No. 15-40238

United States Court of Appeals
for the Fifth Circuit

State of TEXAS; State of ALABAMA; State of GEORGIA; State of IDAHO; State of INDIANA; State of KANSAS; State of LOUISIANA; State of MONTANA; State of NEBRASKA; State of SOUTH CAROLINA; State of SOUTH DAKOTA; State of UTAH; State of WEST VIRGINIA; State of WISCONSIN; PAUL R. LEPAGE, Governor, State of Maine; PATRICK L. MCCRORY, Governor, State of North Carolina; C.L. "BUTCH" OTTER, Governor, State of Idaho; PHIL BRYANT, Governor, State of Mississippi; State of NORTH DAKOTA; State of OHIO; State of OKLAHOMA; State of FLORIDA; State of ARIZONA; State of ARKANSAS; Attorney General BILL SCHUETTE; State of NEVADA; State of TENNESSEE,

Plaintiffs-Appellees,

~ *versus* ~

UNITED STATES OF AMERICA; JEH CHARLES JOHNSON, Secretary, Department of Homeland Security; R. GIL KERLIKOWSKE, Commissioner of U.S. Customs and Border Protection; RONALD D. VITIELLO, Deputy Chief of U.S. Border Patrol, U.S. Customs and Border Protection; SARAH R. SALDANA, Director of U.S. Immigration and Customs Enforcement; LEON RODRIGUEZ, Director of U.S. Citizenship and Immigration Services,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas

Brief of the Cato Institute and Prof. Jeremy Rabkin as *Amici Curiae* in Support of Plaintiffs-Appellees

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Supplemental Certificate of Interested Persons

Case 15-40238, *State of Texas, et al., v. United States of America, et al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Person or Entity	Connection to Case
Josh Blackman	Counsel to *amici*
Cato Institute	*Amicus curiae*
Peter Margulies	Counsel to *amici*
Leif A. Olson	Lead counsel to *amici*
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Leif A. Olson

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Interest and Independence of *Amici Curiae*

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and publishes the annual *Cato Supreme Court Review*.

Jeremy A. Rabkin is a professor of law at George Mason University School of Law. Prof. Rabkin's fields of expertise include administrative law, constitutional history, and statutory interpretation.

As a matter of policy, *amici* support comprehensive immigration reform that provides relief to the aliens protected by DAPA (among many other purposes). It is not, however, for the President to make such changes alone, in conflict with the laws passed by Congress, and in ways that go beyond constitutionally-authorized executive power.

No one other than the *amici* and their counsel wrote this brief or parts of it. The cost of its preparation was paid for solely by *amici* and their counsel.

The parties consent to *amici*'s filing this brief.

Summary of the Argument

The defense of DAPA requires a suspension of disbelief. As the government tells it, DAPA does nothing more than rejigger the Department of Homeland's Security's priorities to protect national security through humdrum exercises of prosecutorial discretion. Oh, and by the way, it incidentally creates a massive registration regime that offers work authorization to virtually all of the four million aliens that may apply. It's all about conserving resources, the government insists, because it can't deport everyone. There's nothing to see here, the government claims, because Congress acquiesced to previous exercises of deferred action and sanctioned work authorizations for these aliens.

Don't believe it.

Instead of a modest application of prosecutorial discretion, DAPA is an unprecedented exercise of executive power in the face of congressional opposition. It conflicts with five decades of congressional policy as embodied in the Immigration and Naturalization Act (INA), and is inconsistent with previous exercises of deferred action. DAPA violates the President's duty to take care that the laws are faithfully executed. As Justice Jackson recognized six decades ago, presidential lawmaking that lacks congressional support "must be scrutinized with caution." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring). Mirroring the Supreme Court's precedents

about reviewability for agency inaction, DAPA amounts to an "abdication" of the law with respect to its beneficiaries, and is an unconstitutional end-run around an uncooperative Congress. Allowing DAPA to proceed would set a dangerous precedent for the separation of powers and irreparably weaken both horizontal and vertical federalism.

Argument

I. DAPA disregards congressional immigration policy.

The government would have this Court believe that DAPA is consistent with congressional policy, and is "the kind[] of actions taken by every single Republican President and every single Democratic President for the past half century."[1] It's simply not true.

DAPA flouts congressional policy on immigration, as embodied in the INA, in two distinct ways. First, Congress has singled out the potential beneficiaries of DAPA—parents of citizens and lawful permanent residents (LPR)—for formidable obstacles to the receipt of legal status. Second, while deferred action historically served as a temporary *bridge* from one status to another—where benefits were construed as arising within a reasonable period after deferred action—DAPA acts as a *tunnel* to dig under and through the INA.

