**No. 15-40238**

# In The 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*,

v.

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. SALDAÑA, DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; LEÓN RODRÍGUEZ, 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 *Amicus Curiae* of Citizens United, Citizens United Foundation, English First Foundation, English First, TREA Senior Citizens League, U.S. Justice Foundation, The Lincoln Institute for Research and Education, Abraham Lincoln Foundation for Public Policy Research, Inc., U.S. Border Control Foundation, Policy Analysis Center, Institute on the Constitution, and Conservative Legal Defense and Education Fund in Support of Appellees and Affirmance


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May 11, 2015

Case No. 15-40238

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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TEXAS, *et al.*,

Plaintiffs-Appellees,

v.

UNITED STATES, *et al.*,

Defendants-Appellants.

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Circuit 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.

Texas, *et al*., Appellees

United States of America, *et al*., Appellants

Citizens United, Citizens United Foundation, English First Foundation, English First, TREA Senior Citizens League, U.S. Justice Foundation, The

Lincoln Institute for Research and Education, Abraham Lincoln Foundation for Public Policy Research, Inc., U.S. Border Control Foundation, Policy Analysis Center, Institute on the Constitution, and Conservative Legal Defense and Education Fund, *Amici Curiae*.

William J. Olson, Robert J. Olson, Herbert W. Titus, Jeremiah L. Morgan, and John S. Miles, counsel for *Amici Curiae*.

Michael Connelly, counsel for *Amicus Curiae* U.S. Justice Foundation.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and 5th Circuit Rule 28.2.1, it is hereby certified that *amici curiae* Citizens United, Citizens United Foundation, English First Foundation, English First, TREA Senior Citizens League, U.S. Justice Foundation, The Lincoln Institute for Research and Education, Abraham Lincoln Foundation for Public Policy Research, Inc., U.S. Border Control Foundation, Policy Analysis Center, and Conservative Legal Defense and Education Fund are non-stock, nonprofit corporations, have no parent companies, and no person or entity owns them or any part of them. *Amicus* Institute on the Constitution is not a publicly traded corporation, nor does it have a parent company which is a publicly traded corporation.

/s/ William J. Olson
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Attorney of Record for *Amici Curiae*

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## INTEREST OF *AMICI CURIAE*[1]

Citizens United, Citizens United Foundation, English First Foundation, English First, TREA Senior Citizens League, U.S. Justice Foundation, The Lincoln Institute for Research and Education, Abraham Lincoln Foundation for Public Policy Research, Inc., U.S. Border Control Foundation, Policy Analysis Center, and Conservative Legal Defense and Education Fund are nonprofit organizations, and each is exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Institute on the Constitution is an educational organization. Each of the *amici* is dedicated, *inter alia*, to the correct construction, interpretation, and application of law.

[1] All parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

## STATEMENT OF THE CASE

On November 20, 2014, the Obama Administration announced executive actions on immigration policy, granting "lawful presence" to about 4 million illegal aliens in the United States. Unable to persuade Congress to enact the DREAM Act,[2] the Administration sought to implement many of the same provisions through three Memoranda issued by the Secretary of Homeland Security and collectively entitled "Deferred Action for Parents of Americans and Lawful Permanent Residents" ("DAPA"). Texas led a coalition of 26 States challenging the legality of DAPA in federal court, and on February 16, 2015, the U.S. District Court for the Southern District of Texas granted the States a preliminary injunction. Texas v. U.S., 2015 U.S. Dist. LEXIS 18551 (S.D. Tex. 2015).

On appeal, the Government attempts to minimize the significance of the Administration's directives, variously describing them as "enforcement policies," "enforcement discretion," and "enforcement priorities." Brief of Appellants ("Govt. Br."), pp. 1-4, 13. On the contrary, the Administration's action purports to clothe certain illegal aliens with "lawful presence," thereby imposing enormous educational, health care, and law enforcement costs on the plaintiff States, the residents of those states, and American taxpayers at large.

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[2] *See*, *e.g.*, 112th Congress, S. 952.

Ratified by the people of the several States, the U.S. Constitution established a federal union to protect their interests. In 2014, the executive branch abdicated its duty to protect the integrity of the States' borders. Now, 26 states have joined together in this historic defense of their existence as sovereign independent States in America's federal system.

