No. 15-674

In the Supreme Court of the United States

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

STATE OF TEXAS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF GOVERNOR ABBOTT, GOVERNOR BENTLEY, GOVERNOR CHRISTIE, GOVERNOR DAUGAARD, GOVERNOR MARTINEZ, AND GOVERNOR WALKER AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are the Governors of Texas, Alabama, New Jersey, New Mexico, South Dakota, and Wisconsin

[1] Pursuant to Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk. Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to its preparation or submission.

("*Amici* Governors"). The *Amici* Governors have two important interests in defending the preliminary injunction correctly entered by the district court and affirmed by the court of appeals. First, the injunction protects the executive branches in the Governors' States from irreparable injuries. In Texas, for example, the executive branch led by the Governor would be responsible for issuing driver's licenses, administering the healthcare system, and managing law-enforcement efforts in response to petitioners' unlawful and unilateral rule.

Second, this Court has held that the primary (if not exclusive) protection for States in our federal system is "the national political process" that makes law through bicameralism and presentment. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985). As a consequence, however, States are unprotected from encroachments on their sovereignty when the president makes law unilaterally. *See id.* at 587 (O'Connor, J., dissenting) (citing Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544-45 (1954)). This case presents an example of unilateral executive lawmaking that is unrivaled in American history and thus a unique threat to the sovereignty of the Governors' States.

SUMMARY OF ARGUMENT

A. The Take Care Clause is comprised of only nine words: the president "shall take care that the laws be faithfully executed." U.S. CONST. art. II, § 3. But a proper understanding of those nine words requires an appreciation of their roots in English history. That history shows that even the king of England could not suspend statutes, authorize individuals to violate statutes, or declare *lawful* the conduct that statutes declare *unlawful*.

The Framers of the Take Care Clause were insistent that America's executive likewise would have no such power.

1. Like many other structural features of the United States Constitution, the Take Care Clause derives from the long struggle by the British Parliament to control the Crown's so-called "prerogative powers"—that is, the monarch's asserted powers to create laws or otherwise act unilaterally. During the seventeenth century, England's Stuart kings asserted the prerogative power to make new laws and regulations through "proclamation" (the equivalent of a modern executive order), and to raise money. Parliament attempted to curb the Stuarts' abuses of royal prerogatives in the Petition of Right of 1640. But the Stuart kings continued their abuses—prompting the English Civil War, the beheading of Charles I, and the temporary creation of a kingless Commonwealth.

2. After the Stuarts were restored to the English throne in 1660, they were unbowed in their efforts to expand royal prerogatives. Charles II claimed the royal prerogative to *suspend* Parliament's laws and to grant *dispensations* for violations of them. Charles attempted to use those prerogatives in his Declaration of Indulgence of 1672, which purported to suspend statutes penalizing Catholics. But his unilateralism enraged Parliament, which forced the king to rescind the Declaration. And in its place, Parliament enacted the Test Act of 1672, which barred Catholics and nonconforming Protestants from public office.

3. Controversy over the Test Act did not end when Charles II died and his brother took the throne. James II, who openly professed the Catholic faith, wanted to form a standing army officered by fellow Catholics, as a

defense against possible rebellion. In 1686, he granted dispensations to certain individuals, excusing them from the requirements of the Test Act and enabling them to be appointed to public offices. Later, James issued the Declaration of Indulgence, suspending the anti-Catholic penal laws more broadly. A distinguished judge ruled that if the dispensing power "be once allowed of, there will need no parliament; all the legislature will be in the king." After the Seven Bishops were tried (and acquitted by a jury) for seditious libel for denying the legality of the Declaration of Indulgence, the City of London rose in their support. William of Orange made condemnation of the dispensing power the first priority in his Declaration of Reasons for ousting James from the throne, and the first two provisions of the Bill of Rights of 1689 repudiated the suspending and dispensing powers. By the eighteenth century, the British Constitution flatly prohibited the suspending and dispensing powers exercised by the Stuarts.

4. It must be emphasized that the dispensing power as exercised by James II and as declared unconstitutional in England is not the same as the exercise of prosecutorial discretion. The dispensing power was not mere non-enforcement of the law; it was the affirmative licensing of what would otherwise be unlawful conduct. James II did not merely refuse to enforce the laws against Roman Catholicism, he granted dispensations that permitted Catholics to serve as officers in the army. In other words, he made *lawful* what the statutory law made *unlawful*.

B. Our Framers wrote the Take Care Clause to prevent our executive from asserting such prerogatives. Some of the earliest state constitutions prohibited the suspending of statutes in terms virtually identical to

those in the English Bill of Rights. And at the Constitutional Convention in 1787, the Framers expressly rejected a proposal to give the president a suspending power, again in terms virtually identical to the English Bill of Rights. They did so precisely because they were concerned that executive branch officials in America might one day suspend a statute in the same way that James II suspended the Test Act.

C. That day arrived when the President promulgated the "Deferred Action for Parental Accountability" rule ("DAPA"), which licenses as *lawful* presence what the Immigration and Nationality Act ("INA") categorizes as *unlawful* presence. In particular, DAPA specifies that "an individual is permitted to be *lawfully present* in the United States," even though that individual is *unlawfully present* under the INA. Pet. App. 413a (emphasis added). That constitutes an unconstitutional dispensation of the statute under the Take Care Clause. The question in this case is not "enforcement priorities," but whether the executive has authority to grant dispensations to millions of individuals, thus giving them "lawful presence" and the right to work and receive benefits that Congress prohibited to them.

D. Even if respondents' claims fail under the Administrative Procedure Act ("APA"), the Take Care Clause provides a cause of action to challenge DAPA. The Constitution thus provides a backstop to ensure that petitioners cannot unilaterally make law by dispensing with the INA and then avoid judicial review of their actions.

E. The importance of this separation-of-powers principle far transcends this particular case. If petitioners can grant dispensations from the INA, future presidents will be able to dispense with countless statutes they do not like.

ARGUMENT

A. FROM MAGNA CARTA TO BLACKSTONE, BRITISH CONSTITUTIONALISM EVOLVED FROM PREROGATIVE TO LAW

1. From King John to Charles I

a. Even before Parliament existed, the barons of England insisted that monarchs rule in accordance with law, rather than mere executive whim or decree. King John (1199-1216) was a major offender against the rule of law. He arbitrarily increased taxes, abused the king's court, mustered soldiers for military misadventures foreign and domestic, and hanged innocents in Wales. WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 27 (2d ed. 1914). Things came to a head in 1215 at Runnymede. In the shadow of an armed insurrection, John agreed to The Great Charter, which established the principle that the king is not a law unto himself; even the king must act through regularized lawmaking procedures to bind his subjects.

Thus began a centuries-long struggle between law—meaning common law, longstanding custom, and Parliamentary enactment—and royal prerogative. The term *prerogative* refers to powers invested in the executive that are not governed by law. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 375 (Peter Laslett ed. 1988) ("This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative."). The term *prerogative* also connotes powers that inhere in the king by virtue of his status as king. *E.g.*, Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 178 (1998) (king's prerogative powers rest "on his inherent right to make

law without the intervention or approval of Parliament"). In an absolute monarchy, all governmental power is prerogative. As Sir William Blackstone explained, when the king lawfully rests his rulings on a royal prerogative, "the king is and ought to be absolute; that is, so far absolute that there is no legal authority that can either delay or resist him. He may reject what bills, may make what treaties, may coin what money, may create what peers, [and] may pardon what offences, he pleases." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *250 (1753) [hereinafter BLACKSTONE'S COMMENTARIES].

Prerogative powers are not all inconsistent with constitutional government. Under the Constitution, for example, the president has certain defined prerogatives, such as the pardon power and the veto, which are committed to the president's discretion. But much of constitutionalism consists of replacing prerogative with law. The framers of the U.S. Constitution carefully reflected on the various prerogative powers exercised by the English king and granted, denied, or limited those powers when creating the Article II executive.

b. One of the most dangerous prerogative powers asserted by English monarchs was the *proclamation* power: the power to create new law without Parliament's approval. Disputes over the proclamation power came to the fore during the Tudor dynasty (1485-1603).

