No. 15-674

In the Supreme Court of the United States

UNITED STATES, *et al.*,

Petitioners,

v.

TEXAS, *et al.*,

Respondents.

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

AMICUS CURIAE BRIEF OF JUSTICE AND FREEDOM FUND SUPPORTING RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Fifth Circuit should be affirmed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). JFF has made numerous appearances in this Court as *amicus curiae*, including *Arizona v. United States*, 132 S. Ct. 2492 (2012).

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case is not about immigration policy. It is not about the wisdom of DAPA's directives. It is about the separation of powers, a doctrine central to the structure of American government. That separation is not always convenient. Gridlock may occur when the legislative and executive branches do not agree about policy. But the Framers wisely recognized that concentration of power in one person or one branch would lead to tyranny. The Deferred Action for Parents of Americans and Lawful Permanent Residents Memorandum ("DAPA") defies the Constitution by grabbing power that belongs solely to the legislative branch. It poses a threat too serious to ignore.

Executive authority admittedly involves the exercise of discretion in the criminal justice system and agency administration. Discretion makes it possible to allocate scarce resources wisely. But discretion is not unfettered and may not be used to encroach on legislative territory by overriding congressional policies. DAPA conflicts with the intricate statutory scheme Congress enacted to address immigration and work authorization. Indeed, Congress declined to adopt the "DREAM Act," which would have implemented features of DAPA.

In short, DAPA is an egregious executive overreach that jeopardizes the constitutional system the Framers carefully designed to protect American liberty.

ARGUMENT

I. DAPA VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS.

Power is of an "encroaching nature" and "ought to be effectually restrained from passing the limits assigned to it." Federalist No. 48, at 305 (James Madison) (Clinton Rossiter ed., 1961). In order to preserve liberty and guard against tyranny, the founders structured the Constitution to allocate power among the three branches of government. Indeed, "the Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights." *Nat'l Labor Relations Bd. v. Noel Canning, et al.*, 134 S. Ct. 2550, 2592-2593 (2014). This separation of powers has come before this Court many times. Sometimes it is subtle, other times transparent:

> Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. *But this wolf comes as a wolf*.

Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) (emphasis added). Today, another "wolf" is before this Court.

The *legislative* branch – not the *executive* branch – is charged with making the law. U.S. Const. art. I, § 1 provides that "[a]ll legislative powers herein granted shall be vested in a *Congress* of the United States, which shall consist of a Senate and House of

Representatives." Art. I, § 8 begins: "The *Congress* shall have power to...." Clause 4 specifies the power at issue in this case: "To establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. The executive reaches too far when it encroaches on legislature territory and makes new law—as it has here. DAPA deprives Congress of exclusive control over quintessentially legislative activity. Its whole purpose is to make new law rather than to execute the law as Congress wrote it. Indeed, its provisions openly conflict with that law and were crafted in the wake of congressional refusal to adopt them.

Early decisions of this Court acknowledge and apply the Constitution's division of labor:

> It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810). Allowing the executive branch the power to forbid the execution of the law—as DAPA does for an entire category of persons—"would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice." *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) (writ of mandamus issued to require Postmaster General to perform a duty imposed by law). No such power can be implied from the President's obligation to faithfully execute the laws. *Id*. Although the executive may decline prosecution or pardon past offenses on an individual, case-by-case basis, unbounded non-enforcement authority "could

substantially reorder the Constitution's separation of powers framework." Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 674 (2014). This Court has an opportunity to zealously guard that framework by affirming the Fifth Circuit decision.

A. Historical Practice Does Not Create Power—Even In The Face Of Acquiescence By The Branch Encroached Upon.

DAPA has not been authorized by statute, so the government grounds its authority in historical practice. *Texas v. United* States, 809 F.3d 134, 184 (5th Cir. 2015). "Arguments based on historical practice are a mainstay of debates about the constitutional separation of powers." Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv. L. Rev. 411, 412 (2012). This is particularly true when considering the allocation of authority between the legislative and executive branches. *Id*. at 412-413. One reason is the sparse text defining executive powers: "Unlike the extensive list of powers granted to Congress in Article I, the text of the Constitution provides relatively little guidance about the scope of presidential authority...." *Id*. at 417-418.

Over the years, legislative delegations have led to a gradual accumulation of executive power:

> The complexities of the modern economy and administrative state, along with the heightened role of the United States in foreign affairs, have necessitated broad delegations of authority to the executive branch.