## ARGUMENT

## I. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE PLAINTIFF STATES HAVE ABDICATION STANDING.

### A. The Plaintiffs Demonstrated Abdication Standing.

Employing a conventional standing analysis, District Judge Hanen concluded that "[t]here is ... ample evidence to support standing based upon the States' demonstration of direct injury flowing from the Government's implementation of the DAPA program." *Id*. at *61. In addition, the district court found that "Plaintiffs (at least Texas) have [abdication] standing ... as well." *Id.* at *115, n.48. These *amici curiae* fully agree with Judge Hanen's observation that "[a]ssuming that the concept of abdication standing will be recognized in this Circuit, this Court finds that this is a textbook example." *Id.* at *114. Moreover, analyzing the case from the standpoint of abdication standing even more fully reveals the illegitimacy of DAPA.[3]

[3] If successful in denying Texas access to federal court based on its multi-layered standing defenses, the Government seeks a dangerous type of immunity from

Judge Hanen described the theory of abdication standing as follows:

> This theory describes a situation when the federal government **asserts sole authority** over a certain area of American life and excludes any authority or regulation by a state; yet subsequently **refuses to act** in that area. Due to this refusal to act in a realm where other governmental entities are barred from interfering, a **state has standing to bring suit to protect itself and the interests of its citizens**. [*Id.* at *94-95 (emphasis added).]

The first precondition is that the federal government must have "sole authority" to control "American life" in a given area. *Id.* at *95. The district court reported that "[t]he States concede, here, that the regulation of border security and immigration are solely within the jurisdiction of the United States" (*id.* at *95), especially in view of the position taken by the Government and affirmed by the U.S. Supreme Court in Arizona v. United States, 567 U.S. ___, 132 S.Ct. 2492 (2012). Second, "the Government has abandoned its duty to enforce the law" over which it has claimed exclusive authority. *Id.* at *101. Here, the district court found, "it is not necessary to search for or imply the abandonment of a duty; rather, the Government has announced its abdication." *Id.* at *101-02.

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suit. Such a ruling, for example, would leave Texas defenseless against an Administration decision to abandon completely the Texas border based on a theory that "enforcement priorities" require the Government focus entirely on illegal immigration into California and Arizona.

### B. The Government's Challenge to Abdication Standing Is Wrong on the Law and the Facts.

The Government states that abdication standing:

> fails on the law [allowing] States to invoke the judicial power to challenge any exercise of authority by the federal government in the **exclusively federal domain** of immigration, **based on nothing more than a State's disagreement** with the federal government's **policy priorities** and choices about how best to allocate limited resources. [*Id.* at 23 (emphasis added).]

In asserting "the exclusively federal domain of immigration," the Government actually concedes that the first prong of abdication standing has been met — there is no room for state action on immigration. If federal law in this area is to be enforced, the federal government claims the exclusive right to enforce it.

As for the second prong, the Government incorrectly characterizes the conflict as a mere policy difference over the setting of prosecutorial priorities. More than a "policy" difference, however, DAPA is a complete refusal to exercise a responsibility or duty — the very definition of an abdication. The Government claims that "DHS is vigorously enforcing the Nation's immigration laws, using the resources that Congress has allocated it" (*id.* at 24), baldly asserting that its:

> approach is the polar opposite of "abdication" [r]epresent[ing] responsible immigration enforcement that advances national security and public safety in the face of real-world resource constraints. [*Id.* at 25.]

On the contrary, in no way did better control of immigration undergird DAPA. Rather, having failed to persuade Congress to enact the DREAM Act and eviscerate many of the nation's immigration laws, the Obama Administration decided to accomplish that objective unilaterally.

The schizophrenic nature of the Government's rationale for its action is revealed by briefs filed by two of the Government's *amici curiae*. A brief filed by a former Solicitor General for a group of Democratic Congressmen adheres to the Government's litigation position that "limited resources" underpins DAPA. *See* Amicus Brief for 181 Members of the United States House of Representatives (Apr. 6, 2015) at 2. On the other hand, a brief filed by several States is reflective of the Obama Administration's true hostility to the immigration laws waived by DAPA:

> the directives will ... allow[] qualified undocumented immigrants to come out of the shadows, work legally, and better support their families. This will ... help avoid tragic situations in which parents are deported away from their U.S. citizen children, who are left to rely on State services or extended family.... [Brief of the Amicus States of Washington, *et al.* (Apr. 6, 2015) at 1.]

**C. Abdication Standing Is Essential to Preserve the National Covenant.**

The civil government of United States of America is unique. As Justice Kennedy observed in 1995:

> [t]he Framers split the atom of sovereignty [so] that our citizens would have two political capacities, one state and one federal, each protected

> from incursion by the other. [United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).]

"The resulting Constitution," Justice Kennedy continued, "created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Id.*

This federal system of dual sovereignty is reflected in a division of legislative powers. Article I, Section 1 vests in a Congress of the United States only those legislative powers "herein granted." The Tenth Amendment, in turn, provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.* at 801.

According to the Supreme Court, one of the powers "delegated" to the United States is the power to enact uniform laws governing immigration and naturalization, to the exclusion of the States and the people.[4] *See* Arizona v. United States, *supra*.[5]

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[4] In truth, the States, the power of Congress to regulate immigration into the United States cannot be found among the powers expressly enumerated in the Constitution. *See* discussion in Arizona v. United States, Brief Amicus Curiae of U.S. Border Control, *et al.*, on the Merits (Feb. 13, 2012), pp. 5-11.