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[1] Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), available at https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

DAPA amounts to an unprecedented expansion of executive power to bypass the law. Contrary to the government's assertion, it is not "consonant" with congressional policy.[2]

A. Congressional policy rejects preferences for parents of citizens and lawful permanent residents.

Congress has not treated all relationships as equally important for family-unification. Specifically, Congress has imposed especially strict limits on the allocation of visas to the parents of U.S. citizens—the very class that DAPA seeks to benefit—as compared to other relationships. The INA prevents a citizen child from petitioning for a visa on the parent's behalf until the child turns 21. 8 U.S.C. § 1151(b)(2)(A)(i). Congress inserted this provision specifically to allow the United States to remove unlawful entrants with post-entry U.S. citizen children. *See Faustino v. INS*, 302 F. Supp. 212, 215–16 (S.D.N.Y. 1969). Congress has also required unlawful entrants, including the parents of post-entry U.S. citizen children, to leave the country for consular visa processing abroad prior to receipt of LPR status. 8 U.S.C. § 1225(a).

In addition, Congress has subjected aliens unlawfully present for more than a year to a *10-year bar* before applying for readmission to the

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[2] The Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. 1, 6 (2014) (available at http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf) ["*OLC Opinion*"].

United States. 8 U.S.C. § 1182(a)(9)(B)(i)(II). In other words, Congress has deliberately crafted the INA to require unlawful entrants with post-entry U.S. citizen to wait as long as *thirty-one years* (including ten years outside the U.S.) for lawful permanent residence. Congress designed this austere architecture to deter unlawful entry and facilitate the removal of unlawful entrants—even those with citizen children. *See Faustino*, 302 F. Supp. at 215–16. DAPA's wholesale grant of work authorization and renewable reprieves from removal to more than a third of the U.S. undocumented population is flatly inconsistent with Congress's regimented process.

Second, unlike the parents of citizens, the parents of LPRs are a class of alien to which Congress has *never* provided any preference under the INA. Parents of LPRs are ineligible to obtain visas as primary beneficiaries. *See* 8 U.S.C. § 1153(a)(1)–(4) (defining visa-preference categories, with no reference to parents of LPRs). These omissions are important. The Supreme Court has held that a relationship that has not been recognized by Congress does not warrant preferential treatment under the INA. *See Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2207 (2014). Even if the parent of a citizen can file a visa petition when the child reaches 21 years of age, the parent of an LPR is *never* eligible to file a visa petition based on that relationship. DAPA's sweeping changes undermine Congress's structured judgment.

B. Previous exercises of deferred actions were bridges to lawful status.

To justify DAPA, the government points to five prior exercises of deferred action that Congress supported: deferred action for (1) self-petitioners under the Violence Against Women Act, (2) T and U visa applicants, (3) foreign students affected by Hurricane Katrina and foreign nationals affected by crises abroad, (4) widows and widowers of U.S. citizens, and (5) other recipients of "ad hoc" deferred action. *OLC Opinion* at 14. Based on past practice, the government argues that Congress has acquiesced to deferred action more generally, and thus DAPA specifically. This conclusion is demonstrably false. Congress sanctioned or acquiesced to each deferred action where one of two qualifications existed: the alien, (1) had an *existing* lawful presence in the U.S., or the *immediate prospect* of lawful residence or presence,[3] or (2) suffered, or would suffer, from an "individual"[4] or "foreign policy" hardship.[5]

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[3] Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. ONLINE 96, 111–125 (2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545544 ["*Congressional Acquiescence*"].

[4] Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 830–31 (2004).

[5] *OLC Opinion* at 14. *See generally* Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law,* 64 AM. U.L. REV. __ (forthcoming 2015), available at http://ssrn.com/abstract=2559836 ["*Boundaries of Discretion*"].

First, for VAWA self-petitioners, deferred action was the bridge between the approval of the visa petition and the availability of the visa. 8 U.S.C. § 1154(a)(1)(iii). Second, for the T and U visa beneficiaries, deferred action was a bridge from likely unlawful presence to lawful admission for *bona fide* victims of human trafficking or other crimes. 8 U.S.C. § 1101(a)(15)(T), (U) (2012). Third, for students affected by Hurricane Katrina, deferred action was the bridge between two periods of lawful presence as a student, when classes were temporarily interrupted because of the natural disaster. Press Release, U.S. Citizenship & Immig. Servs., *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* (Nov. 25, 2005).[6] Fourth, widows and widowers were immediate relatives of U.S. citizens and thus were presumptively entitled to a visa and on a short pathway to obtaining one. 8 U.S.C. § 1151(a)(2)(A)(i). Grants of deferred action based on "individual" hardships such as extreme youth, age, or infirmity have been few and far between.[7] Further, Congress has significantly curbed the Executive's discretionary relief for "foreign policy hardships" such as repression or natural disasters abroad.[8]

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[6] Available at http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf.

