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

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1a. Whether at least one plaintiff State has a personal stake in this controversy sufficient for standing, when record evidence confirms that DAPA will cause States to incur millions of dollars in injuries.

1b. Whether DAPA – which affirmatively grants lawful presence and work-authorization eligibility – is reviewable agency action under the APA.

2. Whether DAPA violates immigration and related benefits statutes, when Congress has created detailed criteria for which aliens may be lawfully present, work, and receive benefits in this country.

3. Whether DAPA – one of the largest changes in immigration policy in our Nation's history – is subject to the APA's notice-and-comment requirement.

4. Whether DAPA violates the Take Care Clause of the Constitution, Art. II, § 3.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of the respondent states and their representatives (collectively, "States").[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF believes separation of powers is an essential feature of the American constitutional system. The Take Care Clause guards the doctrine of separation of powers, which in turn protects individual liberty. *Clinton v. New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Separation of

[1] Pursuant to Supreme Court Rule 37.3(a), all parties consent to the filing of this amicus curiae brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty."); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("The ultimate purpose of . . . separation of powers is to protect the liberty and security of the governed.").

Since its creation in 1977, MSLF has been actively involved in litigation regarding the proper interpretation and implementation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq. E.g.*, *Mountain States Legal Found. v. Nat. Wildlife Fed'n*, 497 U.S. 1020 (1990). In fact, the majority of the litigation in which MSLF attorneys provide representation is brought under the generous judicial review provisions of the APA. *E.g.*, *Herr v. U.S. Forest Serv.*, 803 F.3d 809 (6th Cir. 2015); *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745 (D.C. Cir. 2007); *Northwest Mining Ass'n v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998); *Stupak-Thrall v. Glickman*, 988 F. Supp. 1055 (W.D. Mich. 1997). If the federal government's crabbed interpretation of the APA is adopted in this case, a considerable amount of agency action will be insulated from judicial review.

STATEMENT OF THE CASE

On November 20, 2014, Jeh Johnson, Secretary of the Department of Homeland Security, issued an order to Citizenship and Immigration Services,

Immigration and Customs Enforcement, and Customs and Border Protection (collectively, "Petitioners"), announcing a new program, entitled "Deferred Action for Parents of Americans and Lawful Permanent Residents" ("DAPA"), *see* Petitioners' Appendix ("Pet. App.") at 411a-419a. DAPA would utilize deferred action status to stay deportation proceedings and award certain benefits to four million of the eleven million individuals currently residing illegally in the United States. Pet. App. 5a-6a. The Secretary's order set forth a list of specific criteria illegal alien applicants must meet in order to be eligible for deferred action. Pet. App. 5a-6a, 416a-417a.

Twenty-six states and/or their representatives challenged DAPA, alleging that it violates the APA, conflicts with existing immigration statutes, and violates the Take Care Clause. Joint Appendix ("Joint App.") at 11. The States moved for a preliminary injunction, seeking to halt Petitioners from beginning to process applications for deferred action pursuant to DAPA, and the district court granted the States' motion. Pet. App. 407a. On May 26, 2015, the Fifth Circuit issued an opinion denying Petitioners' motion to stay the preliminary injunction. Pet. App. 156a. On November 9, 2015, the Fifth Circuit affirmed the district court's grant of a preliminary injunction. Pet. App. 1a. Petitioners timely filed a petition for writ of certiorari, and this Court granted the petition.

SUMMARY OF ARGUMENT

In drafting the U.S. Constitution, the Framers' principal concern was preventing the concentration of power in one branch of government. To avoid the concentration of power, the Framers drafted Article II to limit the powers of the Executive Branch to specific, enumerated powers. The Framers included the Take Care Clause, U.S. CONST. art. II, § 3, to impose an affirmative, justiciable duty on the President to enforce the laws passed by Congress. By *sua sponte* suspending the application of the immigration laws for one-third of the illegal aliens currently present in the United States, DAPA constitutes a violation of the President's duty to enforce the laws under the Take Care Clause.

DAPA is also reviewable agency action under the APA. Petitioners have failed to overcome the APA's presumption of reviewability because they have not demonstrated that one of the APA's two very narrow exceptions to judicial review may apply. Judicial review is not precluded by statute because the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, only precludes judicial review of individual challenges to deportation proceedings. Furthermore, Petitioners have no discretion to abdicate their statutory responsibilities. Therefore, DAPA is subject to judicial review under the APA.