Henry VIII believed his royal proclamations should have the force of law. *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 36 & n.7 (2014). Parliament, under Henry's control, passed the "Act of Proclamations," which purported to give legal effect to the king's proclamations as "though they were made by act of parliament." 31 Hen. VIII c. 13. And the king merci-

lessly enforced them using the Star Chamber. *See* CORA L. SCOFIELD, A STUDY OF THE COURT OF STAR CHAMBER 29 (1900). As Blackstone later lamented, Henry VIII's combination of proclamations and the Star Chamber "was calculated to introduce the most despotic tyranny, and which must have proved fatal to the liberties of this kingdom." 1 BLACKSTONE'S COMMENTARIES *271.

Parliament repealed the Act of Proclamations immediately after Henry VIII died in 1547. The act "lived on, however, as a memorable warning against legal authorization for [executive] prerogative or administrative power." HAMBURGER, *supra*, at 38. As David Hume observed, when Parliament repealed the act and clarified that "the king's proclamation [does not have] the same force as to a statute enacted by parliament," it remedied "a total subversion of the English constitution." 5 DAVID HUME, THE HISTORY OF ENGLAND FROM INVASION OF JULIUS CESAR TO THE REVOLUTION OF 1688, at 266-67 (Liberty Fund ed. 1983).

c. The first four Stuart kings (1603-1688) sought to expand royal prerogatives. James I was an ardent believer in the divine right of kings; he wrote a book on the topic shortly before he ascended the English throne. *See The Trew Law of Free Monarchies*, *in* THE POLITICAL WORKS OF JAMES I at 53 (C.H. McIlwain ed. 1918). In James I's view, kings are unrestrained by law; their authority comes from God, and therefore, the king is accountable only to God—never to man or law. *See id.* at 68 ("[B]etwixt the king and his people, God is doubtless the only judge."); *see also* PAULINE CROFT, KING JAMES 132 (2003). James I's absolutist view of monarchies predisposed him to expand royal prerogatives.

In 1610, James I issued a royal proclamation prohibiting "new Buildings in and around London" and "the

making of starch of wheat." *Case of Proclamations*, 77 Eng. Rep. 1352, 1352 (K.B. 1610). Lord Ellesmere, the royalist jurist, argued that the courts should "maintain the power and prerogative of the King," and that "in cases in which there is no authority and [precedent]," the judges should "leave it to the King to order it according to his wisdom." *Id.* at 1353; *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("zone of twilight"). Chief Justice Coke—whose whiggish constitutionalism later informed the views of American framers—held that the King could not lawfully "change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament." *Case of Proclamations*, 77 Eng. Rep. at 1353. Coke concluded, "the law of England is divided into three parts, common law, statute law, and custom; but the King's proclamation is none of them." *Ibid.*

Chief Justice Coke reiterated the point in the *Case of Non Obstante, or Dispensing Power*, 12 Co. Rep. 18 (reprinted in 6 EDWARD COKE, THE REPORTS OF SIR EDWARD COKE IN THIRTEEN PARTS 215 (1826)). Coke observed that the king does have *some* prerogative powers. 12 Co. Rep. at 18. For example, a royal pardon grants mercy notwithstanding (or, as English lawyers said at the time, *non obstante*) the lawful conviction. But Coke insisted that the king's *non obstante* (or dispensing) power *never* can be used to annul statutes. *Id.* at 19. If the king attempted to dispense with a statute, Coke held, the king's effort would be "void," for "an act of Parliament may absolutely bind the King." *Ibid.*

The principles of the *Case of Proclamations* and the *Case of Non Obstante* are part of the American constitutional tradition. *Youngstown*, this Court's foundational

separation-of-powers decision, held that the president cannot make law; that is exclusively Congress's job. The modern version of royal proclamations are "executive orders," which have the force of law only when implementing statutes, treaties, and the Constitution—that is, the sources of "law" defined by the Supremacy Clause. And the Due Process Clause makes clear that no one may be punished or required to act except in accordance with "law." *See* Nathan Chapman & Michael McConnell, *Due Process As Separation of Powers*, 121 YALE L.J. 1672, 1721-26 (2012); *see also id.* at 1782-92 .

d. James's son Charles I continued his father's efforts at unilateral lawmaking. For example, he asserted a royal prerogative to force his subjects to make loans to the crown. In the *Five Knights Case*, five men were arrested for refusing the demand. *See* 3 How. St. Tr. 1 (K.B. 1627). The men petitioned for habeas corpus. Chief Justice Crewe was inclined to side with the knights, so he was replaced with a judge friendly to the king. JAMES S. HART JR., THE RULE OF LAW, 1603-1660: CROWNS, COURTS AND JUDGES 68 (2003). Stocked with the king's friends, the court then denied the habeas petition.

The *Five Knights Case* prompted an "immediate outcry of protest," *Boumediene v. Bush*, 553 U.S. 723, 742 (2008), which led to the Petition of Right. The Petition of Right—again, drafted by Edward Coke—precluded the king from unilaterally raising taxes, imprisoning people without cause, and other unilateral abuses of royal prerogatives. *See* Edward S. Corwin, *The 'Higher Law' Background of American Constitutional Law*, 42 HARV. L. REV. 365, 376-77 (1929).

The Petition of Right was "the second great fundamental compact between the Crown and the [English] Nation," after Magna Carta. THOMAS PITT TASWELL-

LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 430 (P.A. Ashworth ed., 6th ed. 1905). But the Petition's immediate impact was virtually nil: Charles I almost immediately ignored it, disbanded Parliament, and again issued proclamations to demand payments from Englishmen. He evaded judicial review by enforcing those proclamations through the Star Chamber. *See* Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 272 (2009).

The most notorious of Charles I's proclamations required so-called "ship-money." Ship-money was a hoary precedent that Elizabeth I used to finance almost half of the English fleet that battled the Spanish Armada in 1588. *See* D.L. Keir, *The Case of Ship Money*, 52 L.Q. REV. 546, 551 (1936). In accordance with precedent, Elizabeth limited her demands to residents of coastal towns (on the theory that coastal residents disproportionately benefit from naval security). *Ibid.* Charles I dramatically expanded the prerogative: he sought to impose a ship-money tax on the entire nation for purposes of funding an unpopular land war in Europe. *Id.* at 553-54. A man named John Hampden refused to pay the assessment and argued only Parliament could impose taxes. Charles I's hand-picked judges ruled 7-5 against Hampden and held that (1) the king had absolute power to defend the nation, and (2) where Parliament fails to act, the king can (or must) act unilaterally. *See Hampden's Case* (*Ship-Money Case*), 3 How. St. Tr. 825 (1637).

The king's victory was a Pyrrhic one, however, because it prompted Parliament to abolish the Star Chamber. *See* Act for the Abolition of the Court of Star Chamber, 16 Car. 1, c. 10 (July 5, 1641); THE STUART CONSTITUTION: DOCUMENTS & COMMENTARY 106 (J.P. Kenyon ed., 2d ed. 1986) ("[T]he most important single cause of

Star Chamber's unpopularity was the role it was called upon to play in the enforcement of the king's" proclamations.). Moreover, Parliament reversed the judgment in the *Ship-Money Case*, *see* Reinstein, 59 AM. U. L. REV. at 275, and impeached the seven judges who sided with the king, *see* Keir, 52 L.Q. REV. at 547. "These actions marked the beginning of a conflict between a radicalized Parliament and an intransigent King that would culminate in the English Civil Wars and the temporary destruction of the monarchy." Reinstein, 59 AM. U. L. REV. at 275.

Notably, many if not all of these controversies over the reach of royal prerogative arose when the king took a precedent that prior monarchs had used in modest and relatively uncontroversial ways—as Elizabeth had used the ship-money authority to fund defense against the Spanish Armada—and stretched it to cover significant usurpations of power in ways contrary to the will of Parliament. That has continued to be the pattern in American separation-of-powers struggles, including this one.