[7] *See* Wildes, 41 SAN DIEGO L. REV. at 827 (noting fewer than 500 approvals over more than a decade).

[8] *See* 8 U.S.C. § 1182(d)(5)(A) (requiring "case-by-case" showing of "urgent humanitarian reasons").

Finally, the 1990 "Family Fairness" program, instituted by President George H.W. Bush, offered deferred deportations for family members who would shortly be able to receive a lawful status by virtue of the legal status of their spouse or parent. In each case, Family Fairness deferred action acted as a temporary bridge from one status to another.

In sharp contrast, deferred action under DAPA serves as a tunnel to dig under the INA. Relief is not necessarily waiting on the other side of deferred action, as it was in each instance the government relied on. DAPA is not even meant as a temporary stopgap while Congress finishes a bill long in the works. It instead imposes a not-too-veiled quasi-permanent status in the hope that a future Congress affords these aliens permanent status. And although the program can be changed by the winner of the 2016 presidential election, as a matter of practical politics, those given work permits (who haven't committed any crimes) will be effectively untouchable. The President has admitted as much, explaining that future presidents may "theoretically" remove DAPA beneficiaries, but "it's not likely." Remarks by the President in Immigration Town Hall (Dec. 9, 2014).[9] Call it lawful status through adverse possession. This is anything but "consonant … with congressional understandings about the permissible uses of deferred action." *OLC Opinion* at 29.

[9] Available at https://www.whitehouse.gov/the-press-office/2014/12/09/remarks-president-immigration-town-hall-nashville-tennessee.

II. DAPA violates the President's duty to faithfully execute the laws.

The government would have the Court believe that it suddenly determined on November 20, 2014—two weeks after the midterm election and four months after the House of Representatives declined to vote on comprehensive immigration reform—that it was not correctly prioritizing removals, that it needed to shake things up with new policy guidance, and that's all it did. Don't believe it.

The President's immigration agenda failed in Congress. In response, the President sought to accomplish as much of his agenda as he could through executive action, banking on a gridlocked Congress being unable to stop it. This wasn't the first time this happened. *See*, *e.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2599 (2014) (Scalia, J., concurring) ("The majority protests that [the idea that the President gains no new powers when Congress refuses to act] 'should go without saying—except that Justice SCALIA compels us to say it'; ibid., seemingly forgetting that the appointments at issue in this very case were justified on those grounds and that the Solicitor General has asked us to view the recess-appointment power as a 'safety valve' against Senatorial 'intransigence.' Tr. of Oral Arg. 21.").

While this history certainly makes for a compelling political narrative, it resonates on a much deeper constitutional dimension. Under our Constitution, Congress has no obligation whatsoever to enact *any*

law, and it is empowered to use that intransigence as a check on the Executive. THE FEDERALIST NO. 58 (Madison, J.) ("The House of Representatives cannot only *refuse*, but they alone can propose, the supplies requisite for the support of government.") (emphasis added).

The President is not afforded the same luxury. Article II imposes a duty unlike any other in the Constitution: the President "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. The analysis for this imperative, which parallels the Supreme Court's doctrine concerning reviewability under the APA, reveals that DAPA amounts to a deliberate effort to bypass an uncooperative Congress, and a failure to execute the INA against the DAPA beneficiaries.

A. The Take Care Clause analysis parallels the Supreme Court's non-reviewability doctrine.

The four elements of the Take Care Clause give a comprehensive framework to determine whether the executive has complied with his constitutional duty.[10] First, the imperative "shall" commands the President to execute the laws. Second, in doing so, the President must act with "care." Third, the object of that duty is "the Laws" enacted by Con-

[10] *See* Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing The Law*, 20 TEX. REV. L. & POL. 199, 205–217 (2015) ["*Faithfully Executing*"]. Statement of Nicholas Quinn Rosenkranz, U.S. House of Representatives Committee on the Judiciary Hearing: The President's Constitutional Duty to Faithfully Execute the Laws (Dec. 3, 2013).

gress. Fourth, in executing the laws with care, the President must act "faithfully."

Although the Supreme Court has not directly addressed when this command is violated, in *Heckler v. Chaney*, it held in the administrative-law context that an executive policy would be reviewable—and could be set aside—if an "agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. 821, 833 n.4 (1985) (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)). In his concurring opinion, Justice Marshall observed that when "an agency asserts that a refusal to enforce is based on enforcement priorities, it may be that, to survive summary judgment, a plaintiff must be able to offer some basis for calling this assertion into question or for justifying his inability to do so." *Id.* at 853 n.12 (Marshall, J., concurring).

Decades earlier, Justice Brandeis reached a similar conclusion about the interaction between enforcement priorities and faithful execution: "The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted." *Myers v. United States*, 272 U.S. 52, 292 (1926) (Brandeis, J., dissenting). Both justices agree that the President is excused from enforcing the law only when there is a genuine need to

reprioritize resources, he uses his "best endeavors to secure the faithful execution of the laws," and does not attempt to bypass Congress.