Id. at 444-445. Justice Frankfurter, observing this trend, proposed a practice-based "gloss" on presidential power:

> [A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.

*Youngstown Sheet & Tube Co. v. Sawye*r, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). As Justice Frankfurter cautioned, this "gloss" "cannot supplant the Constitution" but historical practice may clarify ambiguities and inform our understanding of the law. *Id*.; Bradley & Morrison, *Historical Gloss*, 126 Harv. L. Rev. at 430-431; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

But "'[p]ast practice does not, by itself, create power.'" *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)). The converse is equally true—the legislative branch does not forfeit its powers through longstanding executive practice:

> It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to

> carry out the powers vested by the Constitution....

Youngstown, 343 U.S. at 588.

Legislative acquiescence would not alter the result, because the separation of powers protects individual liberty. It makes no difference that "the encroached-upon branch approves the encroachment." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010) (quoting *New York v. United States*, 505 U.S. 144, 182 (1992)). When a practice allegedly "enhances the President's powers beyond" constitutional boundaries, "[i]t is no answer . . . to say that Congress surrendered its authority by its own hand." *Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring). Similarly, this Court has rejected unconstitutional delegations of legislative authority:

- *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-538 (1935) ("Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation of an industry.").

- *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) ("By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.")

The Constitution does permit Congress to delegate discretion concerning the details of executing the law, as distinguished from actually making the law:

> The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 407 (1928), quoting *Cincinnati, Wilmington and Zanesville Railroad Co. v. Commissioners*, 1 Ohio St. 77, 88 (1852). *Hampton* exemplifies appropriate delegation. The case involved a Presidential proclamation increasing the rate of duty imposed on barium dioxide, in accordance with a statute granting him authority to do so. The statute provided an objective basis to set the rate using the difference between the cost of producing certain articles in a foreign country, and the cost of producing and selling similar articles in the United States. *Hampton*, 276 U.S. at 404. As this Court noted, it is often necessary to grant executive officers discretion, within defined limits, "to secure the exact effect intended by its acts of legislation." *Id*. at 406. The key is that Congress must "lay down by legislative act an intelligible principle" to guide the exercise of discretion. *Id*. at 409; *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

B. Historical Analysis Supports Limits On Prosecutorial Discretion.

The separation of powers has long been recognized as critical to preventing tyranny:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. at 701, quoting 1 Montesquieu, The Spirit of the Laws 163 (J.V. Prichard ed., Thomas Nugent trans., 1914) (1748), quoted in The Federalist No. 47, at 241 (James Madison). Blackstone agreed that the union of these two powers would be lethal to public liberty. 2 William Blackstone, Commentaries 146-147.

Executive discretion may also guard against tyranny. The President's discretionary pardon power alleviates the harshness of inflexible prosecution. "The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel." Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. at 701, quoting The Federalist No. 74, at 364 (Alexander Hamilton) (Lawrence Goldman ed., Oxford University Press 2008). A discretionary decision "intervenes between the enactment of [a] prohibition and its application to any particular individual." *Id*. at 702.

In early America, executive officials tended to focus on complete enforcement of the law, an approach consistent with "a presumption against treating enforcement discretion as a vehicle for remaking statutory policy." *Id*. at 742. But "if prosecutorial discretion today is an old wine in new bottles, it has been soured by the transition." *Id*. at 743. The modern tendency is to establish policy by prioritizing certain offenses and even "exempting categories of offenders from sanctions" or "prospectively authoring violations." *Id*. at 742. That is the strategy DAPA employs, and it conflicts with the Constitution's protections against oppressive government.

The Constitution was not drafted in a vacuum. It was written against the backdrop of historical experience in Great Britain, repudiating almost all the royal prerogatives characteristic of European monarchies. As a result, "the allocations of power in Articles I and II constitute a massive transfer of previously held executive power to the legislative branch." Robert J. Reinstein, *The Limits of Executive Power*, 59 Am U. L. Rev. 259, 263 (2009). The Presidential veto power was the sole royal prerogative retained by the American executive. *Id*. at 278. The Framers declined to grant a presidential "completion power" comparable to the royal power wherein "the King could, by proclamation and without legislative authorization, change domestic law by prescribing means that he deemed necessary to make a statutory scheme more effective." *Id*. at 264. That royal prerogative is eerily similar to President Obama's

declared intent to "change the law"[2] to conform to his desired policies. Similarly, "President Truman's executive order directing the seizure of the steel mills was the twentieth-century equivalent of an illegal royal proclamation" (*id*. at 310)—an action this Court condemned in *Youngstown*.