ARGUMENT

I. DAPA VIOLATES THE TAKE CARE CLAUSE.

A. The Take Care Clause Guards The Separation Of Powers.

Under Article I of the U.S. Constitution, it is the exclusive province of Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. *TVA v. Hill*, 437 U.S. 153, 194 (1978); U.S. CONST. art. I. Article II vests "[t]he executive Power . . . in a President of the United States of America," who must "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 1; *id.*, § 3. And, under Article III, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Petitioners argue that the Executive Branch has the power to formulate and implement DAPA without authorization from Congress. Pet. Br. at 36-48. At the same time, Petitioners argue that there is no cause of action under the Take Care Clause because the duty to faithfully execute the laws is a political one "not subject to judicial direction." Pet. Br. at 73-74. Thus, Petitioners seek to usurp both the legislative and judicial branches in enacting and implementing DAPA.

Petitioners' view of the Executive Branch's powers runs headlong into the separation of powers doctrine. The Framers intentionally "built into the tripartite Federal Government . . . a self-executing

safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). As James Madison warned, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self[-]appointed, or elective, may justly be pronounced the very definition of tyranny."[2] THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003).[3] At the Constitutional Convention, the Framers adopted the separation of powers doctrine "'not to promote efficiency[,] but to preclude the exercise of arbitrary power.'" *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629-30 (1952) (Douglas, J., concurring) ("'The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.'" (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting))). However inconvenient our process of adopting and implementing laws may be, it is essential to maintain a balance of power between the three branches. *I.N.S.*

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[2] Madison viewed the executive power as necessarily "restrained within a narrower compass" and "more simple in its nature" than the legislative power. THE FEDERALIST NO. 48, at 307 (James Madison) (Clinton Rossiter ed., 2003). Madison's view was "central to the federal government as devised in 1787." Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 6 U. CHI. L. REV. 123, 123 (1994).

[3] All *Federalist* citations herein reference this edition.

v. Chadha, 462 U.S. 919, 958 (1983) (Discussing the separation of powers and concluding, "[t]he choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.").

The Take Care Clause was expressly included by the Framers to avoid giving the President the power to make laws. *Youngstown*, 343 U.S. at 633 (Douglas, J., concurring); Greene, *Checks and Balances*, 6 U. CHI. L. REV. at 144 ("In particular, the framers clearly understood that the executive would not exercise legislative powers."); Zachary Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 693 (2014) ("The evolution of the Take Care Clause from a power-granting to a duty-imposing provision underscores that the Framers intended Congress to have policymaking supremacy."). Indeed, the entire constitutional structure revolves around a distinction between Congress's authority to make the laws and the President's authority to enforce them. *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (The "separation of governmental powers . . . [is] essential to the preservation of liberty."); Jeffrey A. Love & Arpit K. Gark, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1203 (2014) ("[T]he system of checks and balances that the Framers envisioned should prevent the president from making

policy unilaterally, whether through action or inaction.”). This separation of powers must be interpreted and applied functionally to prevent “a tyrannical concentration of all the powers of government in the same hands.” THE FEDERALIST NO. 48, at 310 (James Madison).

Contrary to these venerable principles, Petitioners argue that they may enact a legislative policy unilaterally granting lawful status and associated benefits to four million out of the eleven million illegal aliens residing in the United States. Further, Petitioners urge that they may avoid judicial review of such legislative policy as a function of agency discretion. Petitioners’ argument cannot be reconciled with the Constitution’s separation of powers framework. Under the Framers’ view, “the ability of a president to dictate national policy unilaterally is precisely what the separation of powers was meant to prevent.” Love & Gark, *Presidential Inaction*, 112 MICH. L. REV. at 1204.

B. The Take Care Clause Imposes An Affirmative Duty On The President To Faithfully Execute The Laws, And The President Is Not Authorized To Suspend Or Dispense With The Laws.