2. Charles II and the Suspending Power

During the Restoration period, Charles II and his brother James attempted to revive royal prerogative and extend it to new areas. The most important of these efforts involved the *suspending* and *dispensing* powers: the power to suspend the execution of a law, and the power to grant dispensations or indulgences permitting people to act in ways that would otherwise be unlawful, notwithstanding (or *non obstante*) the law. The precise line between these closely related prerogative powers is sometimes difficult to discern, but in general, as explained by a leading historian, "[t]he power to suspend a law was the power to set aside the operation of a statute for a time. It did not mean, technically, the power to re-

peal it. The power to dispense with a law meant the power to grant permission to an individual or a corporation to disobey a statute." LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 59-60 (1981); *accord* CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS 4 (1998). Or as another scholar explains it:

> A dispensation was in brief a 'license to transgress' a statute law, a royal warrant excepting certain persons from 'the Obligation of a Law,' a permission to act statute notwithstanding, *non obstante*, granted to an individual or, on occasion, to a corporation, at the discretion of the crown * * * * [U]nlike a pardon, a grant of dispensation did not simply exempt the transgressor from penalty after an act; it made the act or 'thing prohibited lawful to be done by him who hath it.' Unlike a suspension, it did not abrogate the statute itself; it only excepted those who had been granted it from the obligation of obedience.

Carolyn A. Edie, *Tactics and Strategies: Parliament's Attack Upon the Royal Dispensing Power 1597-1689*, 29 AM. J. LEGAL HIST. 197, 198-99 (1985).

The suspending and dispensing powers had a limited basis in precedent. *See id.* at 198-209. The monarch long had some repository of inherent power to respond to emergencies and to prevent injustices in particular cases, especially when Parliament was not in session. *Id.* at 203. In particular, a king could grant limited dispensations from statutes in the face of "emergent circumstances." *Thomas v. Sorrell*, 3 Keb. 224 (K.B. 1673) (Rainsford, J.); *see also Case of Monopolies*, 11 Co. Rep. 84b, 88a (1591) (Coke, C.J.); Lucius Wilmerding, Jr., *The President and the Law*, 67 POL. SCI. Q. 321 (1952).

Charles and James would stretch the principle, however, by suspending and granting dispensations from laws in the absence of any emergency, simply because they did not agree that the laws served the national interest.

The principal flashpoint in the Restoration-era struggles over the suspending and dispensing powers was the question of religion. Charles II secretly and James II openly professed the Roman Catholic faith, which was awkward given that the king was supreme head of the "church by law established," the Church of England. In then-recent memory, radical Protestants had overthrown the government in the English Civil War, and real or imagined "Popish Plots" were thought an ever-present danger to political stability. *See, e.g.*, JOHN POLLOCK, THE POPISH PLOT: A STUDY IN THE HISTORY OF THE REIGN OF CHARLES II (1903).

Charles and James sought legal protections for their fellow Catholics, but this was anathema to the Anglican-dominated Parliament. Rather than protecting Catholics, Parliament statutorily excluded them from various offices and jobs. *See, e.g.*, Corporation Act of 1661, 13 Car. II, st. 2 c. 1 (App. 1a-2a, *infra*) (requiring certain officials to take an "Oath of Allegiance and Supremacy" to profess faith in the Church of England and renounce Catholicism).

On March 15, 1672, Charles II issued a Declaration of Indulgence, unilaterally suspending the penal laws against Catholics and Protestant nonconformists. Speaking in the royal first person plural, the King decreed: "We do * * * declare our will and pleasure to be, that the execution of all, and all manner of penal laws in matters ecclesiastical, against whatsoever sort of nonconformists, or recusants, be immediately suspended, and they are hereby suspended." App. 4a, *infra*; *see also* 8 ENGLISH

HISTORICAL DOCUMENTS: 1660-1714, at 387 (A. Browning ed. 1953)).

Charles II's unilateralism enraged Parliament, which forced the king to rescind the declaration. In its place, Parliament enacted the Test Act of 1672, 25 Car. II c. 2 (App. 6a, *infra*), and the Test Act of 1678, 30 Car. II, st. 2 (App. 7a-8a, *infra*), which limited public office to persons willing to forswear belief in the Catholic doctrine of transubstantiation, and to take communion in the Church of England. *See* 2 HENRY HALLAM, CONSTITUTIONAL HISTORY OF ENGLAND FROM THE ACCESSION OF HENRY VII TO THE DEATH OF GEORGE II at 149-50 (1827).

3. James II and the Dispensing Power

On his brother's death in 1685, James II assumed the throne. Not willing to rely on Protestant militias and local gentry for protection against rebellion, he attempted to create a standing army and to place it under the control of Catholic officers. To achieve this end, he granted "dispensations" from the Test Act, which allowed Catholics to hold high civil and military offices notwithstanding Parliament's legislation to the contrary. *See* Alfred F. Havighurst, *James II and the Twelve Men in Scarlet*, 69 L.Q. REV. 522, 529-33 (1953).

A parliamentary address responded that the Test Act "can no way be taken off but by an act of parliament." SCHWOERER, *supra*, at 63. James then disbanded the Parliament, fired judges he expected to be uncooperative, and arranged a test case, *Godden v. Hales*, 2 Show. 475 (K.B. 1686). With one dissent, the court concluded "that the Kings of England were absolute Sovereigns; that the laws were the King's law; that the King had a power to dispense with any of the laws of Government as

he saw necessity for it; [and] that he was the sole judge of that necessity." *Id.* at 478.

Emboldened by *Godden*, James II suspended the ecclesiastical laws by issuing his own Declaration of Indulgence. App. 9a-13a, *infra*; *see also* 8 HISTORICAL ENGLISH DOCUMENTS, *supra*, at 399-400. It declares:

> that from henceforth the execution of all and all manner of penal laws in matters ecclesiastical * * * be immediately suspended; and the further execution of the said penal laws and every of them is hereby suspended.
>
> * * *
>
> [W]e do hereby further declare, that it is our royal will and pleasure, that the oaths commonly called, *The Oaths of Supremacy and Allegiance*, and also the several tests and declarations mentioned in the [Test Acts] shall not at any time hereafter be required to be taken, declared, or subscribed by any person or persons whatsoever, who is or shall be employed in any office or place of trust either civil or military, under us or under our government. And we do further declare it to be our pleasure and intention from time to time hereafter, to grant our royal dispensations under our great seal to all our loving subjects so to be employed, who shall not take the said oaths, or subscribe or declare the said tests or declarations in the abovementioned Acts and every of them.

App. 10a-12a, *infra*.

In 1688, James reissued the Declaration of Indulgence with the requirement that Anglican clergy read it aloud from their pulpits. The famed "Seven Bishops"—

the Archbishop of Canterbury and six others—petitioned the king to withdraw the order, disputing its legality. James charged the bishops with seditious libel. *Case of the Seven Bishops*, 12 How. St. Tr. 183 (K.B. 1688). The alleged libel was that the bishops falsely denied the king's power to suspend the Test Act and to grant dispensations from it. *See* 1 A BIBLIOGRAPHY OF ROYAL PROCLAMATIONS OF THE TUDOR AND STUART SOVEREIGNS AND OF OTHERS PUBLISHED UNDER AUTHORITY 1495-1714, at 468 no. 3869 (R. Steele ed. 1910). Remarkably, the King's Bench split 2-2.

The most ardent defender of the bishops was Justice John Powell. In explaining his vote against the king and the exercise of his dispensing power, Justice Powell observed:

> Gentlemen, I do not remember, in any case in all our law (and I have taken some pains upon this occasion to look into it), that there is any such power in the king, and the case must turn upon that. In short, if there be no such dispensing power in the king, then that can be no libel which they presented to the king, which says, that the declaration, being founded upon such a pretended power, is illegal.
>
> Now, gentlemen, this is a dispensation with a witness: it amounts to an abrogation and utter repeal of all the laws; for I can see no difference, nor know of none in law, between the king's power to dispense with laws ecclesiastical, and his power to dispense with any other laws whatever. If this be once allowed of, there will need no parliament; all the legislature will be in the king, which is a thing worth considering, and I leave the issue to God and your consciences.

