permanent resident status. 8 U.S.C. § 1255(a) (providing status only adjustable for person who was "admitted or paroled into the United States"). "Indeed, a number of DACA applicants have successfully adjusted their status after being paroled back into the United States." Immigrant Legal Res. Ctr., *Practice Advisory: From Advance Parole to a Green Card for DACA Recipients* 7 (Feb. 18, 2016), http://www.adminrelief.org/resources/item.592261-Practice_Advisory_From_Advance_Parole_to_a_Green_Card_for_DACA_Recipients. How many have done so is unclear, as Petitioners have not bothered to track or provide that number. J.A. 403; *see* Press Release, Congressman Bob Goodlatte ("I can only hope that not having a way to track such requests is not intentional to avoid answering the very question my staff asked"). Regardless, lawful permanent residents may apply to become naturalized citizens. 8 U.S.C. § 1427(a). The

ramifications of deferred action are astounding. Truly, DAPA "chang[ed] the law." R. 234; Pet. App. 84a, 361a, 384-85a.

Moreover, the Government misplaces its reliance on an implied general policy of family unification. Past legislative actions, enacted through Congress's constitutional authority, do not justify Petitioners' unilateral creation of a new avenue for immigration relief that affirmatively grants legal benefits to unlawful immigrants. Conversely, Congress has enacted numerous provisions *that prioritize penalizing unlawful entry over the immigrant's familial ties*. *See, e.g.*, 8 U.S.C. § 1255(a) (2012) (providing that immigrants who entered the United States illegally cannot adjust status in the United States to that of permanent residence, even if they qualify for a green card such as by marrying a U.S. citizen); *id.* § 1182(a)(9)(B), (C) (providing that immigrants who have been unlawfully present for certain periods of time are inadmissible to the United States, even if they qualify for a green card such as by marrying a U.S. citizen); *id.* § 1153(a) (setting forth the numerical limitations on many family-based green card categories). The Government cannot splice from context a congressional policy to justify creating a categorical program for immigration relief to a class of immigrants the law deems unlawful. The Government stretches the enabling sections beyond their breaking point to enact the Executive's agenda over that of Congress.

DAPA is neither moored to constitutional authority, either express or implied, nor can it be moored to a delegation of statutory authority. The President expressly acknowledged this fact on numerous occasions. *See* R. 230-33; Pet. App. 265a. Nevertheless, the Government subverted the very law it was charged with enforcing and, as the President admitted, created new law.

III. DAPA VIOLATES THE DUTY TO FAITHFULLY EXECUTE THE LAW BECAUSE IT EXCEEDS THE BOUNDS OF PROSECUTORIAL DISCRETION.

Petitioners assert that creating the deferred action program is a legitimate act of prosecutorial discretion. But claiming prosecutorial discretion does not render its action constitutional; instead, it triggers a new analysis: Did the Government abuse its discretion by creating a categorical deferred action program of this magnitude, which is not backed by any statutory authority? They did.

Drawn from the Executive's constitutional obligation to faithfully execute the law, U.S. CONST. art. II, § 3, and the doctrine of separation of powers,[19] this Court has recognized that the Execu-

[19] In addition to the Take Care Clause, some have opined that prosecutorial discretion is also rooted in the Executive Power Clause, U.S. CONST. art. II, § 1, cl. 1, the Oath of Office Clause, *id.* § 2, cl. 8, the Pardon Clause, *id.* § 2, cl. 1, and the Bill of Attainder Clause, *id.* § 9, cl. 3. *See In re Aiken Cty.*, 725 F.3d 255, 262-63 (D.C. Cir. 2013).

tive has broad prosecutorial discretion. *See, e.g.*, *Wayte v. United States*, 470 U.S. 598, 607 (1985); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *see also Arizona*, 132 S. Ct. at 2498. But this discretion, while broad, is not unfettered. *United States v. Batchelder*, 442 U.S. 114, 125 (1979).

This Court has constrained prosecutorial discretion to the decision whether to prosecute, or in the case of immigration, whether to enforce the law, *in an individual case*. *See Arizona*, 132 S. Ct. at 2499 (recognizing the need for discretion to consider "immediate human concerns" and to preserve the "equities of an individual case"); *Chaney*, 470 U.S. at 831. Expounding on this requirement, this Court warned in *Heckler v. Chaney* that the conscious and express adoption of a categorical exemption might reflect a "general policy that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4 (internal quotation marks omitted). Lower courts applying *Chaney* have indicated that a nonenforcement decision applied broadly raises suspicion of whether the Executive has exceeded its prosecutorial discretion. *See, e.g.*, *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996); *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994); *see also Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973); J.A. 51; R. 95 (expressing advice of OLC that categorical policy of nonenforcement poses "special risks"). Despite this requirement, Petitioners knowingly exceed their discretion to "enter[] the

legislature's domain" and "use[] enforcement discretion to categorically suspend enforcement" to their preferred class of offenders. Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 676 (2014).

There is a dramatic difference between setting enforcement priorities and rendering guidelines for enforcement (as DHS did in a separate directive, *see supra* n.14), and creating a categorical program with base-line eligibility requirements. The former requires individualized assessment; the latter does not. The new "Guidance" articulated in Petitioners' November 20, 2014, DAPA Memorandum provides *no* guidance by which an officer may exercise discretion and reject an application that meets the eligibility criteria that have been set forth.

Drawing analogy from the approvals under the DACA program — a program the Guidance said would be the model for DAPA, Pet. App. 260-61a; R. 4388 — the district court found that less than five percent of all applicants were denied. Pet. App. 256a; R. 4385. The Government admitted "most" of these denials "were based on a determination that the requestor failed to meet certain threshold criteria." R. 4148. The district court had requested specific evidence of the "number, if any, of requests that were denied even though the applicant met the [eligibility] criteria," but the Government failed to provide such evidence. Pet. App. 256-257a & n.8; R. 4385-86 & n.8. Thus, the deferred action program for more than four million unlawful immigrants is nothing more than a conveyer belt of

rubberstamping, or more aptly put, a categorical exemption hidden under the guise of prosecutorial discretion. *See* J.A. 49; R. 94 (advising that Petitioners could not "under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match [their] policy preference").

Moreover, the Government's prospective nonenforcement — or rather its public announcement to decline enforcement of the law in the future — is particularly offensive to Congress's legislative supremacy because it undermines the intended deterrent effect of immigration laws. Such prospective, categorical nonenforcement programs like DAPA far exceed the bounds of prosecutorial discretion and amount to a violation of Petitioners' Article II, section 3 duty to faithfully execute the law. "Similarly, categorical nonenforcement for policy reasons" as the President has admitted to here, "usurps Congress's function of embodying national policy in law." Price, *Enforcement Discretion*, *supra* p. 38, at 705.[20]

The Government ignored the limits of prosecutorial discretion, and if this Court does not

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[20] "[T]hese two forms of executive action most closely approximate the two forms of executive power that the historical background suggests the Framers sought specifically to prohibit: prospective licensing resembles the royal dispensing power, while categorical nonenforcement resembles an executive suspension of statutory law." Price, *Enforcement Discretion*, *supra* p. 38, at 705 (discussing at length the history and limits of prosecutorial discretion).

affirm the preliminary injunction, such unbound authority "could substantially reorder the Constitution's separation of powers framework. . . . [b]y permitting [Petitioners] to read laws, both old and new, out of the Code . . . [and] provide Presidents with a sort of second veto." *Id.* at 674.

CONCLUSION

For these reasons, this Court should affirm, and hold that DAPA violates the Take Care Clause of the United States Constitution.

Respectfully submitted,

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