Article II was structured to provide limited, enumerated powers to the executive. *Youngstown*, 343 U.S. at 587 (“It is clear that if the President had authority to issue the order he did, it must be found

in some provisions of the Constitution."). Article II, § 2 sets forth the limited powers granted to the executive – the power of Commander in Chief, the power to grant reprieves and pardons, the power to make treaties, the power to make appointments, and the power to fill vacancies during the recess of the Senate. U.S. CONST. art. II, § 2. In contrast, Article II, § 3 sets forth the affirmative duties of the executive – the duties to report to Congress, to receive ambassadors and other public ministers, to commission officers of the United States, and to "take care that the laws be faithfully executed[.]" *Id.* § 3. In discussing § 3, Alexander Hamilton – who himself argued for a "vigorous" executive,[4] *see* THE FEDERALIST NO. 70, at 421 – explained that, beside the appointment power:

> The only remaining powers of the Executive are comprehended in giving information to Congress of the state of the Union; in recommending to their consideration such measures as he shall judge expedient; in convening them, or either branch, upon extraordinary occasions; in adjourning them when they cannot themselves agree upon the time of adjournment;

[4] Article II constitutes a balance between the Framers' desire for a "vigorous" executive in order to avoid "a feeble execution of the government" and the Framers' desire to narrowly define the scope of the executive power to the duties enumerated therein. THE FEDERALIST NO. 70, at 422 (Alexander Hamilton); THE FEDERALIST NO. 69 (Alexander Hamilton) (seeking to address concerns that the role of the executive would be akin to a monarchy by setting forth the narrow scope of the president's powers).

> in receiving ambassadors and other public ministers; in faithfully executing the laws; and in commissioning all the officers of the United States.

THE FEDERALIST NO. 77, at 462 (Alexander Hamilton); THE FEDERALIST NOS. 69-77 (Alexander Hamilton) (discussing each of the President's enumerated powers in turn and concluding that such powers constituted the sum total of the structure and powers of the executive department); *Youngstown*, 343 U.S. at 640-41 (Jackson, J., concurring) ("The President does not enjoy unmentioned powers. . . . [If he did,] it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones."). The location of the Take Care Clause in § 3 of Article II cements its status "as a duty rather than a power":

> [T]here is something quite odd about the structure of the Take Care Clause if it was conceived by the framers as the source of presidential power over all that we now consider administration . . . rather than appearing in [§] 2 of Article II, where the balance of the President's basic powers are articulated, the Take Care Clause appears in [§] 3. . . . Most of these [§ 3 duties] are expressed not as something the President may choose to do (as is the case where he has the "power" to undertake actions), but as something that he "shall" do.

Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 62 (1994).

By limiting the President's powers to those enumerated in Article II and including the affirmative mandate of the Take Care Clause, the Framers sought to avoid the historical tradition of English monarchs who often claimed the unilateral power to suspend duly enacted laws. Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 804 (2013); Price, *Enforcement Discretion*, 67 VAND. L. REV. at 675 (arguing that the Take Care Clause places limits on the President's discretion not to enforce the laws because "American Presidents, unlike English kings, lack authority to suspend statutes or grant dispensations that prospectively excuse legal violations."); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 726 n.113 (2003) ("[The Take Care Clause] supposedly was the Constitution's analogue to the English and state constitution prohibitions on dispensing and suspending the laws.").[5] Consistent with the Framers' intent, this Court has declined to interpret the Take Care Clause as a grant of authority. *See Youngstown*,

[5] When England adopted a Bill of Rights in 1689, it abdicated the power of the monarch to suspend laws without the consent of Parliament, and "[t]he suspending power which kings had employed for nearly 400 years to avoid implementing the law was never again exercised by the English crown." Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L. Q. 865, 872 (1994).

343 U.S. at 587 (rejecting President's argument that the Take Care Clause implies a grant of presidential power). Instead, this Court and the circuit courts have held that the Take Care Clause imposes an affirmative obligation to enforce the laws, and the President is not at liberty to dispense with the laws that Congress has passed. *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 612-13 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."); *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974) ("That constitutional duty [to take care that the laws be faithfully executed] does not permit the President to refrain from executing laws duly enacted by the Congress. . . ."). If the President dislikes a law, his only recourse is to exercise the veto power or to try to persuade Congress to change the law.[6] *See Lear Siegler, Inc., Energy Products Div. v. Lehman*, 842 F.2d 1102, 1124 (9th Cir. 1988) ("The only constitutionally prescribed means for the President to effectuate his objections to a bill is to veto it and to state

[6] In the case at bar, President Obama repeatedly expressed his desire for Congress to pass legislation functionally equivalent to DAPA, and Congress declined to do so. *See generally* Elisha Barron, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 631-38 (2011) (discussing Obama's advocacy and multiple failed attempts to pass the DREAM Act). Indeed, when discussing DAPA, Obama cited to Congress's failure to pass legislation as the impetus for his executive action. Joint App. 780-81.

those objections upon returning the bill to Congress. . . ."), *rev'd in part on rehearing en banc*, 893 F.3d 205 (9th Cir. 1989).