App. 14a-15a, *infra* (reprinting 12 How. St. Tr. 183).

With that spirited indictment of the king's dispensing power, the court sent the case to a jury. The jury, in turn, acquitted the bishops. "When the verdict 'Not Guilty' was announced, there were several great shouts in the hall and as news of the acquittal spread into London and beyond, so did the shouting and huzzas." Edie, 29 AM. J. LEGAL HIST. at 229 (internal quotation marks omitted).

Public jubilation over the bishops' acquittal quickly turned into anger against James II and his executive overreach. "The charge had been one of libel, but the verdict was against the prerogative." *Ibid.* Leading citizens invited the husband of James's eldest daughter, William of Orange, to depose James II and assume the English throne as co-monarch with his wife. *See* CORINNE COMSTOCK WESTON & JANELLE RENFROW GREENBERG, SUBJECTS AND SOVEREIGNS: THE GRAND CONTROVERSY OVER LEGAL SOVEREIGNTY IN STUART ENGLAND 229-59 (1981); Carolyn A. Edie, *Revolution and the Rule of Law: The End of the Dispensing Power*, 10 EIGHTEENTH-CENTURY STUD. 434, 440 (1977).

William issued a Declaration of Reasons to explain his deposing of James. Chief among those reasons was his predecessor's exercises of the dispensing power:

> [James II's 'evil Counsellors,'] with some plausible Pretexts, did invent and set on foot the King's dispensing Power; by virtue of which they pretend, that, according to Law, he can suspend and dispence with the Execution of the Laws, that have been enacted by the Authority of the King and Parliament, for the Security and Happiness of the Subject; and so have rendered those Laws

> of no Effect: Though there is nothing more certain, than that, as no Laws can be made but by the joint Concurrence of King and Parliament, so likewise Laws so enacted, which secure the publick Peace and Safety of the Nation, and the Lives and Liberties of every Subject in it, cannot be repealed or suspended but by the same Authority.

10 H.C. Jour. (1688) 1 (Eng.).

The next year, in 1689, Parliament drafted the English Bill of Rights. It started by abolishing the suspending and dispensing powers. *See* Edie, 10 EIGHTEENTH-CENTURY STUD. at 442. Sir Henry Capel explained on the floor of the House of Commons: "We know the King has prerogatives, but to say he has a dispensing power is to say there is no Law." V PARLIAMENTARY HISTORY OF ENGLAND 262 (W. Cobbett ed. 1806). Sir William Williams agreed: "Is there anything more pernicious than the Dispensing Power? There is the end of all Legislative Power, gone and lost." *Id.* at 263.

The very first declaration of the Bill of Rights reads: "[t]hat the pretended Power of Suspending of Laws, or the Execution of Laws, by regal Authority, without Consent of Parliament, is illegal." App. 17a, *infra*; *see also* 4 FOUNDERS' CONSTITUTION 123 (Philip Kurland & Ralph Lerner eds. 2000). The second declaration reads: "the pretended power of dispensing with laws, or the execu-

tion of laws, by regal authority, as it hath been assumed and exercised of late, is illegal." App. 18a, *infra.*[2]

4. The Eighteenth Century British Constitution

It became a basic tenet of British legal thought in the eighteenth century that the suspending and dispensing powers were inconsistent with the rule of law and subversive of the balanced constitution. Blackstone notes that "it was formerly held, that the king might, in many cases, dispense with penal statutes." 1 BLACKSTONE'S COMMENTARIES *186.[3] But by the time Blackstone's *Commentaries* were published in 1765, the English Bill of Rights had "declared that the suspending or dispensing with laws by regal authority, without consent of parliament, is illegal." *Ibid.* He also discusses James II's effort to grant dispensations under the Test Act:

> A proclamation for disarming papists is * * * binding, being only in execution of what the legislature has first ordained: but a proclamation for allowing arms to papists, or for disarming any protestant subjects, will not bind; because the first would be to assume a dispensing power, the latter a legislative one; to the vesting of either of

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[2] The difference in wording is based on the belief by some in Parliament that extreme circumstances might warrant some emergency dispensing power. *E.g.*, V PARLIAMENTARY HISTORY OF ENGLAND, *supra*, at 262. All agreed, however, that James's use of the dispensing power was abusive and unconstitutional.

[3] The Founders relied "heavily and preeminently on the *Commentaries*." AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 7 (2012); *accord* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 31 (1967).

> which in any single person the laws of England are absolutely strangers.

Id. at *271. In modern terminology, an executive order is lawful only to the extent it is enforcing otherwise applicable law—not when it is contrary to that law. *Compare Youngstown*, 343 U.S. at 635-37 (Jackson, J., concurring) (category one), *with id.* at 637-38 (category three).

Blackstone's view was echoed by the other great legal mind of the late eighteenth century, Lord Mansfield. As Mansfield explained in 1766, "I can never conceive the prerogative to include a power of any sort to suspend or dispense with laws." 16 THE PARLIAMENTARY HISTORY OF ENGLAND 267 (T.C. Hansard ed. 1813). That is so, Mansfield explained, because "the duty of [the executive branch] is to see the execution of the laws, which can never be done by dispensing with or suspending them." *Ibid.* That is, as the common law came to America at our birth, *suspending* the law was the exact opposite of *executing* the law.

B. THE U.S. CONSTITUTION INCORPORATES THE BRITISH REJECTION OF THE SUSPENDING AND DISPENSING POWERS

1. Consistent with the British constitution at the Founding, at least three States affirmatively outlawed the suspending and dispensing powers prior to the U.S. Constitution. The Virginia Declaration of Rights (1776) provided "[t]hat all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people, is injurious to their rights and ought not to be exercised." 4 FOUNDERS' CONSTITU-

TION 123.[4] Similarly, the Delaware Declaration of Rights and Fundamental Rules (1776) said "[t]hat no Power of suspending Laws, or the Execution of Laws, ought to be exercised unless by the Legislature." *Id.* at 124. And the Vermont Constitution (1786) declared that "[t]he power of suspending laws, or the execution of laws, ought never to be exercised, but by the Legislature, or by authority derived from it, to be exercised in such particular case only as the Legislature shall expressly provide for." *Ibid.*

2. When the Framers met in Philadelphia in 1787, they too discussed the royal prerogative to suspend laws or grant dispensations. The delegates to the Constitutional Convention first took up the executive power plank of the Virginia Plan (Resolution 7) on June 1, 1787. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 62 (Max Farrand ed. 1911) [hereinafter FARRAND'S RECORDS]. Resolution 7 vested in the executive all "Executive rights" that had been vested in Congress under the Articles of Confederation. *Id.* at 63. Immediately, delegates worried that an unlimited grant of "executive" power would include the royal prerogative powers, such as to make "peace & war." *Id.* at 65 (Charles Pinckney). John Rutledge, who arguably had been the

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[4] Virginia's Declaration of Rights was "a landmark in the development that was to culminate in the federal Bill of Rights." Bernard Schwartz, *Commentary to Virginia Declaration of Rights of 1776*, *in* 2 THE ROOTS OF THE BILL OF RIGHTS 233 (B. Schwartz ed. 1980). And it bore particularly deep impressions from England's battles against the Stuarts' executive overreach. Article I of Virginia's Declaration uses the phrase "life, liberty, [and] property," which comes from John Locke, who invoked numerous variations of that phrase. *See* LOCKE, *supra*, at 271, 311, 312, 313, 359, 367. Locke, in turn, borrowed the phrase from Parliamentary debates against the Stuarts' prerogatives. *See* Corwin, 42 HARV. L. REV. at 383.

most capable wartime state executive in the nation, wished to achieve the benefits of a unitary executive "tho' he was not for giving" the executive the full range of royal prerogative powers. *Ibid.* James Wilson declared that "[h]e did not consider the Prerogatives [historically claimed by] the British Monarch as a proper guide in defining the Executive powers." *Ibid.* The delegates voted to vest the executive only with the powers to "carry into effect, the national laws" and the power of appointment. *Id.* at 67.