The Framers rejected certain royal prerogatives directly relevant to this case:

> Two of the Crown's asserted prerogatives had empowered kings to suspend the operation of statutes and to grant individuals the dispensation of not being bound by statutes. The suspending power was much more powerful than the veto because it allowed a king to nullify not only bills that were presented for his assent but also all statutes that pre-dated his reign - indeed, every law on the statute books. The dispensing power resembled an anticipatory pardon; yet, if used widely enough, the power could be tantamount to suspending a statute.

Id. at 278-79. This is exactly the type of authority DAPA exerts by categorically suspending operation of the law for unlawful aliens who meet certain criteria. But repudiation of these features of royal authority was "a central achievement of the English Revolution" and "an important backdrop to the American constitutional enterprise." Price, *Enforcement Discretion and*

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[2] *See Texas v. United States*, 86 F. Supp. 3d 591, 657 and n.71 (S.D. Tex. 2015) (quoting Press Release, Remarks by the President on Immigration—Chicago, Ill., The White House Office of the Press Sec'y (Nov. 25, 2014)).

Executive Duty, 67 Vand. L. Rev. at 692. Numerous state constitutions contain similar restraints.[3]

Early American history testifies to the new nation's restraints on executive power. The "Whiskey Rebellion of 1794" was a serious challenge to enforcement of the highly unpopular federal excise taxes on distilled spirits. *Id*. at 736. Yet the Washington Administration, believing it their constitutional duty to enforce the statutes, suggested statutory changes rather than engaging in a policy of non-enforcement. *Id*. 737. President Washington pardoned the *past* crimes of the "Whiskey Rebels" in exchange for their promise to obey the law in the future. *Id*. at 738. This careful deference to the legislative branch clashes with the current Administration's categorical exclusion of certain persons from prosecution for ongoing *future* violations. DAPA asserts the royal prerogatives repudiated by the Framers.

More recent history offers continuing support for restraints on executive power. In *Youngstown*, Justice Frankfurter noted the many times Congress had provided for executive seizure of an industry (16 times since 1916)—but "[i]n every case it ha[d] qualified this grant of power with limitations and safeguards." *Youngstown*, 343 U.S. at 597-598 (Frankfurter, J.,

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[3] *Id.* at 692 n. 71, listing states with current restrictions: Ala. Const. § 21; Ark. Const. art. I, § 12; Del. Const. art. I, § 10; Ind. Const. art. I, § 26; Ky. Const. § 15; La. Const. art. III, § 20; Maine Const. art. I, § 13; Mass. Const. pt. I, art. XX; Md. Const., Decl. of Rights, art. 9; N.C. Const. art. I, § 7; N.H. Const., Bill of Rights, art. XXIX; Ohio Const. art. I, § 18; Ore. Const. art. I, § 22; Pa. Const. art. I, § 12; S.C. Const. art. I, § 7; S.D. Const. art. VI, § 21; Tex. Const. art. I, § 28; Vt. Const. art. XV.

concurring). DAPA seizes powers never granted by Congress—indeed, it flouts the existing statutory scheme (Section IIIB).

II. EXECUTIVE DISCRETION IS BROAD BUT NOT UNLIMITED.

A. Executive Authority Involves The Exercise Of Discretion.

Faced with limited resources and massive statutory schemes, the executive branch must set priorities for prosecution. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. at 682. Discretion is critical to both criminal justice and agency administration. *Id*. at 681. State plaintiffs do not dispute this basic principle, nor do they ask the courts to rewrite immigration policy. As the Fifth Circuit noted, "[n]either the preliminary injunction nor compliance with the APA requires the Secretary to enforce the immigration laws or change his priorities for removal, which have expressly not been challenged." *Texas*, 809 F.3d at 169.