[5] By no means do these *amici curiae* agree with the position taken by the U.S. Supreme Court in Arizona v. United States that the States have no role in "border security and immigration," with several of these *amici* having urged the opposite position in two *amicus curiae* briefs filed in that case:

- Arizona v. United States, Brief Amicus Curiae of U.S. Border Control, *et al.*,

Thus, by its express terms, then, the Tenth Amendment does not "reserve" to the States or the people any powers over the subject matters of immigration and naturalization. As Justice Kennedy observed, "[t]he States have no power, reserved or otherwise, over the exercise of federal authority within its proper sphere." Thornton at 841.

But what happens if the federal government "abdicates" its delegated authority, refusing to enforce its own laws, as is claimed by the States in this case? According to the Government, there is no "case" or "controversy," but only a policy dispute to be resolved politically at the national level. Govt. Br. at 1-2. However, the Government is mistaken. As the Supreme Court ruled in Marbury v. Madison, "all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation...." *Id.*, 5 U.S. (1 Cranch) 137, 177 (1803). The Tenth Amendment, then, is legally binding, contemplating that those powers delegated to the federal government would be exercised, not abdicated. As the Marbury Court affirmed this principle, quoting Blackstone's Commentaries, "'where there is also a legal right, there is a legal remedy by suit or action at law, whenever that right is invaded.'" *Id.* at 163. Otherwise, the States and the people

On Petition for a Writ of Certiorari (Sept. 12, 2011); and

- Arizona v. United States, Brief Amicus Curiae of U.S. Border Control, *et al.* On Writ of Certiorari (Feb. 13, 2012).

would be left powerless to protect the States' sovereign interests and to secure the liberties of their citizenry.[6]

If the federal government could, with legal impunity, abdicate the exclusive power vested in it in the area of immigration and naturalization, the States and their people would be left in a legal no-man's land. In our federal system, the Tenth Amendment confers standing to the States to sue in federal court to protect both their sovereign capacities and their role as *parens patriae*, to ensure that the federal government perform its legal duty to exercise the powers delegated to it by the national covenant.

## II. DAPA IS THE PRODUCT OF THE EXERCISE OF RAW PREROGATIVE POWER, A POWER THAT IS NOT RECOGNIZED BY THE CONSTITUTION.

The United States Constitution established a government vested with three types of powers:

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[6] Article IV, Section 4, imposes an affirmative duty on the federal government to "protect [the States] against Invasion." The enormous influx of persons across our nation's Southern border is manifest throughout the district court opinion. *See* Texas at *4-5. This massive illegal immigration that the federal government has allowed could easily be viewed as an invasion. *See* Arizona v. United States, *Amicus Brief* of U.S. Border Control (Feb. 13, 2012) at 16-32. Moreover, when the federal government fails to fulfil its constitutional duty to protect the States, Article I, Section 10 grants to the States authority to defend themselves against invasion. *See id.* at 32-38.

> A legislative power to make law, a judicial power to adjudicate cases in accord with law, and an executive power to execute the lawful force of the government. [P. Hamburger, Is Administrative Law Unlawful? 125 (Univ. of Chi. Press: 2014) (hereinafter "Hamburger").]

None of these "three types of power ... includes a power to excuse persons from the obligation of law." *Id.* Such power to dispense with the law "does not exist in the Constitution," but rather belongs to the past when kings "waived" the requirements of the law, singling out "favored persons telling them that, notwithstanding the rule, they need not comply." *Id.* at 120-21. Such is the case with DAPA.

Although the Government insists that DAPA is just management "guidelines for deferring action on the removal of [certain] aliens who are not priorities," the Government actually concedes that they are more than that — such guidelines being "among other [unspecified] things" that purportedly advance the new DHS immigration enforcement policies. *See* Govt. Br. at 1. Indeed, the court below discovered that, along with prosecutorial deferral, DAPA:

> establish[ed] a national rule or program of awarding *legal presence* – one which not only awards a three-year, renewable reprieve, but also awards over four million individuals, who fall into the category that Congress deems removable, the right to work, obtain Social Security numbers, and travel in and out of the country. [Texas at *157.]

Additionally, the district court pointed out that the "President's own labeling of the program" stripped away the bureaucratic veil of discretionary guidance when he

announced to the nation: "I just took an action to change the law." *Id*. at *183. In that moment of candor, the district court observed, the President made a "deal":

> [I]f you have children who are American citizens ... if you've taken responsibility, you've registered, undergone a background check, you're paying taxes, you've been here for five years, you've got roots in the community — *you're not going to be deported.... If you meet the criteria, you can come out of the shadows*. [*Id.* at *183-84.]

The Government decries the district court's reliance upon "language in the [Secretary's] Guidance indicating that aliens accorded deferred action are considered to be 'lawfully present' for some purposes." Govt. Br. at 45. Indeed, the Government insists, "[d]eferred action 'does not confer any form of legal status in this country' and may be revoked or terminated at any time, in the Secretary's sole discretion." *Id.* Thus, the Government belittles "[w]hat the district court described as 'lawful presence' [to be] nothing more than the inevitable consequence of any exercise of prosecutorial discretion: remaining free of the government's coercive power for so long as the government continues to forebear from exercising that power." *Id.* at 46.