The D.C. Circuit's decision in *Crowley Caribbean Transport v. Peña* elaborates. 37 F.3d 671 (D.C. Cir. 1994). There, the court held that a "broad policy against enforcement poses *special risks* that [the agency] 'has consciously and expressly adopted a general policy that is so extreme as to amount to an *abdication* of its statutory responsibilities.'" *Id.* at 677 (citing *Chaney*, 470 U.S. at 833 n.4) (emphasis added).

The Administrative Procedure Act is not the Take Care Clause, nor vice versa. Though framed in terms of reviewability, the premise of the *Chaney* test—an agency that abdicates its statutory responsibility—parallels the review that should be applied here—the executive branch abdication of its Constitutional responsibility to execute the laws. The courts have a role to set aside unconstitutional abdications. The executive branch's duty here, as always, derives from the Take Care Clause. The President, and the executive agencies he supervises, "*shall* take Care that the Laws be faithfully executed." With this understanding, *Chaney* is the closest facsimile we have in the Supreme Court's jurisprudence to determining whether DAPA is lawful.

B. DAPA emerged as an unconstitutional end-run around congressional defeat.

Like the mythical phoenix, DAPA arose from the ashes of congressional defeat. On June 30, 2014, Speaker John Boehner announced that

the House would not bring to a vote the comprehensive immigration bill that had passed the Senate a year earlier. Steven Dennis, *Immigration Bill Officially Dead: Boehner Tells Obama No Vote This Year, President Says*, ROLL CALL, June 30, 2014.[11] Within hours of learning that the bill was dead, the President announced that he would act alone: "I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing…. [I will] fix as much of our immigration system as I can on my own, without Congress." Remarks by the President on Immigration (June 30, 2014).[12]

That declaration commenced an eight-month process where the White House urged its legal team to use its "legal authorities to the fullest extent." Michael D. Shear & Julia Preston, *Obama Pushed 'Fullest Extent' of His Powers on Immigration Plan,* N.Y. TIMES, Nov. 28, 2014.[13] By one account, the President reviewed "more than [60] iterations" of the proposed executive action, expressing his disappointment because they "did not go far enough." Carrie Budoff Brown, *et al.*, *How*

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[11] Available at http://blogs.rollcall.com/white-house/immigration-bill-officially-dead-boehner-tells-obama-no-vote-this-year.

[12] Available at http://www.washingtonpost.com/politics/transcript-president-obamas-remarks-on-immigration/2014/06/30/b3546b4e-0085-11e4-b8ff-89afd3fad6bd_story.html.

[13] Available at http://www.nytimes.com/2014/11/29/us/white-house-tested-limits-of-powers-before-action-on-immigration.html.

Obama Got Here, POLITICO, Nov. 20, 2014.[14] Finally, on November 20, 2014—two weeks *after* the mid-term elections—he revealed DAPA.

C. DAPA is not a faithful execution of the laws.

To justify the lawfulness of DAPA, the Justice Department looked to DAPA's progenitor: DACA. *OLC Opinion* at 17. Secretary Jeh Johnson, in establishing DAPA, "direct[ed] USCIS to establish a process, *similar to DACA*, for exercising prosecutorial discretion through the use of deferred action."[15] By the government's own admission, both in the OLC Opinion and during the course of this litigation, DACA was DAPA's constitutional lodestar. There are certainly differences between the two programs—namely the classes of aliens they target—but DAPA's implementation strategy mirrors DACA's in all significant respects. It is all but certain that it will adopt priorities and guidelines similar to those of DACA, but on a much larger scale.

Under DACA, DHS has adopted an extremely broad policy that restricts the ability of officers to enforce the immigration laws. *Faithfully Executing* at 227–39. The policy cabins their discretion both procedurally (requiring less thorough review of applications) and substan-

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[14] Available at http://www.politico.com/story/2014/11/how-obama-got-here-113077.html.

[15] Jeh Johnson, Secretary of Homeland Security, Memorandum, "Exercising Prosecutorial Discretion" at 4 (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf (emphasis added).

tively (eliminating grounds for denial beyond the Secretary's preferences). *Id.* at 246–248. First, to expedite reviews through the so-called "lean and lite" review, DHS limited the depth of investigation that officers could employ to dig into an application. ROA.1435–ROA.1437 (USCIS emails documenting the "lean and lite" review). Officers were procedurally constrained from investigating various indicia of fraud that would normally counsel against providing relief. ROA.1609. If an application has "discrepancies [that] still don't add up," and the "DACA requestor's attempts to explain" fail, the officer is not to deny the request, but instead "refer the case to [the Center for Fraud Detection Operations] for further research." ROA.1672. Officers can take the hint that the answer should not be "Deny," even if they have suspicions of fraud.