This is not the first time this Court has considered the outer limits of executive discretion. In *Youngstown*, the Court had to decide whether the President exceeded his constitutional powers in taking possession of the nation's steel mills. The Government argued the seizure was "necessary to avert a national catastrophe" and thus within the President's "inherent power." *Youngstown*, 343 U.S. at 582, 584. No statute authorized the action. *Id*. at 586. But considering the President's constitutional powers, this Court concluded the seizure exceeded executive authority:

> 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. The 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. at 587-588. President Truman did not exercise discretion to execute the law "in a manner prescribed by Congress" but rather "in a manner prescribed by the President." *Id*. at 588.

Discretion is permissible but limited. The separation of powers doctrine was not designed "to promote efficiency" or "avoid friction" but rather "to preclude the exercise of arbitrary power" and "save the people from autocracy." *Youngstown*, 343 U.S. at 613-614 (Frankfurter, J., concurring), quoting *Myers v. United States*, 272 U.S. 52, 240, 293 (1926). At times the relationship between the legislative and executive branches may be acrimonious and stalemates may occur, but "[t]hat is a risk inherent in our system." *Youngstown*, 343 U.S. at 633 (Douglas, J., concurring). "The Framers with memories of the tyrannies produced by a blending of executive and legislative power rejected that political arrangement." *Id*.

1. Presidential Power.

Executive power is sometimes exercised by the President alone, as in *Youngstown*, and other times through agencies, as in this case. The executive branch

has become extremely powerful—perhaps, as one commentator suggests, "the most powerful branch of government." Reinstein, *The Limits of Executive Power*, 59 Am U. L. Rev. at 265. But the limits woven into the constitutional fabric are still viable.

Justice Jackson's *Youngstown* concurrence proposed a three-tiered analysis of Presidential authority. Where the President acts in accordance with congressional authorization, his authority is at its peak. *Youngstown,* 343 U.S. at 635 (Jackson, J., concurring). When Congress has neither granted nor withheld authority, there may be an independent source of power. *Id*. at 637. Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id*. at 637. Extreme caution is needed because "what is at stake is the equilibrium established by our constitutional system." *Id*. at 638. In *Youngstown*, Congress "ha[d] laid down specific procedures to deal with the type of crisis confronting" President Truman, but he chose to bypass them. *Id*. at 662 (Clark, J., concurring). The same is true here. Congress enacted elaborate statutory provisions to handle immigration, including deportations and work authorizations, but the Obama Administration chose to override them. (See Sections IIIA, IIIB.) In *Youngstown*, even dissenting Justice Vinson admitted that executive authority did not extend that far, even in times of national emergency:

> This does not mean an authority to disregard the wishes of Congress on the subject, when that

> subject lies within its control and when those wishes have been expressed, and it certainly does not involve the slightest semblance of a power to legislate, much less to 'suspend' legislation already passed by Congress.

Youngstown, 343 U.S. at 691-692 (Vinson, J., dissenting) (quoting from the Solicitor General's brief in *United States v. Midwest Oil Co*., 236 U.S. 459 (1915)).

2. Executive Agencies.

The expansion of the administrative state is undeniable. Agencies exercise considerable executive power, and discretion is needed to stretch limited resources. Indeed, "agencies today routinely establish policy and even issue binding regulations pursuant to statutes that provide only vague and highly general guidance regarding Congress's desired policy." Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. at 683.

But while agencies may prioritize within the limits set by Congress, they may not expand discretion beyond those bounds or revise statutory terms. *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("*UARG*"). Like DAPA's reconstruction of immigration law, the EPA rule at issue in *UARG* "purport[ed] to *alter* [statutory permitting] requirements and to establish with the force of law that otherwise-prohibited conduct w[ould] not violate the Act." *Id.* at 2445.

Where Congress has expressly delegated authority or left a gap for an agency to fill, the agency's reasonable interpretation is entitled to deference and

the court should not substitute its own judgment. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-844, 865-866 (1984).

> *Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001).

Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 57 (2011) (applying *Chevron* to uphold Treasury Dept. rule that medical residents are not exempt from FICA tax). But "an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole,' . . . does not merit deference." *UARG*, 134 S. Ct. at 2442, quoting *University of Tex. Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2529 (2013). An agency regulation cannot stand if it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Here, DAPA collides with the intricate statutory provisions enacted by Congress to regulate unlawful immigration. (See Sections IIIA, IIIB.)