The Government's paraphrase of DAPA is disingenuous. As the district court found, "lawful presence" is not just an incidental consequence of the Secretary's decision to defer action. *See* Texas at *160-62. Rather, the court found that "DHS has enacted a wide-reaching program that awards legal presence, to individuals Congress has deemed deportable or removable, as well as the ability to obtain Social

Security numbers, work authorization permits, and the ability to travel." *Id.* at *144-45. "Absent DAPA," the court observed, "these individuals would not receive these benefits." *Id.* at *145. "It is this affirmative action," the court concluded, "that takes Defendants' actions outside the realm of prosecutorial discretion." *Id.* at *162.

Although the Government equivocates in its brief whether those aliens who qualify for DAPA are still subject to the enforcement of the immigration law that they are violating (*see* Govt. Br. at 1-3), there is nothing equivocal about the terms of DAPA as explained by the President: "*you'll actually get a piece of paper that gives you an assurance that you can work and live here without fear of deportation*." *See* Texas at *184, n.95. In other words, the President has promised and provided that, "notwithstanding the rule[s]," an estimated 4 million illegal aliens "need not comply."[7]

Thus, DAPA cannot be just an exercise of prosecutorial discretion because, by definition, the exercise of prosecutorial discretion "cannot guarantee relief from the obligation of the law itself." *See* Hamburger at 122. In fact, DAPA marks "the return of extralegal legislation ... accompanied by the return of the dispensing power"[8] once wielded by English monarchs, whose claim to prerogative rule included the right to

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[7] *See* Hamburger at 120.

[8] *Id*. at 120-21.

"waive" laws respecting "favored persons," which is the very antithesis of the law of separation of powers and, thus, unrecognized by the Constitution. *See generally* Hamburger at 66-72, 125-26.

The DHS Secretary's attempt to implement the DAPA waiver is not the first instance wherein the Obama Administration has employed such extra-constitutional dispensing power:

> [A]lthough the Affordable Care Act required so-called mini-med insurers to provide guaranteed levels of insurance, the Department of the Health and Human Services gave waivers to favored corporations, relieving them of the duty to meet the regulatory and thus also the statutory levels. [Hamburger at 124.]

As Professor Hamburger has acutely observed, "[w]aivers or dispensations are profoundly dangerous" and "doubly lawless," in that the DHS Secretary acts "outside the law to permit others to act above the law." *Id.* at 126-27. Additionally, the DAPA waiver is an exercise of prerogative power of "favoritism,"[9] dispensing with the law in favor of a class of persons who are expected to be "aligned" with the President's political party.[10] The use of the DAPA waiver, coupled with the promised

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[9] *See* Hamburger at 127.

[10] *See, e.g.*, M. Oleaga, "Immigration Executive Action: House Democrats Release 'Toolkit' for Eligible DACA, DAPA Immigrant Applicants, latinpost.com (Mar. 28, 2015) http://tinyurl.com/p5edbmk; J. Jordan, "Obama's immigration amnesty," Foxnews.com (Nov. 28, 2014) http://goo.gl/nBwTUV; E. Schultheis, "Immigration reform could be bonanza for Democrats," Politico (April 22, 2013)

benefits accruing to illegal aliens the status of "lawful presence," is designed to "co-opt political support for [a] politically insupportable law[]," providing relief to some at the expense of others, "shifting the cost of objectionable laws from the powerful to others, with the overall effect of entrenching"[11] the failure of the Government to enforce its immigration laws. *See* Hamburger at 128. Although normally not the recipient of special entitlements, DAPA awards to an alien subclass political and economic privileges characteristic of a title of nobility[12] which is expressly forbidden by Article I, Section 9 of the Constitution. *See* 2 J. Story, Commentaries on the Constitution §1350-1351, pp. 223-24 (Little, Brown, 5th ed.: 1891) ("Distinctions between citizens in regard to rank would soon lay the foundation of odious claims and privileges, and silently subvert the spirit of independence and personal dignity, which are so often proclaimed to be the best security of a republican government.").

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http://goo.gl/jXzXTB.

[11] *See* Hamburger at 127.

[12] *See* St. George Tucker, A View of the Constitution of the United States, 160-66 (Liberty Fund: 1999).

## III. DAPA VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS.

DAPA violates the constitutional separation of powers. Concurring in Youngstown Sheet & Tube Co. v. Sawyer, Justice Jackson explained that "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Id.*, 343 U.S. 579, 635 (1952). Now the prevailing view of the Supreme Court, Justice Jackson's Youngstown opinion noted three categories for viewing Presidential power, which depend upon Congress' level of involvement in a given issue. In category one, the President's "authority is at its maximum" when he "acts pursuant to an express or implied authorization of Congress...." *Id.* This category involves the President's enforcement of the law, the opposite of what has occurred here.