Second, DHS weakened the scope of officer discretion by limiting the grounds for denial to checking boxes on a template. ROA.1690. These grounds were the exact criteria set by the Secretary's preferences, displacing any meaningful case-by-case review. *Faithfully Executing* at 233–239. This approach amounts to discretion in name only.

D. DAPA designated classes of beneficiaries to yield a virtually automatic grant rate.

In *Arpaio v. Obama*, the district court affirmed the legality of DACA because "[s]tatistics provided by the defendants reflect that such case-by-case review is in operation." 27 F. Supp. 3d 185, 209 n.13

(D.D.C. 2014). Specifically, "36,860 requests for deferred action under DACA were denied and another 42,632 applicants were rejected as not eligible." *Id.* Out of the total 719,746 individuals who made initial requests for deferred action, this amounts to roughly a five-percent denial rate. (A similar rate for DAPA would vest over one third of the U.S. undocumented population with a reliable, renewable shield against removal.)

As far as exercises of discretion go, five percent is an extremely low denial rate for such a significant benefit—especially one that requires *no* showing of hardship (atypical in the immigration context). Further, the miniscule number of revocations demonstrates DACA's hobbling influence on immigration enforcement. *See* ROA.2225 (out of 591,555 DACA grants, there have been *only 113* subsequent terminations, indicating that DACA effectively protects against removal in *99.98%* of the relevant cases). But the bottom line of the absolute number of denials hardly tells the whole story.

The trivially low denial rate is a function of the Secretary's application of rote criteria and the stripping of any meaningful discretion from individual agents to actually assess aliens on a case-by-case basis. The administration selected and publicized the categories of people who would receive benefits, knowing that only those who would qualify would likely apply. Felons—the very people DAPA seeks to locate—will be the *last* aliens to apply, because registration will identify and priori-

tize them for removal. The government has *never* accounted for this glaring hole in its defense. At the margins, there will certainly be some aliens who may think they are eligible but do not meet the criteria—hence the miniscule denial rate. But these are outliers.

That the President is still deporting 400,000 other aliens is immaterial to the Take Care Clause analysis. DAPA will have a negligible effect on *who* is deported. The beneficiaries of DAPA are primarily aliens not currently subject to removal proceedings, who would otherwise remain in the proverbial "shadows," and are effectively unknown to the government. These are people who otherwise *would not and could not* be removed. By allowing those aliens to register, the administration is *still* not removing them—undercutting the government's claim that DAPA is necessary to prioritize aliens and thus enforce immigration laws.

Contrary to the government's rose-tinted rationalization, DAPA will do little to identify the most dangerous aliens, and will only make it easier to identify those who were already the lowest priority for removal—non-violent aliens with citizen family members. This further undercuts the government's argument that DAPA aims to enforce deportation priorities. It won't and can't do this—by design.

III. DAPA operates at the "lowest ebb" of presidential authority and threatens the separation of powers.

This case is about much more than the APA. It is about the separation of powers and the rule of law. That this appeal reaches the Court in the administrative-law context should not obscure the fundamental threat DAPA poses to our checks and balances. DAPA willfully disregards the express and implied will of Congress. It operates in what Justice Jackson referred to as the President's "lowest ebb" of authority, which "must be scrutinized with caution" by the courts. *Youngstown*, 343 U.S. at 637–38. Such scrutiny will reveal that though deferred action and work permits have been authorized by Congress in the abstract, as employed, they operate to bypass Congress. DAPA is not a humdrum exercise of prosecutorial discretion, based on modest new policy guidance, so DHS can prioritize resources.

The enforcement of the Take Care Clause is essential to protect both horizontal and vertical federalism. For the former, review preserves the balance between Congress and the Executive. For the latter, the states can safeguard their role as the bulwarks of individual liberty. DAPA must be stopped before it begins so it will not serve as a precedent for evasions of the Constitution "presently unimagined, [which] will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers." *Noel Canning*, 134 S. Ct. at 2550 (Scalia, J., concurring).

A. Presidential action at the "lowest ebb" of executive power "must be scrutinized with caution."

To assess the conjunction or disjunction between the Congress and the President, we turn to the cornerstone of our separation of powers jurisprudence—*Youngstown Sheet & Tube Co. v. Sawyer*—and in particular the tripartite framework advanced by Justice Jackson. The Court concluded that President Truman could not rely on his inherent powers to seize steel mills in the face of imminent labor strikes. *Youngstown*, 343 U.S. at 588–89. Justice Jackson concurred, finding the executive power is at its "lowest ebb" when the actions the President takes are "measures incompatible with the expressed or implied will of Congress." *Id.* at 637 (Jackson, J., concurring). In such cases, the President "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.*

With this limited Article II arsenal, the president's "claim to a power at once so conclusive and preclusive *must be scrutinized with caution*, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 638 (emphasis added). In this lowest zone, presidential power is "most vulnerable to attack and [is] in the least favorable of possible constitutional postures." *Id.* at 640. Jackson's framework has become the canonical holding of the case and of separation-of-powers jurisprudence as a whole.