3. Deferred Action.

The Executive branch enjoys broad prosecutorial discretion at each critical juncture of a deportation proceeding:

> "To ameliorate a harsh and unjust outcome, the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. This commendable

> exercise in administrative discretion, developed without express statutory authorization, originally was known as nonpriority and is now designated as deferred action. A case may be selected for deferred action treatment at any stage of the administrative process. Approval of deferred action status means that, for the humanitarian reasons described below, no action will thereafter be taken to proceed against an apparently deportable alien, even on grounds normally regarded as aggravated." 6 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure § 72.03[2][h] (1998).

Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 484 (1999) ("*AAADC*").

Courts rightly hesitate to interfere when discretion is exercised on a case-by-case basis. In *AAADC*, this Court found that 8 U.S.C. § 1252(g) restricts judicial review. The Court also explained that, unlike criminal proceedings where delay merely postpones the just punishment of a criminal (*id*. at 490), deportation is not imposed as a punishment but rather "is necessary in order to bring to an end *an ongoing violation* of United States law." *Id*. at 491; *see Carlson v. Landon*, 342 U.S. 524, 537 (1952).

In *AAADC*, Respondents alleged they were unfairly targeted for deportation because of their membership in a politically unpopular group. *AAADC*, 525 U.S. at 472. Unlike *AAADC*, where officials exercised *individual* discretion, this case is about the categorical suspension of enforcement for a broad group of persons who would otherwise be subject to the law. In such a case, discretion is not unfettered.

B. Prosecutorial Discretion Is Not Unfettered.

In the criminal justice system, the government has broad discretion about whether to prosecute and what charges to bring. *Wayte v. United States*, 470 U.S. 598, 607 (1985); *AAADC*, 525 U.S. at 489-490. But that discretion is "not unfettered." *Wayte*, 470 U.S. at 608; *United States v. Batchelder*, 442 U.S. 114, 124-125 (1979) (prosecutor did not have "unfettered" discretion to prosecute under either of two statutes that prohibited identical conduct); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 142-143 (2002) (Labor Board had "generally broad" but "not unlimited" discretion to select and craft remedies for violations). "Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints." *Wayte*, 470 U.S. at 608, quoting *Batchelder*, 442 U.S. at 125 (footnote and internal quotation marks omitted). In *Heckler v. Chaney*, this Court reasoned that agency enforcement discretion is analogous to a prosecutor's decision whether or not to indict—"a decision which has long been regarded as the special province of the Executive Branch." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (citing U.S. Const. art. II, § 3). But "it is inappropriate to rely on notions of prosecutorial discretion to hold agency inaction unreviewable." *Id.* at 846 (Marshall, J., concurring in the judgment). Like its counterpart in criminal justice, an agency's discretion is not unbounded.

Outside the immigration context, agency discretion has recently been an issue in marijuana enforcement. After several states legalized medical marijuana, advocates urged the Obama Administration "to adopt

a formal policy of declining enforcement against individuals who possess the drug in compliance with state law." Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. at 757. In 2009, the Justice Department directed its attorneys not to focus resources on prosecuting "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." Memorandum from David W. Ogden, Deputy Att'y Gen., to Selected U.S. Att'ys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana 2 (Oct. 19, 2009), available at http://perma.cc/JEV5-E7AQ. This exercise of discretion is just barely constitutional but probably passes muster. Persons using medical marijuana are a low priority but still face potential prosecution, and setting enforcement priorities is a normal use of discretion that conserves scarce resources.

DAPA is a radical departure from this model. DAPA transforms presence deemed unlawful by Congress into "lawful presence" and confers benefits (such as work authorization) that would otherwise be unavailable. This dramatic change in legal status far exceeds merely postponing prosecution or declining to commence deportation proceedings. Individualized, case-by-case discretion is appropriate. But DAPA categorically suspends enforcement and prospectively excludes certain well-defined categories of persons from the scope of the law, raising profound separation of powers concerns:

> *Prospective nonenforcement* - that is, an announced promise of declining enforcement of a law in the future - is a particular offense to

> legislative supremacy because it undermines the deterrent effect of the law. Similarly, *categorical nonenforcement* for policy reasons usurps Congress's function of embodying national policy in law; it effectively curtails the statute that Congress enacted, replacing it with a narrower prohibition.

Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. at 705 (emphasis added). These actions are essentially a "second veto" (*id*. at 688, 690) allowing the executive to overrule a law enacted by Congress (at least for the duration of the President's term). DAPA is an example of this danger:

> Although the Secretary has discretion to make immigration decisions based on humanitarian grounds, *that discretion is conferred only for particular family relationships and specific forms of relief—none of which includes granting lawful presence*, on the basis of a child's immigration status, to the class of aliens that would be eligible for DAPA.

Texas, 809 F.3d at 180 (emphasis added). This is an egregious invasion of legislative territory and an attack on constitutional structure.

Ironically, DAPA destroys genuine discretion. An opinion from the Office of Legal Counsel (OLC) acknowledged that "deferred action programs depart in certain respects from more familiar and widespread exercises of enforcement discretion."[4] DAPA is an

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[4] *See* Karl R. Thompson, Office of Legal Counsel, U.S. Dep't of Justice, The Department of Homeland Security's Authority to

unprecedented action that replaces case-by-case discretion with its own non-negotiable priorities and "deliberately hobbles immigration law enforcement." Josh Blackman, *ARTICLE: The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 Tex. Rev. Law & Pol. 213, 237-238 (Spring 2015). DAPA's "consistent discretion" is "oxymoronic" and contrary to appropriate individual discretion. *Id*. at 240. DAPA "turn[s] discretion into a rubber stamp" (*id*. at 284) that undermines the ability to detect fraud and national security risks while ensuring that applications meeting DAPA criteria will be approved. *See Texas*, 809 F.3d at 174. Such "rubber-stamp discretion" is not discretion at all.

Expansive executive discretion also impairs political accountability:

> Substantial nonenforcement of federal statutes clouds public perception of what conduct is unlawful, thus impairing rule-of-law values and diminishing Congress's political accountability for the range of conduct it has proscribed.

Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. at 746. By obscuring the line between legislative and executive, executive "lawmaking" generates confusion as to who is responsible for existing laws and policies.

Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others 24 (2014), available at http://bit.ly/1Qh5mRF [perma.cc/NDX3-55G5].

III. DAPA IS AN EXECUTIVE ENCROACHMENT ON LEGISLATIVE POWER.

At its core, this case is about an executive decision to categorically reclassify millions of persons unlawfully residing in the United States. *Texas*, 809 F.3d at 170. The Department of Homeland Security has discretionary power in individual cases, but the executive branch lacks authority to alter the statutory scheme by prospectively excluding an entire category of persons from application of the law:

> The true distinction...is between the *delegation of power to make the law*, which necessarily involves a discretion as to what it shall be, and *conferring authority or discretion as to its execution*, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

Field v. Clark, 143 U.S. 649, 693-694 (1892) (emphasis added) (quoting *Moers v. Reading*, 21 Pa. 188, 202 (1853)). Executive discretion involves "setting priorities within the confines of statutory policy, not an unrestrained authority to adjust the law on the ground to match their preferences as to what the law on the books ideally should be." Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. at 765. DAPA crosses the line and encroaches on legislative territory. The executive branch has *made new law* because unlawful aliens who meet the stated criteria automatically receive "lawful presence" status. This status "is not an enforceable right to remain in the United States and can be revoked at any time" but "th[e] classification nevertheless has significant legal

consequences." *Texas*, 809 F.3d at 148. Those consequences include eligibility for federal and state public benefits that are otherwise not available to unlawfully present persons.

A. DAPA Conflicts With The Intricate Statutory Scheme Enacted By Congress.

Congress has enacted specific and intricate statutory provisions that unambiguously address lawful presence in the United States:

> Federal governance of immigration and alien status is extensive and complex. Congress has specified categories of aliens who may not be admitted to the United States. See 8 U. S. C. § 1182. Unlawful entry and unlawful reentry into the country are federal offenses. §§ 1325, 1326.

Arizona, 132 S. Ct. at 2499. Examples of these provisions include 8 U.S.C. §§ 1101(a)(20), 1255 (lawful-permanent-resident status); §§ 1101(a)(15), 1201(a)(1) (nonimmigrant status); §§ 1101(a)(42), 1157-59, 1231(b)(3) (refugee and asylum status); § 1182(d)(5) (humanitarian parole); § 1254a (temporary protected status); *cf*. §§ 1182(a) (inadmissible aliens), 1227(a)-(b) (deportable aliens). *Texas*, 809 F.3d at 179 n. 162. Congress has specified various narrow classes eligible for deferred action but the list does not include the group of 4.3 million persons who would be eligible for lawful presence under DAPA. *Id*. at 179, citing DAPA Memo at 4. DAPA openly flouts existing law and hijacks legislative authority.