In category two, the President acts "in absence of either a congressional grant or denial of authority" from Congress. *Id.* at 637. The Government has mistakenly argued that this case involves category two, on the theory that "historical precedent" of past limited deferred action programs by past Presidents somehow indicates Congress' approval, and justifies DAPA's deferred action. Texas at *170-71. But Judge Hanen correctly rejected this argument, observing that other small, targeted deferred action programs relied upon by the Government are completely unlike the

current amnesty program, which extends to millions of persons, and do not demonstrate "'a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned....'" *Id.* at *172.

On the contrary, as Appellees briefly noted (*see* Texas Br. at 50), this case is a Youngstown category three case — one where "the President takes measures incompatible with the expressed or implied will of Congress," and where "his power is at its lowest ebb...." Youngstown at 637.[13] In such a case, "[c]ourts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject." *Id.* Certainly, this Court cannot lawfully "disable" Congress from acting on immigration matters since such matters have been determined by the Supreme Court to be "matters solely for the responsibility of the Congress...." Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952). *See also* Texas at *121.

Indeed, Congress thrice has made its position known with respect to the provisions of DAPA. First, Congress has explicitly legislated with regard to the legality of aliens' presence and the grounds for their removal. *See* Arizona v. United States at 2499. As the U.S. Department of Justice's Office of Legal Counsel Memorandum ("OLC Memo") notes, "[i]n the INA, Congress established a

[13] *See* OLC Memo at 6.

comprehensive scheme governing immigration." *Id.* at 3. Second, Congress implicitly rejected the President's DAPA scheme, in refusing to take any steps toward enacting the DREAM Act.[14] Third, Congress has on occasion granted the President "narrow, statutorily defined circumstances" whereby he may "grant deferred-action status" for certain specified illegal aliens. *See* Texas Br. at 5. The President's broad assumption of a general power to waive the nation's immigration laws is very different than Congress having exempted a narrow class of persons. With DAPA, the President has acted contrary to Congress' clear desires, his power is clearly "at its lowest ebb" and, indeed, its exercise is unconstitutional.

## IV. DAPA VIOLATES THE PRESENTMENT AND TAKE CARE CLAUSES OF THE CONSTITUTION.

### A. The Interplay between the Clauses.

The President's authority with respect to the legislative function is strictly confined. The Presentment Clause in Article I, Section 7 requires that, for a bill to become law, it must pass both houses of Congress, and then "be presented to the President" who may either "sign it" or "return it" (employing his "veto" power), at which point two-thirds of both houses still may override that veto. Thus, aside from

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[14] *See* http://goo.gl/4anZnQ; *see also* Complaint para 20.

"recommend[ing]" legislation under Article II, Section 3, the veto is the only legislative authority the Constitution grants to the President.

After a bill becomes law, other constitutional provisions govern. The Take Care Clause of Article II, Section 3 requires the President to "take Care that the Laws be faithfully executed," and the President's Oath of Office requires him to "preserve, protect and defend the Constitution of the United States." So long as a law was duly enacted, and so long as it comports with the Constitution, the President lacks discretion in choosing whether to implement or enforce the law.[15] Indeed, the Take Care Clause requires that the law be enforced.

The Supreme Court has noted that "[a]lthough the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes." Clinton v. New York, 524 U.S. 417, 439 (1998). However, the Court did not view this silence as authorizing executive action, but rather viewed it as "equivalent to an express prohibition" on the post-enactment executive meddling with enacted statutes. *Id.* Whenever a President acts to "effect the repeal of laws ... without observing the procedures set out in Article I, § 7 ... he is rejecting the policy

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[15] On the other hand, if a law was not duly enacted, or if it is "repugnant" to the Constitution, then the President is duty-bound by his oath **not** to implement and enforce it. *See* Article II, Section 1, Clause 8. No such claim was made in this case.

judgment made by Congress and relying on his own policy judgment." Clinton, 524 U.S. at 444-45.

Indeed, in the debates on the Constitution, Hamilton and other advocates of a strong Executive proposed that "[t]he Executive ought to have an absolute negative" over laws passed by Congress. Records of the Federal Convention, June 4, 1787, reprinted in P. Kurland & R. Lerner, The Founders' Constitution ("Founders", Univ. of Chicago Press (1987)), vol. 2, p. 389. However, other delegates thought that "[t]his was a mischievous sort of check," that "[t]o give such a prerogative would certainly be obnoxious to the temper of this country," and the proposal was unanimously rejected by a vote of the state delegations. *Id.* at 390. Since the framers specifically rejected the idea that the President should have an absolute veto, it certainly could not be argued that they would have favored absolute executive power to dispense with a law for policy reasons after it has been enacted.