Under this analysis, DAPA crashes into the shore of the Executive's "lowest ebb." First, the President is not acting in concert with Congress. Congress rejected or failed to pass his preferred immigration reform bills. Second, there is no murky "twilight" about congressional intent. The House of Representatives passed a resolution affirmatively opposing DAPA. Seung Min Kim, *House Sends Obama Message with Immigration Vote*, POLITICO, Dec. 4, 2014.[16] Third, DAPA does not "resemble in material respects" previous exercises of deferred actions. As discussed earlier, all of these previous programs acted as a *temporary bridge* from one status to another, where a legal status was available within a reasonable period after deferred action, or responded to extraordinary foreign policy or individual hardships.

The President is sidestepping the express and implied will of Congress because the legislative branch has refused to enact his preferred policies. DAPA is a perfect storm of executive law-making, truly the nadir of *Youngstown*'s "lowest ebb."

B. DAPA is designed to grant lawful presence and work authorization.

Congress generally has wide discretion in choosing the means to accomplish legitimate policy goals. However, invoking the talisman of national security—even in times of war—does not expand the scope of

[16] Available at http://www.politico.com/story/2014/12/house-immigration-vote-obama-113327.html.

these powers. As the Supreme Court recognized about the "judicial authority" in *Boumediene v. Bush*, "[s]ecurity subsists, too, in fidelity to freedom's first principles." 553 U.S. 723, 796–97 (2008). The Court reminded us that "personal liberty … is secured by adherence to the separation of powers," *id.*, and that courts play an essential role in preserving this balance. When the separation of powers is breached, not even national security will save the law.

Unlike the Military Commissions Act at issue in *Boumediene*—where the President "act[ed] pursuant to an express or implied authorization of Congress [and] his authority [was] at its maximum," *Youngstown*, 343 U.S. at 636 (Jackson, J., concurring)—DAPA is a unilateral executive action that *conflicts* with the express and implied will of Congress. In this case, the "Presidential claim to a power at once so conclusive and preclusive must be *scrutinized with caution*, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 638 (emphasis added).

As with all constitutional scrutiny, this inquiry entails determining the fit between the *means* chosen to accomplish the desired *ends*. Even if the government's interest is compelling, the policy is void if the approach chosen is improper. With DAPA, the government's stated objectives—the identification and prioritization of dangerous aliens for removal in order to promote national security—are unimpeachable, and within the core of the President's authority (although this objective was

insufficient to justify the seizure of the steel mills). Had the President pursued these policies alone, there would have been no controversy, let alone a case.

What renders DAPA unconstitutional, however, is the means through which these goals are accomplished. Even if deferred action and work authorization are lawful in the abstract,[17] applying Jackson's "scrutin[y] with caution" reveals that the manner and scale by which these policies are being implemented goes beyond the power Congress delegated to the Executive.

Consider the government's defense of DAPA as articulated in the district court: To help DHS agents quickly distinguish dangerous immigrants from those who pose no threat, the government had to defer the deportations of as many as 4 million aliens. Once the aliens sign up, the argument goes, they will undergo background checks and receive a biometric ID, making it much easier for DHS to identify them. Incidentally, because halting millions of deportations was not reason enough to coax immigrants to "come out of the shadows," the Executive will approve virtually every single enrollee for work authorization as an "incentive" to sign up. Pay no attention to the fact that the most dangerous felons are extremely unlikely to register. It's all about national security, the government insists.

[17] 8 U.S.C. § 1324a(h)(3).

During a colloquy in the district court, Judge Hanen asked why the government could not accomplish the identification of non-dangerous aliens without granting work authorization: "There's nothing that's stopping [DHS] from saying: All right … We're going to do a background check on you, and we'll give this card that says for three years we're not prosecuting you." ROA.5286:11–15. In other words, the President could achieve the important goal of protecting national security with significantly more tailoring.

Kathleen Hartnett, the Justice Department lawyer, conceded that the administration could do that as an "alternative," but "that was not the judgment of how to do the program." ROA.5286:17–18. Judge Hanen replied that "even with my injunction in place, you could satisfy all those security needs." ROA.5286:20–21. More specifically—here comes DAPA's rub—the government could protect national security "without issuing legal presence and without giving [immigrants] tax benefits and employment authorizations and Social Security." ROA.5286:21–23. Providing biometric identification cards can be done without granting other myriad benefits to millions. Such a regime would have far fewer constitutional and procedural difficulties.