Three days later, on June 4, the delegates debated whether to give the executive an absolute veto on legislation—one of the prerogatives of the Crown that had survived the Glorious Revolution. Benjamin Franklin rose and expressed his concerns: "The first man, put at the helm [of the presidency] will be a good one. No body knows what sort may come afterwards. The Executive will be always increasing here, as elsewhere, till it ends in a monarchy." *Id.* at 103. The Convention voted to allow Congress to override the executive's veto.

Then Pierce Butler moved the question whether "the National Executive [would] have a power to suspend any legislative act for a term of [time]." *Ibid.* Elbridge Gerry worried "that a power of suspending might do all the mischief dreaded from the [veto] of useful laws; without answering the salutary purpose of checking unjust or unwise ones." *Id.* at 104. As Madison reports, "On question 'for giving this suspending power' all the States * * * were *no*." *Ibid.* (emphasis in original). The very idea of a suspending power was unanimously rejected, never to be proposed again.

On July 26, the Convention referred the matter to the Committee on Detail, which was charged with preparing and "reporting a Constitution conformably to the Pro-

ceedings aforesaid." 2 FARRAND'S RECORDS 85, 117. That committee was chaired by Rutledge and dominated intellectually by Wilson, two of the delegates who had expressed concern about executive prerogative on June 1. The amended Virginia Plan originally vested a "single person" with "power to carry into execution the national laws." 1 FARRAND'S RECORDS 67. The Committee changed this to read: "he shall take care that the laws of the United States be duly and faithfully executed." 2 FARRAND'S RECORDS 185. As a result, the execution of the law became a *duty* rather than *power*, as indicated by the word "shall." This effectively precluded any assertion of a dispensing or suspending power.

3. During the state ratification debates, the Framers' decision to deny the suspending power to the president was a source of solace to those who feared executive overreach. As George Nicholas noted during Virginia's ratification debate: "The English Bill of Rights provides that no laws shall be suspended. The Constitution provides that no laws shall be suspended, except one, and that in time of rebellion or invasion, which is the writ of *habeas corpus*." 3 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 246 (2d ed. 1881).

Nicholas was correct that the Framers deliberately adopted only one suspension clause—and it applies only to the writ of habeas corpus. *See* U.S. CONST. art. I, § 9, cl. 2. More importantly for present purposes, that singular suspension clause is located in Article I, not Article II—suggesting that the suspension power lies with Congress and not the president. *See* Saikrishna Bangalore Prakash, *The Great Suspender's Unconstitutional Suspension of the Great Writ*, 3 ALB. GOV'T L. REV. 575

(2010) (arguing Lincoln's suspension of habeas was unconstitutional).

4. Scholars agree that the Framers "felt themselves the heirs of the Revolution, of the glory derived from 1688. Americans of the 1770s felt they were approaching a 'centennial' of their own, reliving memories of the English Bill of Rights." GARY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 64 (1979). Chief among their aims was curbing executive prerogatives. As one scholar puts it, the Take Care Clause:

> is a succinct and all-inclusive command through which the Founders sought to prevent the executive from resorting to any of the panoply of devices employed by English kings to evade the will of Parliament. The duty to execute laws 'faithfully' means that American presidents may not—whether by revocation, suspension, dispensation, inaction, or otherwise—refuse to honor and enforce statutes that were enacted with their consent or over their veto. Many scholars have agreed that the Take Care Clause was meant to deny the president a suspending or dispensing power.

MAY, *supra*, at 16; *see also id.* at 160 n.58 (citing authorities); David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. INT'L L. & FOREIGN AFF. 75, 99-100 (2007).

The Take Care Clause's rejection of the suspending and dispensing powers is so unambiguous that it has been accepted even by the executive branch. In *United States v. Smith*, 27 F. Cas. 1192 (C.C.D.N.Y 1806), the

defendants claimed the president had authorized their violation of the Neutrality Act. President Jefferson's lawyers countered that under the Take Care Clause, the president "cannot suspend [the Act's] operation, dispense with its application, or prevent its effect * * * * If he could do so, he could repeal the law, and would thus invade the province assigned to the legislature, and become paramount to the other branches of the government." *Id.* at 1203. Supreme Court Justice William Paterson—who previously signed the Constitution and decided the case while riding circuit—agreed that the Take Care Clause "explicitly" denies the president a "dispensing power." *Id.* at 1229; *accord* Benjamin Civiletti, *The Attorney General's Duty to Defend & Enforce Constitutionally Objectionable Legislation*, 4A U.S. OP. OFF. LEGAL COUNSEL 55, 57 (1980) ("The history of th[e] dispute [over the Stuarts' 'dispensing power'] was well-known to the Framers of the Constitution, and it is clear that they intended to deny our President any discretionary power of the sort that the Stuarts claimed."); *Youngstown*, 343 U.S. at 602 ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").

By framing the Take Care Clause as a duty, the Framers rejected the idea that the president should be vested with the prerogative powers of suspending or dispensing with the laws. Indeed, the section of Kurland and Lerner's magisterial *The Founders' Constitution* pertaining to the Take Care Clause begins with the first two provisions of the English Bill of Rights, repudiating those powers. When President Andrew Jackson argued that the Take Care Clause made him the sole judge of whether the laws were being faithfully executed, this

Court responded: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 613 (1838). The Court added that this "would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution," and recognizing such a principle "would be clothing the President with a power entirely to control the legislation of congress." *Ibid.*

C. THE DAPA RULE RESTS ON THE DISPENSING POWER, WHICH IS BARRED BY THE TAKE CARE CLAUSE

1. Apart from its subject matter, the executive action challenged in this case precisely parallels James II's use of the dispensing power. The Immigration and Nationality Act defines persons who entered this country without authorization and do not fall into any of its specific exceptions as being here *unlawfully*. *See* Pub. L. No. 89-236, 79 Stat. 911 (1956), as amended by the Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3445 (1986). That includes the beneficiaries of the DAPA order. Among the consequences of *unlawful presence* are ineligibility for work permits and for many social-welfare programs. *E.g.*, 8 U.S.C. § 1324a. Moreover, the INA expressly provides that every day a DAPA beneficiary spends in the United States should accrue as time under the individual's unlawful-presence clock. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(I)-(II), (ii). These consequences were set by Congress for the purpose of discouraging illegal immigration. And unlike deportation, which necessarily involves enforcement discretion, these consequences are absolute—unless there is an explicit statuto-

ry exception, these consequences apply to every person in this country unlawfully.

Under the DAPA rule, some four million people who are unlawfully present in the United States have been given dispensations to remain lawfully and to obtain work permits and social-welfare benefits. Their unlawful-presence clocks do not run. This is not mere non-enforcement. It is not an exercise of prosecutorial discretion. It is not a matter of enforcement priorities. Like James II's dispensations, DAPA permits "an individual * * * to be lawfully present in the United States," notwithstanding the INA's provisions to the contrary. Pet. App. 413a. Until such time as it might be revoked, its beneficiaries are no longer in violation of the law. Because petitioners are acting outside their statutory authority, and are making *lawful* what Congress has declared *unlawful*, they are in violation of the Take Care Clause.

2. Petitioners and their *amici* offer four counterarguments. Each is meritless.

a. The government relies heavily on five previous deferred-action programs. Like the precedents invoked by Charles II and James II, however, these were entirely different in kind from DAPA and cannot be stretched to justify DAPA. Each involved relatively small numbers of persons who had been *lawfully* present in the country and soon would again be *lawfully* present. The deferred-action programs thus were in service of congressional intent, albeit not (because of unexpected circumstances) the letter of the law. One of the lessons of executive usurpations under the Stuarts was that precedents established by custom cannot be allowed to metastasize beyond their original limits or to invade the legislative domain.