Statutory limitations on lawful residence reflect congressional concern about unlawfully present

persons applying for and receiving public benefits from federal, state, and local governments. *Texas*, 809 F.3d at 179. Congress was also concerned about "closely guarding access to work authorization and preserving jobs for those lawfully in the country." *Id*. at 181. DAPA brushes these concerns aside by causing a dramatic increase in the number of aliens eligible for work authorization, which in turns triggers eligibility for numerous public benefits.

INA spells out the classes of aliens eligible for work authorization—"*with no mention of the class of persons whom DAPA would make eligible*." *Id*. at 181 (emphasis added). Indeed, Congress enacted the Immigration Reform and Control Act of 1986 ("IRCA") "as a comprehensive framework" to combat the employment of persons unlawfully present in the country. *Arizona*, 132 S. Ct. at 2504, quoting *Hoffman*, 535 U.S. at 147. Employers face an array of criminal and civil penalties if they knowingly hire, recruit, refer, or continue to employ unauthorized workers, or fail to verify the status of potential employees. *Arizona*, 132 S. Ct. at 2504. In *Hoffman*, this Court found that federal immigration policy, as expressed in IRCA, foreclosed the National Labor Relations Board's award of backpay to an unauthorized alien. *Hoffman*, 535 U.S. at 140. Combating the employment of unauthorized aliens is central to "the policy of immigration law" as expressed in IRCA." *Id*. at 147, citing *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194, and n. 8 (1991).

Under IRCA, employment of an undocumented alien is not possible without some person "directly contravening explicit congressional policies." *Hoffman*,

535 U.S. at 148. With its vast expansion of work authorization, DAPA contravenes explicit congressional policies. If DAPA had merely deferred deportation of a low-priority group of aliens, it might be a reasonable exercise of discretion. Instead, "the decision to establish a program to solicit registrations for deferrals as a means to provide work authorization to bring these aliens 'out of the shadows' elevates the policy to the level of disregarding the law." Blackman, *The Constitutionality of DAPA Part II*, 19 Tex. Rev. Law & Pol. at 236.

The Fifth Circuit's carefully reasoned opinion canvasses the detailed statutory scheme enacted to address DAPA's subject matter: lawful presence and employment. DAPA "amounts to a categorical, prospective suspension of both the statutes requiring removal of unlawful immigrants and the statutory penalties for employers who hire immigrants without proper work authorization." Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. at 760. The conflicts between DAPA and existing immigration law are open and obvious, leading inexorably to the conclusion that the executive branch has usurped legislative power.

B. Congress Explicitly *Rejected* DAPA's Terms When It Declined To Enact The "DREAM Act."

As one discerning commentator described it:

> Overall, DAPA is a perfect storm of executive lawmaking, descending to the lowest depths of *Youngstown*, beyond the "zone of twilight," and even below the "lowest ebb." . . . Like the

> mythical phoenix . . . DAPA arose from the ashes of congressional defeat.

Blackman, *The Constitutionality of DAPA Part II*, 19 Tex. Rev. Law & Pol. at 267.

Youngstown is precisely on point. In 1947, Congress "consider[ed] whether governmental seizure should be used to avoid serious industrial shutdowns"—the very power President Truman exercised unilaterally in defiance of Congress. *Youngstown*, 343 U.S. at 598 (Frankfurter, J., concurring). This was not a case that left room for doubt about congressional intent:

> [N]othing can be plainer than that Congress made a conscious choice of policy in a field full of perplexity and peculiarly within legislative responsibility for choice. In formulating legislation for dealing with industrial conflicts, Congress could not more clearly and emphatically have withheld authority than it did in 1947.

Id. at 602.