Hartnett's answer was striking: The President chose to offer work authorization to millions to "provide an *incentive* for people to come out and identify themselves." ROA.5287:8–9. (emphasis added). She repeated that "work authorization is a large incentive for getting people to be

able to come out of the shadows, as it said, and to identify themselves." ROA.5287:11–13. In other words, an assurance to not deport an alien who is here unlawfully was not a sufficient justification. It was necessary for the Executive to effectively rubber-stamp 5 million new work authorizations. And remember, this entire regime was purportedly created to provide an administrative convenience to DHS agents who encounter aliens and have to decide whether to investigate them. Whatever marginal benefit this expedited identification process offers, the legitimate goal could be accomplished without such dubious means.

Faced with this chasm between ends and means, Judge Hanen questioned why "just an offer to stay in the country without being prosecuted" was insufficient, and the government has "to give [applicants] some extra incentive?" ROA.5287:19–22. Though Hartnett tried to distance herself from this obvious point, she inevitably conceded it. She asserted that the "law-enforcement officials that run the Department of Homeland Security had made the judgment that [DAPA was] the right way to get people to come out [of the shadows and] account for themselves…." ROA.5288:1–3.

This inverts the means and the ends. Instead of using deferred action as a tool to promote national security, the government has invoked national security as smoke screen to obscure DAPA's true goal: affording millions who would not otherwise be deported with work authorization to bring them "out of the shadows." Accepting this pretextual de-

fense requires a massive suspension of disbelief in light of the history of legislative failure to enact comprehensive immigration reform and the government's crafting of DAPA to accomplish as much as possible of what Congress rejected.

Further, the notion of using deferred action and work authorization as an "incentive" to promote security is the quintessential policy judgment that only Congress can make. Historically, Congress has only sanctioned deferred action in limited contexts, such as when an alien (1) had the *immediate prospect* of lawful residence[18] or (2) suffered a hardship.[19] In these cases, past presidents were promoting congressionally-designed goals. Deferred action and work authorization can only exist in the zones of legislative authorization or acquiescence, not when the President is using them for goals antagonistic to congressional design.[20] DAPA's sweeping expansion of deferred action beyond these limited purposes undermines Congress's comprehensive framework.

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[18] *Congressional Acquiescence*, 103 GEO. L.J. ONLINE at 111–125.

[19] *Boundaries of Discretion*, 64 AM. U.L. REV. at __.

[20] Two general grants of authority have been understood to allow these limited forms of deferred action. *See* 6 U.S.C. § 202(5); 8 U.S.C § 1103(a). *See also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999). However, finding the wholesale authority in these provisions that the government claim would be akin to discovering the "elephants in mouseholes" that the Supreme Court has described as indicia of an implausible delegation from Congress. *See Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133–35 (2000).

If Congress were to pass a statute that gave work benefits to undocumented immigrants to promote national security, some might doubt its efficacy—*amici* wouldn't—but the judiciary would have no license to question its wisdom. DAPA presents an entirely different calculus. Instead of enforcing congressional judgments, DAPA effectively rewrites the law in the President's own image. The implausible "national security" argument—entirely at odds with anything Congress has ever enacted or acquiesced in—reveals the gap between the executive and the legislative branches.

Ultimately, to determine whether the President is adhering to his constitutional duty to "take care that the laws be faithfully executed," we must examine whether he is acting in good faith to comply with the laws or deliberately deviating from them to achieve a contrary policy. *Faithfully Executing* at 205-18. The Executive's house-of-cards defense toppled in the district court, demonstrating DAPA's true aims.

To paraphrase Chief Justice Roberts's opinion in *NFIB v. Sebelius*, even if work authorization and deferred action are "necessary" (read "convenient") approaches to accomplish the goal of national security, the underlying objective of prospectively licensing 5 million aliens and affording them work authorization cannot be deemed "proper." 132 S. Ct. 2566, 2591–93 (2012). The propriety of the act must be judged against the background principles of the separation of powers, and in this case, the limits on the President's authority to abdicate his duty. Even if de-

ferred action and work authorization could be used on a smaller scale in concert with Congress, DAPA is unlawful as executed here.[21] The judiciary need not defer to this tendentious position, and should recognize it for what it is—a smokescreen to allow the President to enact policies that were defeated by the democratic process.

IV. Enforcement of the Take Care Clause protects horizontal and vertical federalism.

In virtually all cases, political disputes have no place in the courts because the Constitution "commit[s] the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 216 (1962). Under our separation of powers, the President cannot act without Congress, and Congress cannot act without the President. This dynamic ensures that political questions can be worked out through the political process, obviating the need for judicial intervention. The complementary symbiosis, however, degrades into parasitism when one branch purports to act without the other.