Allowing the President to dispense with or suspend certain laws, even partially, would render the President's constitutionally limited means of disagreeing with Congress a nullity. *Kendall*, 38 U.S. (12 Pet.) at 525 ("[V]esting in the President a dispensing power . . . would be clothing the President with a power to control the legislation of congress, and paralyze the administration of justice."); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 278-80 (2009) ("The prohibition on the suspending and dispensing powers was encoded in Article II's requirement that the President must 'take Care that the Laws be faithfully executed.' Thus, these rejected royal prerogatives were denied to the President."). "A critical piece" of the legacy of the Revolution "was the hard won principle that the Executive did not possess the authority to suspend a law." May, *Presidential Defiance*, 21 HASTINGS CONST. L. Q. at 872; Price, *Enforcement Discretion*, 67 VAND. L. REV. at 693 ("At the Constitutional Convention, the delegates unanimously rejected a proposal to grant the President suspending authority." (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 103-04 (Max Farrand ed., 1966))). Indeed, by the time the Constitutional Convention convened in 1787, "six states had constitutional clauses restricting the power to suspend or dispense with the laws" and the Framers looked to those states' constitutions for

guidance. Steven G. Calabresi *et al.*, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1534 (2012). In drafting Article II, the Framers also emulated England's Bill of Rights:

> A[n] act of parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. . . . And it cannot be altered, amended, dispensed with, suspended, or repealed. . . . It is true it was formerly held, that the king might in many cases dispense with penal statutes, but now . . . the suspending or dispensing with laws by regal authority, without consent of parliament, is illegal.

1 WILLIAM BLACKSTONE, COMMENTARIES, Ch. 2 at 185 (1765).[7]

From a practical standpoint, the Take Care Clause must be read to impose an affirmative duty on the President to execute the laws. Without such an affirmative duty, the laws passed by Congress would be dead letters that the President could choose to enforce or ignore depending on political whims and preferences. Arthur S. Miller, *The President and Faithful*

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[7] Blackstone's Commentaries was an oft-cited resource by the Framers and "'constituted the preeminent authority on English law for the founding generation. . . .'" *District of Columbia v. Heller*, 554 U.S. 570, 593-94 (2008) (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)).

Execution of the Laws, 40 VAND. L. REV. 389, 398 (1987) ("There is no way, at least no *known* way, that either Congress or the judiciary can oversee the implementation of the details of the statutes. . . ." (emphasis in original)). This effect would be manifestly contrary to the Framers' intent. *See* Thomas Lloyd, *Notes of the Pennsylvania Ratification Convention* (Dec. 1, 1787), *available at* http://consource.org/document/thomas-lloyds-notes-of-the-pennsylvania-ratification-convention-1787-12-1 ("I would not have the legislature sit to make laws, which cannot be executed. It is not meant here that the laws shall be a dead letter; it is meant, that they shall be carefully and duly considered, before they are enacted; and that then they shall be honestly and faithfully executed." (statement of James Wilson)). As one scholar has phrased it, "[a] literal reading of the 'take care' clause confirms the President's duty to ensure that officials obey Congress's instructions. . . ." Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decision-makers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 650-51 (1989); *see also* Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 220-21 (2015) ("The Constitution does not simply vest the President with powers concerning his own office, but imposes a duty on the President to *execute* the laws of Congress with those powers." (emphasis in original)); Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. at 398 ("Once Congress enacts a statute, whether over a Presidential

veto or with his approval, the President is duty bound to enforce it. . . . To 'execute' a statute . . . emphatically does not mean to kill it."). The Take Care Clause is not a mere nicety that the President may disregard at will.

Here, Petitioners argue that DAPA's suspension of the immigration laws for four million out of the eleven million illegal aliens currently residing in the United States is merely an exercise of prosecutorial discretion akin to a nationality-based action to temporarily delay deportation of a specific immigrant population during an international crisis.[8] Pet. Br. at 49-50. But there are limits to the President's prosecutorial discretion. While prosecutorial discretion is undisputedly necessary in individual enforcement actions, that discretion does not extend to a unilateral decision not to enforce the laws with regards to millions of illegal aliens.[9] Where a president "cho[o]se[s]

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[8] The executive actions cited by Petitioners are more appropriately characterized as an exercise of the President's enumerated powers over foreign affairs. *See* U.S. CONST. art. II, § 2. DAPA applies equally to all nations, and is thus distinguishable from past executive actions pausing specific deportation prosecutions for humanitarian purposes. Blackman, *The Constitutionality of DAPA Part II*, 19 TEX. REV. L. & POL. at 265-66 ("That DAPA applies equally to all nations makes it more difficult to square with the President's broad powers over foreign affairs."). Regardless, Petitioners "make[ ] no pretense of relying on the President's constitutional authority over foreign affairs." *Id.* at 266.