The same is true here. Congress rejected the Development, Relief, and Education for Alien Minors Act ("DREAM Act"). This proposed legislation "passed the House of Representatives during the 111th Congress and then stalled in the Senate." *Common Cause v. Biden*, 748 F.3d 1280, 1281, 409 U.S. App. D.C. 306 (D.C. Cir.), *cert. denied*, 135 S. Ct. 451 (2014) (citing H.R. 5281, 111th Cong. (2010). It had features strikingly parallel to DAPA, including "a form of permanent residency and work permits for certain immigrants who were brought to the United States as minors." Blackman, *The Constitutionality of DAPA*

Part II, 19 Tex. Rev. Law & Pol. at 267; *see* DREAM Act of 2010, S. 3992, 111th Cong. (2010). The pattern tracks *Youngstown*—Congress declines to enact the President's proposed legislation, followed by the executive's exertion of the power Congress denied. This "amounts to an open and notorious decision to disregard the democratic process, based on pretextual legal justifications." Blackman, *The Constitutionality of DAPA*, *Part II*, 19 Tex. Rev. Law & Pol. at 269. And "unlike President Truman, who told Congress he would listen if they passed legislation, President Obama threatened to veto a bill that would defund his program." *Id*. at 282.

Upholding DAPA would be tantamount to writing the separation of powers out of the Constitution. As in *Youngstown*, "[t]o find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress." *Youngstown,* 609 (Frankfurter, J., concurring).

C. DAPA Is Not An Unreviewable Exercise Of Prosecutorial Discretion But Rather An Abuse Of Discretion.

The government insists that 8 U.S.C. § 1252(g) places DAPA beyond judicial review. *Texas*, 809 F.3d at 164. But that statute is not an expansive "zipper clause" that shields DAPA's executive overreach from review. It "applies only to discrete actions . . . to *commence* proceedings, *adjudicate* cases, or *execute*

removal orders." *AAADC*, 525 U.S. at 482.[5] *AAADC* involved allegations that petitioners were targeted for deportation because of their political affiliations. The government's discretionary decision to commence proceedings for these individuals fell within the statutory bounds, rendering it unreviewable. *Id*. at 472-473. DAPA, in contrast to *AAADC*'s commencement decision, involves a sweeping executive action that prospectively and categorically reclassifies millions of persons and thereby excludes them from the reach of existing immigration law. This action is inherently legislative in nature.

Reviewability often hinges on whether there is a "meaningful standard against which to judge the agency's exercise of discretion." *Id*. at 832. If so, a reviewing court may consider "whether the agency has stayed within the bounds of its statutory authority." *UARG*, 134 S. Ct. at 2439 (reviewing an EPA interpretation of the Clean Air Act), quoting *Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (emphasis deleted). DAPA "at least can be reviewed to determine whether the agency exceeded its statutory powers." *Chaney*, 470 U.S. at 832. *Chaney*, like *AAADC*, was a case of unreviewable discretion. The FDA's decision not to take enforcement action to prevent the use of lethal injection, as requested by death row inmates, was not subject to judicial review under the Administrative Procedure Act. *Chaney* and *AAADC* both clarify the

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[5] *See, e.g.,* 8 U.S.C. § 1252(a)(2)(A) (any claim arising from the inspection of aliens arriving in the United States); 8 U.S.C. § 1252(a)(2)(B) (denials of discretionary relief authorized by various statutory provisions); 8 U.S.C. § 1252(a)(2)(C) (final removal orders against criminal aliens).

contours of executive discretion. Here, because Congress has enacted an intricate statutory scheme (Section IIIA) and DAPA openly disregards and conflicts with that scheme (Section IIIB), there is assuredly a "meaningful standard" for review.

The Fifth Circuit dissent countered the majority with an assertion that "[d]eferred action decisions. . . are quintessential exercises of prosecutorial discretion" and therefore "presumptively unreviewable." *Texas*, 809 F.3d at 189, 196 (King, J., dissenting). Sometimes this is true, but not always—and certainly not here. Justice Brennan's concurring opinion in *Chaney* provides a succinct summary that highlights the outer limits of agency discretion and illuminates the difference between unreviewable cases and circumstances where review is appropriate:

> It may be presumed that Congress does not intend administrative agencies, agents of Congress' own creation, to ignore clear jurisdictional, regulatory, *statutory*, *or constitutional commands* . . . . *Individual, isolated nonenforcement decisions*, however, must be made by hundreds of agencies each day.

Chaney, 470 U.S. at 839 (Brennan, J., concurring) (emphasis added). DAPA transgresses both statutory and constitutional commands. As *Chaney* explained, "Congress did not set [the Department of Homeland Security] free to disregard legislative direction in the statutory scheme that the agency administers." *Id*. at 833.

CONCLUSION

This Court should affirm the decision of the Fifth Circuit.

Respectfully submitted,

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