In the conflict between 1686 and 1688, the issue was not merely whether James II actively prosecuted the penal laws against Catholics. The issue was that he purported "to grant our royal dispensations under our great seal to all our loving subjects so to be employed, who shall not take the said oaths, or subscribe or declare the said tests or declarations in the abovementioned Acts and every of them." App. 12a, *infra*; 8 HISTORICAL ENGLISH DOCUMENTS, *supra*, at 399-400. It is essential to see that "unlike a pardon, a grant of dispensation did not simply exempt the transgressor from penalty after an act; it made the act or 'thing prohibited lawful to be done by him who hath it.'" Edie, 29 AM. J. LEGAL HIST. at 198-99.

That is what DAPA does. It gives DAPA beneficiaries actual physical licenses in the form of photographic identification; a picture of the license is reproduced below, *see* App. 20a, *infra*. Those DAPA licenses make several things lawful that would be unlawful without the license (like being present in the United States, working in the United States, and tolling the unlawful-presence clock). *See* Part C.1, *supra*. That is, the rule gives license holders the right to do the very things the INA declares unlawful. That is a textbook dispensation, and it is unconstitutional.

b. Petitioners and their supporters argue passionately that the current immigration laws are unfair and impose great human cost. Similarly, James II argued passionately that the Test Act was discriminatory and that repeal was necessary in the interest of toleration. But after losing his political battle with Parliament, James II had no way to undermine the Test Act beyond unilaterally asserting his will.

Likewise, the President spent years demanding that Congress amend the INA to effectuate his DAPA policy. He never argued, nor does he argue now, that the immigration laws are unconstitutional in a way that is cured by DAPA. Until the issuance of DAPA, the President repeatedly acknowledged that he had no authority to "suspend" the INA through an "executive order." JA14. Then he did it anyway.

c. Nor do petitioners' pleas for "deference" justify DAPA. Deference under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), is a matter of statutory interpretation. Petitioners' claim is not they deserve deference in interpreting the statute, but that they should be granted extra-statutory discretion beyond that granted by the INA. That is pure bootstrapping. The executive is not entitled to deference as to whether it is entitled to extra-statutory discretion. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) ("[I]t is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U. S. 726, 745 (1973))).

d. Finally, petitioners argue that DAPA does not truly "change" the law because the order is temporary and might be revoked at any time. That does not distinguish it from the suspending or dispensing powers, which were also temporary and also left the underlying law in place.

D. THE TAKE CARE CLAUSE SUPPLIES A CAUSE OF ACTION IF THE APA IS INAPPLICABLE

Neither the district court nor the court of appeals found it necessary to address respondents' constitutional claim because they concluded the APA provides a cause of action for respondents' substantive and procedural

statutory claims. Were this Court to conclude that the APA does not provide a cause of action for the substantive statutory claim, for whatever reason, the Court still should reach the merits of that claim under the Take Care Clause. The reach of the judgment would be the same. But the Constitution would provide the cause of action.

As this Court held in *Davis v. Passman*, 442 U.S. 228, 241-44 (1979), when officers of the federal government violate provisions of the Constitution, the Constitution itself, through 28 U.S.C. § 1331, provides a cause of action to any person with standing to sue. A statutory cause of action is necessary only for statutory, not constitutional, claims. *Davis*, 442 U.S. at 241. Moreover, this Court has repeatedly held that the Constitution allows equitable-relief claims against federal officers who act unconstitutionally, *e.g.*, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 698-99 (1949); *United States v. Lee*, 106 U.S. 196 (1882), just as it allows such claims against state officers, *Ex parte Young*, 209 U.S. 123 (1908).

The limits on the Take Care claim are important to recognize. Mere non-enforcement or under-enforcement of a statute does *not* give rise to a constitutional claim. Nor does the Take Care Clause apply when the executive exercises prosecutorial discretion or prioritizes some forms of enforcement over others. Rather, the Clause kicks in only when the executive branch purports to suspend or grant dispensations from statutory law—that is, to declare that those in violation of the law are acting lawfully and are entitled to affirmative benefits Congress has denied them. *See* Part C.1, *supra*.

Throughout this litigation, petitioners have asserted a broad and judicially unreviewable discretion to enforce

(or not enforce) the immigration laws as they see fit—even to the point of giving work permits, lifting ineligibility for Social Security, Earned Income Tax Credits, and Obamacare, and stopping the unlawful-presence timeclock. A proper understanding of the Take Care Clause reveals these assertions of unbounded discretion are legally baseless. The president has a constitutional duty—not merely the power—to faithfully execute the law. That principle merits reaffirmation today, just as it did in *Kendall* and *Youngstown*.

E. REVERSAL WOULD PORTEND LIMITLESS EXECUTIVE POWER

Using handpicked judges, James II won the judicial imprimatur of his declaration suspending the Test Act, and he used that precedent to justify ever-increasing exercises of executive power. *See* Part A.3, *supra* (discussing *Godden v. Hales*). Should this Court reverse, the president and the Office of Legal Counsel will have an equally potent and dangerous precedent at their disposal. The question in any future case, as in this one, is not whether the president's rule makes good policy; the question is whether the Constitution allows the president to license statutory violations. It does not.

For example, suppose a future president tries and fails to lower the capital-gains rate to 15%. That president could declare that the IRS will "prioritize" capital-gains collections under 15% and invite taxpayers to send in forms requesting settlements for that amount. The president could point to statutory authority for tax settlements. *See* 26 U.S.C. §§ 7121-7122. And the president could revoke the policy at any time. But for as long as the policy remained in effect, under petitioners' rule in this case, taxpayers would be legally authorized to pay the lower rate.

Or suppose a future president determines that environmental-protection laws hurt the economy. If that president fails to convince Congress to amend the statutes, the president instead could issue permits allowing polluters to emit noxious chemicals with impunity. The president even could pretend that the dispensations accord with congressional intent to consider the job-killing costs of environmental regulations. *E.g.*, 42 U.S.C. § 7612 (requiring "comprehensive [cost benefit] analysis"); 33 U.S.C. § 1375 ("comprehensive study on costs"). Again, those permits could be revoked at will. But for as long as the permits are valid, under petitioners' rule in this case, the permittee could lawfully do myriad things that the environmental laws flatly prohibit.

Or suppose a president wanted to give federal education grants to universities that refuse to follow the civil-rights laws, in violation of Title VI. That president could claim enforcement discretion to "negotiate" "voluntary compliance" with the civil-rights laws, rather than cutting off funds entirely as Congress required. Under petitioners' rule here, President Nixon would have had unreviewable discretion to do just that in the past, *but see Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (cited in *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985)), as would another president in the future.

* * *

The President was correct when he recognized that *only Congress* can lawfully effectuate DAPA. As he said in October 2010, "I am president, I am not king. I can't do these things just by myself." JA14. Indeed, even James II could not do these things by himself. The Framers adopted the Take Care Clause to ensure that the executive in this republic is likewise forbidden to make law unilaterally.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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April 2016

APPENDIX

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[*Ed. Note: All words spelled as in the originals.*]

An Act for the well governing and regulating of corporations, 13 Cha. II. St. 2 c. 1 (Corporation Act of 1661)

* * *

And be it further Enacted by the Authority aforesaid That all persons who upon the Foure and twentieth day of December One thousand six hundred sixty and one shall be Maiors Aldermen Recorders Bailiffes Towne-Clerks Common Councel men and other persons then bearing any Office or Offices of Magistracy or Places or Trusts or other Imployment relating to or concerning the Government of the said respective Cities Corporations and Burroughs and Cinque Ports and theire Members and other Port Towns shall at any time before the Five and twentieth day of March One thousand six hundred sixtie and three when they shall be thereunto required by the said respective Commissioners or any three or more of them take the Oathes of Allegiance and Supremacy and this Oath following.

> *I. [, name,] do declare and beleive That it is not lawfull upon any pretence whatsoever to take Arms against the King and that I do abhor that Traiterous Position of taking Arms by His Authority against His Person or against those that are co[m]missioned by Him So helpe me God.*

And alsoe att the same time shall publiquely subscribe before the said Commissioners or any Three of them this following Declaration.