This abuse is even more precarious when the President crafts his policy so that Congress cannot defund it,[22] not-too-subtly boasts about it

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[21] As the district court observed, an estimated 500 to 1,000 people received deferred action annually between 2005 and 2010. DACA increased that number 200-fold, and DAPA would increase it 1,000-fold. ROA.4436.

[22] *House GOP panel: Defunding immigration order 'impossible,'* THE HILL (Nov. 20, 2014), available at http://thehill.com/policy/finance/224837-appropriations-panel-defunding-immigration-order-impossible.

in legal opinions,[23] and then threatens to veto any effort to stop it.[24] Imagine if President Truman had threatened to veto a bill that would have defunded his steel mill seizures!

With DAPA, the President enacted policies that Congress rejected, and attempted to insulate them from judicial review by claiming they were mere policy "guidance." The role of the courts to police the "complete abdication of statutory responsibilities" is heightened when it involves the "violation of constitutional rights," *Chaney*, 470 U.S. at 853 (Marshall, J., concurring), or the equally-important separation of powers. While the D.C. Circuit decision reversed by *Chaney* was a "clear intrusion upon powers that belong to Congress, the Executive Branch and the states," *id.*, review of DAPA here would reinforce the powers of Congress to limit the President's power.[25]

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[23] *OLC Opinion* at 26 ("But DHS has informed us that the costs of administering the proposed program would be borne almost entirely by USCIS through the collection of application fees.") (citations omitted).

[24] *Obama: I'll veto bill that reverses immigration actions*, USA TODAY (Feb. 4, 2015), available at http://www.usatoday.com/story/news/nation/2015/02/04/obama-boehner-immigration-dreamers-homeland-security-department/22854865/.

[25] *Arizona v. United States*, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., concurring in part and dissenting in part) ("But there has come to pass … the specter that Arizona and the States that support it predicted: A Federal Government that *does not want to enforce the immigration laws as written*, and leaves the States' borders unprotected against immigrants whom those laws would exclude.") (emphasis added).

This case's charge ascends to an even higher valence because it is brought by more than half the states in the Union. As the unanimous Supreme Court recently explained, "Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. 'State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *New York v. United States*, 505 U.S. 144, 181 (1982)). The sovereign states are uniquely situated to "protect[] the liberty of the individual from arbitrary power.'" *New York*, 505 U.S. at 181.

In cases where Congress and the President acted in concert to violate the separation of powers, the states stood ready to reaffirm those bulwarks of liberty. In cases where the President alone failed to execute his lawful duties, the governments closest to the people stood ready to reassert the separation of powers. *Train v. New York City*, 420 U.S. 35, 41 (1975) (holding that EPA cannot spend "less than the entire amounts authorized to be appropriated."); *Massachusetts v. EPA*, 549 U.S. 497 (2007). The judicial role is not "lessened … because the two political branches are adjusting their own powers between themselves." *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring). Rather, "[t]he Constitution's structure requires a stability which transcends the convenience of the moment.… Liberty is always at stake

when *one* or more of the branches seek to transgress the separation of powers." *Id.* at 449–450. (citations omitted; emphasis added).

Even where a state's sovereign interests are not directly implicated, "[t]he independent power of the States also serves as a check on the power of the Federal Government." *NFIB*, 132 S. Ct. at 2578. In the companion case to *NFIB*, 26 states challenged the Affordable Care Act's expansion of Medicaid as coercive under the federal spending power. The Court recognized the role the states played in the other aspect of the judgment—the Commerce Clause challenge to the individual mandate. Chief Justice Roberts explained, "[t]he independent power of the States also serves as a check on the power of the Federal Government: 'By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.'" *Id.* (quoting *Bond*, 131 S. Ct. at 2364).

The states have articulated a cognizable injury sufficient to demonstrate standing. But the "special solicitude" afforded to states under our Constitution, *Massachusetts*, 549 U.S. at 520, is not limited to Article III standing. Texas and the other 25 states in this case are serving a much higher purpose than litigating over driver's license costs. They serve as the last bulwark against an unlawful abdication of the Constitution.

Conclusion

During the height of the Korean War, the Supreme Court rejected the President's efforts to bypass Congress and engage in executive lawmaking. Even national security was not a sufficient legal defense to rescue the seizures. The Constitution, the Court held, shows that "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. Justice Jackson closed his iconic opinion with this timeless wisdom:

> The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. *But it is the duty of the Court to be last, not first, to give them up.*

Id. at 655 (emphasis added).

This Court must be the "last, not first" to surrender to the Executive's "exercise of authority without law." The preliminary injunction should be affirmed.

Respectfully submitted,

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On May 8, 2015, I filed this *Brief of the Cato Institute and Prof. Jeremy Rabkin as Amici Curiae* using the CM/ECF System, which will send a Notice of Filing to all counsel of record.

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