If DAPA is permitted, then any future President could simply decide, at any time, not to enforce any given law. This would effectively grant the President an unlimited and unchecked **veto at-will**. Such a result could not possibly be what the framers intended, because it would render the Presentment Clause redundant and, worse, irrelevant. This "threat of nonenforcement gives the President improper leverage over Congress by providing a second, postenactment veto." R. Delahunty

& J. Yoo, "Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause," 91 TEX. L. REV. 781, 795 (2013).

### B. DAPA Is Not Simply the Exercise of a Negative Veto Power, but Rather Is Positive Law.

In exercising his "qualified" veto power, "the [President] has not any power of *doing* wrong, but merely of *preventing* wrong from being done. The [Executive] cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses." W. Blackstone, Commentaries, 1:149-51, 155 (1765), reprinted in Founders', vol. 2, p. 388. Here, however, DAPA **has** altered the status quo — without Congressional approval. President Obama has not acted simply to stop Congress from changing current law; instead, DAPA "is actually affirmative *action* rather than inaction." Texas at *144. Under current law, the presence of millions of illegal aliens is illegal. *Id*. at *1. Yet, the Government is now advising illegal aliens eligible under DAPA that "**you are considered to be lawfully present** in the United States," (*id*. at *162 (emphasis added)), turning their "illegal presence into a legal one...." *Id*. at *153. Thus, the President did not just decline to enforce a duly enacted and constitutional law. Rather, the President has **created positive law**, in violation of the Article I, Section 7 process by which our laws are made, including the concepts

of bicameralism, majority vote, presentment, and signature. With DAPA, President Obama has unilaterally and *de facto* enacted portions of the DREAM Act.

### C. When Legitimate Prosecutorial Discretion Becomes a Take Care Clause Violation.

To be sure, the notion of "prosecutorial discretion" — relied upon by the Government here — has deep roots in the common law, and permits the Executive leeway to rigid enforcement of criminal laws, for certain important reasons in certain cases. As exercised here, however, it provides no support for the Government's position.

The continuum of prosecution and enforcement of laws is best viewed as a sliding scale. On one end of the scale it is inflexible, 100 percent enforcement in every case. Next to that is the exercise of legitimate prosecutorial discretion not to enforce the law in a particular case as to a particular person and, as the government is so eager to point out, such decisions are generally unreviewable by any court. *See* Govt. Br. at 5, 20, and 34. On the other end of the scale is the wholesale refusal to enforce the law in all cases as to any persons — 0 percent enforcement — which constitutes a clear violation of the President's duty under the Take Care Clause. The Supreme Court has agreed there is a line that cannot be crossed, determining that the President cannot adopt a "'policy' that is so extreme as to amount to an abdication of

his statutory responsibilities." Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985). *See* OLC Memo at 7. Whereas Article II vests the entire "executive power" in the President, the Take Care Clause is a limit on that power and, as such, a violation thereof is clearly reviewable by the courts.[16]

Prosecutorial discretion does not trump the Take Care Clause when discretion is used as mere cover for abdication. This is such a case. It is not merely discretion when "[t]he district court even found that the Executive generally would not enforce the law even against aliens whose applications are denied," and thus that "almost all unauthorized aliens could benefit from the policy of non-enforcement." States Br. at 23. This is precisely the "abdication of ... statutory responsibilities" of which the Supreme Court warned in Heckler.

### D. DAPA Is Not Merely an Exercise of Prosecutorial Discretion, but Rather Grants Immunity from Prosecution.

In 2009, President Obama took the position that he could not unilaterally effect the changes contained in DAPA. *See* Texas at *28. Then, in 2014, he asked the OLC for its opinion as to whether he could take executive actions that he had previously

[16] Even though it triple-qualifies its statement, the Congressional Research Service appears to agree, stating that "[a] policy of non-enforcement that amounts to abdication ... could potentially be said to violate the Take Care Clause." K. Manuel & T. Garvey, "Prosecutorial Discretion in Immigration Enforcement: Legal Issues," Congressional Research Service (Dec. 27, 2013), R42924, summary page.

announced that he could not take.[17] OLC responded that the President **could** take such actions, **but only if** officials "evaluate[d] each application ... on a **case-by-case basis**...." *Id.* at 17-18 (emphasis added). DAPA was careful to make plentiful use of the OLC terminology, in order to give the illusion of compliance[18] with the case-by-case review essential to a valid exercise of prosecutorial discretion. Thus, DAPA surrounds its nondiscretionary mandates with OLC terminology, such as that "the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis." *Id.* at 5. The Government argues that DAPA simply sets out "criteria for use in evaluating whether to exercise enforcement discretion...." Govt. Br. at 42. The Government continues that "the guidelines are inherently discretionary and leave room for individualized case-by-case determinations of whether deferred action is appropriate." *Id.* at 43.

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[17] *See* Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, "The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others" ("OLC Memo") (Nov. 19, 2014), http://goo.gl/YDJtQT.