I. [, name,] do declare That I hold that there lyes no Obligation upon me or any other person from the Oath commonly called The Solemn League and Covenant and that the same was in it selfe an unlawfull Oath and imposed upon the Subjects of this Realm against the knowne Laws and Liberties of the Kingdome.

* * *

Charles II, Declaration of Indulgence (Mar. 15, 1672)

Charles Rex.

Our care and endeavours for the preservation of the rights and interests of the church, have been sufficiently manifested to the world, by the whole course of our government since our happy restoration, and by the many and frequent ways of coercion that we have used for reducing all erring or dissenting persons, and for composing the unhappy differences in matters of religion, which we found among our subjects upon our return; but it being evident by the sad experience of twelve years, that there is very little fruit of all these forcible courses, we think ourselves obliged to make use of that supreme power in ecclesiastical matters, which is not only inherent in us, but hath been declared and recognised to be so, by several statutes and acts of Parliament; and therefore we do now accordingly issue this our declaration, as well for the quieting of our good subjects in these points, as for inviting strangers in this conjecture to come and live under us ; and for the better encouragement of all to a cheerful following of their trades and callings, from whence we hope, by the blessing of God, to have many good and happy advantages to our government; as also for preventing for the future the danger that might otherwise arise from private meetings and seditious conventicles.

And in the first place, we declare our express resolution, meaning and intention to be, that the Church of England be preserved, and remain entire in its doctrine, discipline and government, as now it stands established by law ; and that this be taken to be, as it is, the basis, rule, and standard of the general and public worship of God, and that the orthodox conformable clergy do receive and enjoy the revenues belonging thereunto, and that no

person, though of a different opinion and persuasion, shall be exempt from paying his tithes or dues whatsoever. And further we declare, that no person shall be capable of holding any benefice, living, or ecclesiastical dignity or preferment of any kind, in this our kingdom of England, who is not exactly conformable.

We do in the next place declare our will and pleasure to be, that the execution of all, and all manner of penal laws in matters ecclesiastical, against whatsoever sort of nonconformists or recusants, be immediately suspended, and they are hereby suspended; and all judges, judges of assize and gaol delivery, sheriffs, justices of peace, mayors, bailiffs and other officers whatsoever, whether ecclesiastical or civil, are to take notice of it, and pay due obedience thereto.

And that there may be no pretence for any of our subjects to continue their illegal meetings and conventicles, we do declare, that we shall from time to time allow a sufficient number of places as they shall be desired, in all parts of this our kingdom, for the use of such as do not conform to the church of England, to meet and assemble in order to their public worship and devotion, which places shall be open and free to all persons.

But to prevent such disorders and inconveniences as may happen by this our indulgence, if not duly regulated; and that they may be the better protected by the civil magistrate; our express will and pleasure is, that none of our subjects do presume to meet in any place, until such places be allowed, and the teacher of that congregation be approved by us.

And lest any should apprehend that this restriction should make our said allowance and approbation difficult

to be obtained, we do further declare, that this our indulgence as to the allowance of the public places of worship, and approbation of the preachers, shall extend to all sorts of nonconformists and recusants, except the recusants of the Roman Catholic religion, to whom we shall in no wise allow public places of worship, but only indulge them their share in the common exemption from the penal laws, and the exercise of their worship in their private houses only.

And if after this our clemency and indulgence any of our subjects shall pretend to abuse this liberty, and shall preach seditiously, or to the derogation of the doctrine, discipline or government, of the established church, or shall meet in places not allowed by us, we do hereby give them warning, and declare we will proceed against them with all imaginable severity. And we will let them see, we can be as severe to punish such offenders when so justly provoked, as we are indulgent to truly tender consciences.

Given at our court at Whitehall this 15th day of March, in the four and twentieth year of our reign.

An Act for preventing dangers which may happen from popish recusants, 25 Car. II. c. 2 (Test Act of 1672)

* * *

III. Persons refusing, &c. to take the Oaths and Sacrament, incapable of Office.

And bee it further enacted by the authoritie aforesaid That all and every the person or persons aforesaid that doe or shall neglect or refuse to take the said Oathes and Sacrament in the said Courts and places and at the respective times aforesaid shall be ipso facto adjudged uncapeable and disabled in Law to all intents and purposes whatsoever to have occupy or enjoy the said Office or Offices Imployment or Imployments or any part of them or any matter or thing aforesaid or any proffitt or advantage appertaining to them or any of them, and every such Office and Place Imployment and Imployments shall be void, and is hereby adjudged void.

* * *

VIII. Persons taking the Oaths to subscribe the Declaration following.

And bee it further enacted by the authoritie aforesaid That at the same time when the persons concerned in this Act shall take the aforesaid Oathes of Supremacy and Alleigiance, they shall likewise make and subscribe this Declaration following under the same Penalties and Forfeitures as by this Act is appointed.

> *I [,name,] doe declare That I doe beleive that there is not any Transubstantiation in the Sacrament of the Lords Supper, or in the Elements of Bread and Wine, at, or after the Consecration thereof by any person whatsoever.*

An Act for the more effectuall preserving the Kings Person and government by disableing papists from sitting in either House of Parlyament, 30 Car. II st. 2 (Test Act of 1678)

* * *

That from and after the First Day of December which shall be in the yeare of our Lord God One thousand six hundred seaventy and eight noe Person that now is or hereafter shall be a Peere of this Realme or Member of the House of Peeres shall vote or make his Proxie in the House of Peeres or sitt there dureing any Debate in the said House of Peeres, Nor any person that now is or hereafter shall be a Member of the House of Commons shall vote in the House of Commons or sitt there dureing any Debate in the said House of Commons after their Speaker is chosen untill such Peere or Member shall from time to time respectively and in manner following first take the severall Oathes of Allegiance and Supremacy and make subscribe and audibly repeate this Declaration following;

> *I [, name,] doe solemnely and sincerely in the presence of God professe testifie and declare That I doe believe that in the Sacrament of the Lords Supper there is not any Transubtantiation of the Elements of Bread and Wine into the Body and Blood of Christ at or after the Consecration thereof by any person whatsoever; And that the Invocation or Adoration of the Virgin Mary or any other Saint, and the Sacrifice of the Masse as they are now used in the Church of Rome are superstitious and idolatrous, And I*

doe solemnely in the presence of God professe testifie and declare That I doe make this Declaration and every part thereof in the plaine and ordinary sence of the Words read unto me as they are commonly understood by English Protestants without any Evasion, Equivocation or Mentall Reservation whatsoever and without any Dispensation already granted me for this purpose by the Pope or any other Authority or Person whatsoever or without any hope of any such Dispensation from any person or authority whatsoever or without thinking that I am or can be acquitted before God or Man or: absolved of this Declaration or any part thereof although the Pope or any other. Person or Persons or Power whatsoever should dispence with or annull the same, or declare that it was null and void from the begining.

King James II, Declaration of Indulgence (Apr. 4, 1687)

His Majesty's gracious declaration to all his loving subjects for liberty of conscience.

James R.

It having pleased Almighty God not only to bring us to the imperial crown of these kingdoms through the greatest difficulties, but to preserve us by a more than ordinary providence upon the throne of our royal ancestors, there is nothing now that we so earnestly desire as to establish our government on such a foundation as may make our subjects happy, and unite them to us by inclination as well as duty; which we think can be done by no means so effectually as by granting to them the free exercise of their religion for the time to come, and add that to the perfect enjoyment of their property, which has never been in any case invaded by us since our coming to the crown; which being the two things men value most, shall ever be preserved in these kingdoms, during our reign over them, as the truest methods of their peace and our glory.