[9] As the States demonstrate, the President did not stop at suspending the INA and other immigration laws for one-third of

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inaction in order to promote his own policy goals at the expense of Congress's, [that] decision . . . raise[s] separation-of-powers questions." Love & Gark, *Presidential Inaction*, 112 MICH. L. REV. at 1220-22 (Arguing that the executive "must not be allowed to thwart the will of Congress by refusing to enforce the law.").

Therefore, the Take Care Clause's affirmative mandate that the Executive Branch must execute the laws requires the President to enforce those laws, regardless of his opinion of them. *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L. J. 1725, 1794 (1996) ("[The Take Care Clause] advances the Founding goal of balance in mandating that the executive remain faithful to something other than his whim – presumably federal laws and the Constitution."); May, *Presidential Defiance*, 21 HASTINGS CONST. L.Q. at 873-74 ("The duty to execute the laws faithfully means that the President may not – whether by revocation, suspension, dispensation, inaction, or otherwise – fail to honor and enforce statutes to which he or his predecessors have assented, or which may have been enacted over his objection.").

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illegal aliens. DAPA creates alternative criteria for granting illegal aliens lawful status and thereby affirmatively grants legal benefits, including work authorization, to aliens who satisfy those criteria. States' Brief at 45-50.

C. The Take Care Clause Is Justiciable.

Because the Take Care Clause imposes an affirmative duty on the President to execute the laws, it necessarily provides a right of action when the President shirks such duty. *See Kendall*, 37 U.S. (12 Pet.) at 526 ("It is a sound principle, that in every well-organized government the judicial[ ] powers should be co-extensive with the legislative; so far, at least, as they are to be enforced by judicial proceedings."); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 100 (2007) ("The suggestion that the Take Care Clause . . . limits the role of courts . . . is difficult to accept in light of the commonplace judicial role in ensuring 'that the Laws be faithfully executed.' The Judiciary performs this task every day . . . it spends much of its time controlling the manner in which the Executive Branch executes the laws."). It is the exclusive province of this Court to interpret the laws pursuant to its function of judicial review.[10] *Baker v.*

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[10] The nature of the ever-growing administrative state highlights the importance of judicial review to place some limits on the Executive Branch. *See City of Arlington v. F.C.C*, __U.S.__, 133 S. Ct. 1863, 1877-78 (2013) (Roberts, C.J., dissenting) ("Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power . . . executive power . . . and judicial power. . . . The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government."). The only way to discourage agency lawlessness is to provide a right of action to those injured by an agency's unlawful actions. *Marbury*, 5 U.S. (1 Cranch) at 163 ("The very essence of civil

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Carr, 369 U.S. 186, 211 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, *or whether the action of that branch exceeds whatever authority has been committed*, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." (emphasis added)). And "[o]ur system of government 'requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.'" *United States v. Nixon*, 418 U.S. 683, 704 (1974) (quoting *Powell v. McCormack*, 395 U.S. 486, 549 (1969)). As Thomas Jefferson recognized in the process of writing Virginia's constitution, such checks and balances are the entire purpose of the tripartite separation of powers:

> [T]he government we fought for [is] one . . . in which the powers of government should be so divided and balanced, among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason that convention, which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no

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liberty certainly consists in the right of every individual to claim the protection of the laws.").

> person should exercise the powers of more than one of them at the same time.

Thomas Jefferson, NOTES ON THE STATE OF VIRGINIA 123-24 (Lilly & Wait ed. 1832).