[18] This is not the first time the Government has employed deception in this case. Judge Hanen called the Government's argument against state standing an "illusion of choice" for Texas to change how it issues drivers' licenses in order to avoid the severe monetary injury that DAPA will inflict on it. Texas at *45-46. Even the President's own lawyers in the OLC Memo noted that "the Executive cannot, **under the guise** of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences." OLC Memo at 6 (emphasis added).

But the Government's DAPA lexicon provides only an illusion of compliance with OLC standards. On balance, DAPA effects a result opposite from what its terms imply, ordering federal employees to take certain set actions in certain cases based on uniform criteria. Judge Hanen was unpersuaded by the government's terminology, noting that it is not the "'label that the ... agency puts upon its given exercise of administrative power'" that is important, but "'rather, it is what the agency does in fact.'" Texas at *185, *citing* Professionals & Patients for Customized Care v. Shalala, 56 F.3d 592, 596 (5th Cir. 1995). *See* States Br. at 45-46.

After all of its disclaimers, DAPA "**direct**[s] USCIS to establish a process ... for exercising prosecutorial discretion ... to those individuals who" meet the established criteria. DAPA Memorandum at 4 (emphasis added). In other words, that agency **must** "exercise prosecutorial discretion" not to act, the antithesis of prosecutorial discretion. *Id*. at 1. Even worse, Immigration and Customs Enforcement ("ICE") is "**instructed** to ... seek administrative closure or termination of the cases of individuals ... who meet the above criteria," leaving no discretion for ICE to determine whether to terminate proceedings. *Id*. at 5 (emphasis added). Thus, the district court concluded that, under the DACA program, "DHS employees ... are **required** to issue deferred action status to any applicant who meets the criteria...." Texas at *17 (emphasis added).

Viewed correctly to be a mandate rather than a set of guidelines, DAPA is incompatible with the principles underlying prosecutorial discretion for several reasons. First, although prosecutorial discretion is traditionally exercised as to **known persons**, DAPA, applies to an unknown number of persons, categorically, some of whom may be known to the federal government, but no doubt many or most of whom are actually unknown. Second, prosecutorial discretion is traditionally exercised as to **known crimes**, but DAPA grants a general "immunity from th[e] law"[19] for immigration crimes that the government is likely not even aware have occurred. Third, prosecutorial discretion is traditionally exercised retrospectively, as to **past events**, but DAPA is both retrospective and prospective in nature. The Government is eager to point out that "it is not a crime simply to be *present* in the United States after an unlawful entry." Govt. Br. at 46 (emphasis added). That may be so, but what the Government does not say is that, although not a crime, unlawful presence is still unlawful. DAPA thereby claims to exercise "prosecutorial discretion" in order to explicitly make "lawful" what Congress has explicitly made unlawful. Even the OLC Memo notes that "deferred action ... represents a decision to openly tolerate an undocumented alien's continued [unlawful] presence in the United States for a fixed period." OLC Memo at 20. The OLC Memo acknowledges

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[19] Texas at *148.

that "[d]eferred action arguably goes beyond such tacit acknowledgment by expressly communicating to the alien that his or her unlawful presence will be tolerated." *Id.* at 20-21. Lastly, unlike prosecutorial discretion, DAPA's "lawful presence" status gives a blank check for illegal aliens to commit future crimes. Under DAPA, illegal aliens will be given the opportunity to apply for "advanced parole" under 8 U.S.C. § 1182(d)(5)(A). *See* States Br. at 9. Having gained this status, illegal aliens would then be free to leave and re-enter the country. Without DAPA, this would be a crime under 8 U.S.C. § 1325 and, in many cases, a felony. However, piggybacking on DAPA's turning "unlawful" presence into "lawful presence," the idea of "advance parole" goes even further, claiming that what is a crime (illegal entry) is no longer a crime. Indeed, the Obama Administration clearly intended that future unlawful acts would be the result of DAPA since, on November 20, 2014, the same day the DAPA memorandum was issued, a separate memorandum was issued, entitled "Directive to Provide Consistency Regarding Advance Parole."[20] Quite unlike prosecutorial discretion, DAPA is more like a medieval indulgence, but tied to the anticipation of future political support.

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[20] http://www.dhs.gov/sites/default/files/publications/14_1120_memo_arrabally.pdf.

## V. DAPA WILL FURTHER BURDEN ALREADY STRESSED SOCIAL SECURITY AND MEDICARE TRUST FUNDS.

DAPA grants "lawful status" to illegal aliens who meet certain criteria. This "lawful status" opens the door to receiving federal benefits jeopardizing benefits to American workers. Indeed, the Government concedes that DAPA:

> does not bar aliens who are accorded deferred action from receiving social security **retirement benefits**, social security **disability benefits**, or health insurance under Part A of the **Medicare** program.... An alien with work authorization may obtain a Social Security Number (SSN) and accrue quarters of covered employment toward meeting these requirements.... And once a valid SSN is obtained, an alien may correct wage records to add prior covered employment within approximately three years of the year in which the wages were earned ... or in limited circumstances thereafter.... [Govt. Br. at 48-49.]