We cannot but heartily wish, as it will easily be believed, that all the people of our dominions were members of the Catholic Church. Yet we humbly thank Almighty God, it is and has of long time been our constant sense and opinion (which upon divers occasions we have declared) that conscience ought not to be constrained nor people forced in matters of mere religion; it has ever been directly contrary to our inclination, as we think it is to the interest of government, which it destroys by spoiling trade, depopulating countries, and discouraging strangers, and finally, that it never obtained the end for which it was employed. And in this we are the more confirmed by the reflections we have made upon the

conduct of the four last reigns. For after all the frequent and pressing endeavours that were used in each of them to reduce this kingdom to an exact conformity in religion, it is visible the success has not answered the design, and that the difficulty is invincible.

We therefore, out of our princely care and affection unto all our loving subjects that they may live at ease and quiet, and for the increase of trade and encouragement of strangers, have thought fit by virtue of our royal prerogative to issue forth this our declaration of indulgence, making no doubt of the concurrence of our two Houses of Parliament when we shall think it convenient for them to meet.

In the first place we do declare, that we will protect and maintain the archbishops, bishops, and clergy, and all other our subjects of the Church of England, in the free exercise of their religion, as by law established, and in the quiet and full enjoyment of all their possessions, without any molestation or disturbance whatsoever.

We do likewise declare, that it is our royal will and pleasure, that from henceforth the execution of all and all manner of penal laws in matters ecclesiastical, for not coming to church, or not receiving the Sacrament, or for any other nonconformity to the religion established, or for or by reason of the exercise of religion in any manner whatsoever, be immediately suspended; and the further execution of the said penal laws and every of them is hereby suspended.

And to the end that by the liberty hereby granted, the peace and security of our government in the practice thereof may not be endangered, we have thought fit, and do hereby straightly charge and command all our loving subjects, that as we do freely give them leave to meet

and serve God after their own way and manner, be it in private houses or in places purposely hired or built for that use, so that they take especial care, that nothing be preached or taught amongst them which may any ways tend to alienate the hearts of our people from us or our government; and that their meetings and assemblies be peaceably, openly, and publicly held, and all persons freely admitted to them; and that they do signify and make known to some one or more of the next justices of the peace what place or places they set apart for those uses.

And that all our subjects may enjoy such their religious assemblies with greater assurance and protection, we have thought it requisite, and do hereby command, that no disturbance of any kind be made or given unto them, under pain of our displeasure, and to be further proceeded against with the uttermost severity.

And forasmuch as we are desirous to have the benefit of the service of all our loving subjects, which by the law of nature is inseparably annexed to, and inherent in, our royal person, and that none of our subjects may for the future be under any discouragement or disability (who are otherwise well inclined and fit to serve us) by reason of some oaths or tests, that have been usually administered on such occasions, we do hereby further declare, that it is our royal will and pleasure, that the oaths commonly called, *The Oaths of Supremacy and Allegiance*, and also the several tests and declarations mentioned in the Acts of Parliament made in the 25th and 30th years of the reign of our late royal brother King Charles the Second, shall not at any time hereafter be required to be taken, declared, or subscribed by any person or persons whatsoever, who is or shall be employed in any office or place of trust either civil or

military, under us or under our government. And we do further declare it to be our pleasure and intention from time to time hereafter, to grant our royal dispensations under our great seal to all our loving subjects so to be employed, who shall not take the said oaths, or subscribe or declare the said tests or declarations in the abovementioned Acts and every of them.

And to the end that all our loving subjects may receive and enjoy the full benefit and advantage of our gracious indulgence hereby intended, and may be acquitted and discharged from all pains, penalties, forfeitures and disabilities by them or any of them incurred or forfeited, or which they shall or may at any time hereafter be liable to, for or by reason of their nonconformity or the exercise of their religion, and from all suits, troubles, or disturbances for the same, we do hereby give our free and ample pardon unto all nonconformists, recusants, and other our loving subjects, for all crimes and things by them committed or done contrary to the penal laws formerly made relating to religion and the profession or exercise thereof, hereby declaring, that this our royal pardon and indemnity shall be as good and effectual to all intents and purposes, as if every individual person had been therein particularly named, or had particular pardons under our great seal, which we do likewise declare shall from time to time be granted unto any person or persons desiring the same, willing and requiring our judges, justices, and other officers, to take notice of and obey our royal will and pleasure herein before declared.

And although the freedom and assurance we have hereby given in relation to religion and property might be sufficient to remove from the minds of our loving subjects all fears and jealousies in relation to either, yet

we have thought fit further to declare, that we will maintain them in all their properties and possessions, as well of church and abbey-lands as in any other their lands and properties whatsoever.

Given at our court at Whitehall, the fourth day of April, 1687, in the third year of our reign.

***Case of the Seven Bishops*, 12 How. St. Tr. 183 (1688)**

Justice Powell. Truly I cannot see, for my part, any thing of sedition, or any other crime, fixed upon these reverend fathers, my lords the bishops.

For, gentlemen, to make it a libel, it must be false, it must be malicious, and it must tend to sedition. As to the falsehood, I see nothing that is offered by the king's counsel, nor any thing as to the malice: It was presented with all the humility and decency that became the king's subjects to approach their prince with.

Now, gentlemen, the matter of it is before you; you are to consider of it, and it is worth your consideration. They tell His Majesty, it is not out of averseness to pay all due obedience to the king, nor out of a want of tenderness to their dissenting fellow subjects, that made them not perform the command imposed upon them; but they say, because they do conceive that the thing that was commanded them was against the law of the land, therefore they do desire His Majesty, that he would be pleased to forbear to insist upon it, that they should perform that which they take to be illegal.

Gentlemen, we must consider what they say is illegal in it. They say, they apprehend the declaration is illegal, because it is founded upon a dispensing power, which the king claims, to dispense with the laws concerning ecclesiastical affairs.

Gentlemen, I do not remember, in any case in all our law (and I have taken some pains upon this occasion to look into it), that there is any such power in the king, and the case must turn upon that. In short, if there be no such dispensing power in the king, then that can be no libel which they presented to the king, which says, that the

declaration, being founded upon such a pretended power, is illegal.

Now, gentlemen, this is a dispensation with a witness: it amounts to an abrogation and utter repeal of all the laws; for I can see no difference, nor know of none in law, between the king's power to dispense with laws ecclesiastical, and his power to dispense with any other laws whatever. If this be once allowed of, there will need no parliament; all the legislature will be in the king, which is a thing worth considering, and I leave the issue to God and your consciences.

An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (English Bill of Rights of 1689)

* * *

Whereas the late King James the Second, by the assistance of divers evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom;

By assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament;

By committing and prosecuting divers worthy prelates for humbly petitioning to be excused from concurring to the said assumed power;

By issuing and causing to be executed a commission under the great seal for erecting a court called the Court of Commissioners for Ecclesiastical Causes;

By levying money for and to the use of the Crown by pretence of prerogative for other time and in other manner than the same was granted by Parliament;

By raising and keeping a standing army within this kingdom in time of peace without consent of Parliament, and quartering soldiers contrary to law;

By causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law;

By violating the freedom of election of members to serve in Parliament;

By prosecutions in the Court of King's Bench for matters and causes cognizable only in Parliament, and by divers other arbitrary and illegal courses;

And whereas of late years partial corrupt and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason which were not freeholders;

And excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberty of the subjects;

And excessive fines have been imposed;

And illegal and cruel punishments inflicted;

And several grants and promises made of fines and forfeitures before any conviction or judgment against the persons upon whom the same were to be levied;

All which are utterly and directly contrary to the known laws and statutes and freedom of this realm;

* * *

And thereupon the said Lords Spiritual and Temporal and Commons, pursuant to their respective letters and elections, being now assembled in a full and free representative of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties declare[:]

That the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal;

That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal;

That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious;

That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal;

That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal;

That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law;

That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law;

That election of members of Parliament ought to be free;

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament;

That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders;

That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void;

And that for redress of all grievances, and for the amending, strengthening and preserving of the laws, Parliaments ought to be held frequently.

* * *

And that the oaths hereafter mentioned be taken by all persons of whom the oaths have allegiance and supremacy might be required by law, instead of them; and that the said oaths of allegiance and supremacy be abrogated.

* * *

Petitioners' Employment Authorization Card