Petitioners' argument that the Take Care Clause is not justiciable, Pet. Br. at 73-74, conflicts with the Take Care Clause's unmistakable intention to "subordinate[ ] the President to the law." Cass R. Sunstein, *An Eighteenth Century Presidency in a Twenty-First Century World*, 48 ARK. L. REV. 1, 12 (1994) ("*For purposes of judicial review*, the President's most important constitutional duty is 'to Take Care that the Laws be faithfully executed.'" (emphasis added)). Even where the President is exercising an enumerated power – *e.g.*, in granting recognition to a foreign sovereign vis-à-vis the power to receive ambassadors – the President "is not free from the ordinary controls and checks of Congress" or the review of the courts.[11] *Zivotofsky ex rel. Zivotofsky v. Kerry*, __ U.S. __, 135 S. Ct. 2076, 2090 (2015). Petitioners offer no explanation why certain enumerated executive powers of Article II are subject to judicial review, but the President's abdication of his duty to take care that the laws are faithfully executed is not.

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[11] Where the President takes executive action that threatens the separation of powers, the importance of judicial review is all the more important. *See Buckley*, 424 U.S. at 123 ("This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary. . . .").

Of course, Congress may empower executive officers with certain duties by statute, as in the INA, which outlines specific guidelines for the Secretary to follow regarding removal proceedings, guidelines for admission, and criteria for deportation. 8 U.S.C. §§ 1125, 1182, 1227, 1229a. But when executive officers act pursuant to a statute, their actions are undisputedly subject to judicial review, as Chief Justice Marshall explained in *Marbury*:

> [W]hen the legislature proceeds to impose on [an executive] officer other duties; when he is directed peremptorily to perform certain acts, when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; he is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

5 U.S. (1 Cranch) at 166; *see also Bowsher v. Synar*, 478 U.S. 714, 778 (1986) ("Executive action under legislatively delegated authority that might resemble 'legislative' action in some respects. . . . [I]s *always* subject to check by the terms of the legislation that authorized it, and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely." (emphasis added)).

By providing alternative criteria for legal status and granting concomitant benefits, DAPA would dispense with the INA for approximately four million of the eleven million illegal aliens currently residing

in the United States. Pet. Br. at 3-4, 62. It is difficult to see how such dispensation would not constitute an abdication of the President's duty to faithfully execute the INA. *See* May, *Presidential Defiance*, 21 HASTINGS CONST. L. Q. at 881 ("In light of the Framers' unbending opposition to an absolute veto [power] and their concern that even a qualified veto might 'put too much in the power of the President,' it is virtually inconceivable that they intended the 'executive power' conferred by Article II to encompass a prerogative of suspending the laws.") (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 585 (Max Farrand ed. 1966))). While the President has concededly not suspended the INA's application to all illegal aliens, there is no logical end point to Petitioners' argument that he has the discretion to dispense with the INA for ever-larger groups of illegal aliens. Pet. Br. at 48-50, 58-60. At some point, the INA will be rendered ineffective. *Kendall*, 38 U.S. (12 Pet.) at 613 ("[V]esting in the President a dispensing power . . . would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice."). Judicial review of DAPA – and any executive action whereby the President purports to dispense with a statute's application to a large portion of individuals to whom the statute applies – is necessary to ensure the President's compliance with the Take Care Clause and give effect to the laws duly enacted by Congress.

D. DAPA Violates The Take Care Clause Because It Conflicts With The Statutory Scheme Enacted By Congress To Address Immigration.

When executive action conflicts with "the express or implied will of Congress," presidential power is at its "lowest ebb."[12] *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring) ("Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."). And if the President violates the Take Care Clause when he declines to enforce laws passed by Congress, it follows *a fortiorari* that he certainly may

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[12] *But see* Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 557-58 (2005) (arguing that Justice Jackson's tiered analysis in *Youngstown* applies only to analyses of the constitutionality of the President's actions, and "says nothing about whether . . . a president has statutory *authorization*." (emphasis added)). Professor Stack argues that this Court has yet to articulate a standard of judicial review of the President's assertions of statutory power, and that the inability of Congress to "actively polic[e] the president's assertion of statutory authority" requires searching judicial review that insists upon an identifiable statutory authorization for the President's action. *Id.* at 558-61, 581-82 ("[A]ssessing the president's claim of statutory authority separately from whether the Constitution independently authorizes the action . . . provides one way to take seriously Justice Jackson's view that the presence of statutory authorization makes a difference to constitutional review."); *see also* Blackman, *The Constitutionality of DAPA Part II*, 19 TEX. REV. L. & POL. at 267 ("Justice Jackson's framework for the separation of powers has no place for unilateral executive action based solely on Congress's resistance to presidential preferences. . . .").

not make legislative policies that actively conflict with laws passed by Congress. *Id.* at 655 (Jackson, J., concurring) ("The Executive, except for recommendation and veto, has no legislative power.").