Nonetheless, the Government tries to minimize the effect of such benefit eligibility, arguing:

> it generally takes five years (20 quarters) of covered employment to establish eligibility for social security disability benefits, and ten years (40 quarters) to establish eligibility for social security retirement benefits and most Medicare Part A coverage — far longer than the three-year period of deferred action set forth in the 2014 Guidance. [*Id*. at 49-50.]

Whether the burden on the Social Security and Medicare system occurs today or tomorrow, DAPA will still impose a burden. The Social Security system is already troubled, and faces a seriously troubled financial future. The most recent Social Security Trustees Annual Report shows:

- the reserves of the Disability Insurance ("DI") Trust Fund are expected to be depleted next year — in **2016** — and continuing income is expected to cover only about 81 percent of costs at that time; and

- the reserves of the Old-Age and Survivors Insurance ("OASI") Trust Fund are anticipated to be inadequate within the next **10 years**.[21]

DAPA's conference of "lawful status" on 4 million persons will add new beneficiaries to both systems.[22] Lower income workers, such as most of those benefitted by the DAPA program, will receive Social Security benefits disproportionately greater than higher income workers as compared to taxes paid, resulting in a significant increased drain on trust funds.[23]

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[21] *See* 2014 Annual Report of the Trustees (July 28, 2014), pp. 2-3. http://www.ssa.gov/oact/tr/2014/ tr2014.pdf.

[22] *See* Letter from Stephen C. Goss, Chief Actuary, Social Security Administration 3-4 (Feb. 2, 2015), www.ssa.gov/OACT/solvency/BObama_20150202.pdf. The Goss letter's estimates should be viewed in light of recent reports that the Social Security "Office of the Chief Actuary has consistently underestimated retirees' life expectancy and made other errors that make the finances of the retirement system look significantly better than they are...." J. Novack, "Harvard Study: Social Security in Far Worse Shape Than Official Numbers Show," (May 8, 2015), Forbes.com, http://www.forbes.com/sites/janetnovack/2015/05/08/harvard-study-social-security-in-far-worse-shape-than-official-numbersshow/.

[23] An illegal alien born in 1995 granted lawful status under DAPA who fell in the "low earnings" tier (career average earnings equal to $20,308), would receive annual Social Security benefits of $11,251 in wage-indexed 2014 dollars. On the other hand, a U.S. citizen born the same year in the "high earnings" tier (career average earnings equal to $72,206) would **pay 3.5 times the taxes** paid by the low income worker, but would receive annual Social Security benefits of $24,657 — **only 2.2 times the benefits paid** to the low income worker. *See* Office of the Chief

Lastly, around two-thirds of those eligible for deferred action under DAPA are from Mexico.[24] The United States and Mexico have already negotiated a Social Security Totalization Agreement which, if it were to go into effect,[25] would dramatically increase the drain on Social Security OASI trust funds by Mexican Nationals.[26] Under the totalization agreement, immigrants would receive credit towards taxes paid into the Mexico retirement system, and only six quarters of credits would be needed in the U.S. in order to be able to receive Social Security benefits.[27]

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Actuary, Social Security Administration, Actuarial Note No. 2014.9 (July 2014), "Replacement Rates for Hypothetical Retired Workers," Table C.

[24] J. Krogstad and J. Passel, "Those from Mexico will benefit most from Obama's executive action" (Nov. 20, 2014), http://www.pewresearch.org/fact-tank/2014/11/20/those-from-mexico-will-benefit-most-from-obamas-executive-action/.

[25] The U.S.-Mexico Totalization Agreement signed in 2004 was withheld from Congress and the public until litigation by one of these *amici*, TREA Senior Citizens League, compelled its disclosure pursuant to the Freedom of Information Act. The agreement would go into effect if submitted to Congress and neither house passes a resolution disapproving of the agreement within 60 legislative days. *See* http://www.socialsecurity.gov/international/Agreement_Texts/mexico.html.

[26] *See* GAO Report, "Social Security: Proposed Totalization Agreement with Mexico Presents Unique Challenges" (Sept. 2003), http://www.gao.gov/new.items/d03993.pdf.

[27] *See* TSCL, "Ask the Advisor: Totalization Agreement with Mexico" (Feb. 6, 2014), http://seniorsleague.org/2014/ask-the-advisor-february-2014/.

## CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief Amicus Curiae of Citizens United, *et al*. in Support of Appellees and Affirmance, was made, this 11th day of May, 2015, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae*

## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief Amicus Curiae of Citizens United, *et al*. in Support of Appellees and Affirmance complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,819 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as well as Circuit Rule 32(a)(1), because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 14.0.0.756 in 14-point Times New Roman.

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Dated: May 11, 2015