In creating DAPA, the President did not legislate in a vacuum. He purposely acted contrary to a comprehensive statutory scheme governing immigration. DAPA conflicts with the INA because it affirmatively mandates that immigration officials shall *not* institute removal proceedings against four million of the eleven million illegal aliens in the United States if those aliens demonstrate that they satisfy specific criteria, and makes those aliens eligible for specific benefits based on their now-legal presence. U.S. App. 417a. By contrast, the INA mandates that Petitioners "shall" "inspect[,]" "detain[,]" and institute "removal proceedings" against illegal aliens not qualifying for asylum or not in fear of persecution. 8 U.S.C. § 1225. It also lists specific criteria that must be satisfied in order for an alien to be granted lawful presence in the United States. *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1182(a)(9)(B)(i)(II), 1201(a), 1255. In addition, Congress has authorized Petitioners to grant deferred action status only to specific groups. Under the INA and other statutes, to be eligible for deferred action status, an illegal alien must fit within one of the following categories: (1) children who are self-petitioning for immigrant status under the Violence Against Women Act, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV); (2) victims of human-trafficking-related crimes who assist law enforcement, *id.* § 1227(d)(1); (3) immediate

family members of lawful permanent residents killed on September 11, 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361 (2001); and (4) immediate family members of U.S. citizens killed in combat. Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694-95 (2003). In contrast, under DAPA, any illegal alien whose child is a citizen or lawful permanent resident, has been present since January 1, 2010, and is not an enforcement priority for deportation is eligible for deferred action status. Pet. App. 417a. And it is clear that Congress has not authorized the President to grant deferred action under the rubric set forth in DAPA – the legislation that would have granted deferred action to the very individuals to whom DAPA is directed repeatedly failed to pass in Congress. *See* Barron, *The DREAM Act*, 48 HARV. J. ON LEGIS. at 631-38.

DAPA not only suspends the laws' application to more than one-third of illegal aliens, it directly conflicts with those laws' narrow categories of individuals eligible for deferred action. Because DAPA conflicts with the "express" will of Congress and the President's power is therefore at its "lowest ebb," *Youngstown*, 343 U.S. at 637-38, Petitioners' claim of "broad authority" that should be afforded "particular deference" should be rejected.[13] *See* Pet. Br. at 50-51;

[13] By the same token, Petitioners' claim that DAPA falls within its exercise of prosecutorial discretion rings hollow. Although the President retains prosecutorial discretion, the exercise of this discretion cannot invalidate his duty under the Take

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Blackman, *The Constitutionality of DAPA Part II*, 19 TEX. REV. L. & POL. at 266 ("These efforts to enact substantive policies in the face of congressional intransigence must be viewed skeptically."). Petitioners' attempts to adopt alternative criteria for deferred action status in DAPA conflict with the criteria provided by Congress. Thus, DAPA violates the Take Care Clause.

II. DAPA IS AGENCY ACTION SUBJECT TO REVIEW UNDER THE APA.

Even if this Court determines the Take Care Clause is not justiciable, the APA provides for judicial review of agency actions claimed to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[,]" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. . . ." 5 U.S.C. § 706(2)(A), (C). The States challenge DAPA as an unlawful agency action under the APA. Specifically, the States allege that DAPA conflicts with the INA and thus is "not in accordance with law." Pet. App. 338a. Petitioners unconvincingly argue that one of the narrow exceptions to judicial review of agency actions applies. Pet. Br. at 36-41. Both

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Care Clause *to enforce* the law. Price, *Enforcement Discretion*, 67 VAND. L. REV. at 675 (Because of the Take Care Clause's enforcement duty, "[e]xecutive officials . . . lack discretion to categorically suspend enforcement or prospectively exclude defendants from the scope of statutory prohibitions.").

the district court and the Fifth Circuit properly rejected Petitioners' attempts to avoid judicial review.

A. Congress Intended The APA To Provide Generous Judicial Review Of Agency Actions.

When Congress passed the APA, it understood one of the main features of the bill to be its generous provisions for judicial review of agency actions. The very genesis of the APA was to address the problem of administrative agencies acting as "miniature independent governments." S. DOC. NO. 79-248, at 379 (1946) (statement of Rep. Doyle). There is ample evidence in the legislative history of Congress's intent to provide judicial oversight in order to safeguard against agency abuses of power. S. DOC. NO. 79-248, at 305 (1946) (Senator McCarran emphasizing that judicial review is "something in which the American public has been and is much concerned, harkening back, if we may, to the Constitution of the United States, which sets up the judicial branch of the Government for the redress of human wrongs and for the enforcement of human rights."); *id.* at 347 (Representative Michener stating that "[t]he only aim and purpose of this bill is to see that the rank and file of American people receive the justice which our system of jurisprudence attempts to guarantee to them.").

In providing for broad judicial review of agency actions, Congress intended the APA to impose significant limitations on agency discretion to ensure that

agencies do not exceed the authority given them by statute. Statutes are not "blank checks drawn to the credit of some administrative office or board" but rather are "*judicially confined* to the scope of authority granted or to the objectives specified." H.R. REP. NO. 79-1980, at 275 (1946) (emphasis added) (report of Francis Walter, Member, H. Comm. on the Judiciary).

The facts of this case are an apt illustration of the type of agency action Congress intended to prevent in passing the APA. Congress sought to address the significant separation-of-powers concerns presented if agencies were permitted to "not only become the law makers but . . . interpret their own self-made laws and execute them." S. DOC. NO. 79-248, at 383-84 (1946) ("Our Government is based on the principle of three branches: Congress makes the laws, and the courts interpret them, and the executive branches execute them, but in many of these agencies we find all of these functions of the Government lodged in one person or one board. . . . This bill gives the aggrieved party the right to appeal to the courts. . . .") (statement of Rep. Robsion). In passing DAPA, Petitioners arrogated upon themselves the authority to make, interpret, and execute a legislative policy which they now claim is immune from judicial review. DAPA is exactly the evil at which the APA was directed. *Id.* at 393 ("It was never contemplated or intended by the founders of this Republic that the power to legislate vested in Congress should be usurped by a bunch of appointive officers here in Washington who were

never elected by any constituency and never could be.") (statement of Rep. Jennings). The legislative history of the APA demonstrates the necessity of judicial review in cases where, as here, millions of taxpayers and dozens of states are impacted by an agency action that conflicts with the express will of Congress.

B. Neither Of The APA's Narrow Exceptions To Judicial Review Apply.

The only two exceptions to the broad presumption of judicial review of agency action are: (1) where the statute precludes review; and (2) where agency action "is committed to agency discretion by law." 5 U.S.C. § 701(a)(1), (2). These exceptions are to be "narrowly construed[.]" *Heckler v. Chaney*, 470 U.S. 821, 825 (1985). For the first exception to apply, there must be "clear and convincing evidence" of legislative intent to preclude judicial review, and the government agency must demonstrate "explicit statutory authority" for its position that judicial review is precluded. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977). Similarly, the discretionary exception is "very narrow" and Congress intended it to apply only in "'those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overland Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 752, at 26 (1945)), *abrogated on other grounds*, *Califano*, 430 U.S. at 99.

As demonstrated below, neither narrow exception insulates DAPA from judicial review in this case.

1. No statute precludes judicial review of DAPA.

There is a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) ("From the beginning 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" (quoting *Abbott Laboratories*, 387 U.S. at 140) (alteration in original)). The "mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." *Id.* at 671. Instead, judicial review is precluded only where it is expressly provided in the statute or otherwise clear from the statutory scheme as a whole. *Sackett v. EPA*, 132 S. Ct. 1367, 1373-74 (2012). An agency bears a "heavy burden" to overcome the presumption of reviewability. *Bowen*, 476 U.S. at 672.

Here, Petitioners argue that 8 U.S.C. § 1252(g)[14] exempts DAPA from judicial review and thus falls

[14] This provision of the INA provides, "no court shall have jurisdiction to hear any cause or claim *by or on behalf of any alien* arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal

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within the APA's first category of unreviewable cases, 5 U.S.C. § 701(a)(1). Pet. Br. at 41. Even though § 1252(g) undisputedly applies to individual aliens challenging their deportation proceedings, Petitioners suggest that, because aliens are those "most directly affected" by individualized deportation decisions, Congress must have intended to preclude all challenges of all agency actions concerning deportation. *Id*. But it simply does not follow that, because the INA bars challenges by an *individual alien* to deportation proceedings instituted by the Attorney General, Congress also intended to shield from review Petitioners' multi-agency legislative policy adopting standardized criteria for granting deferred action status and legal benefits. This Court has previously held that, where Congress precludes review only of a specific factual scenario, it did not intend to preclude review of broader claims under the statute – even where those claims concern the same subject matter. *See Bowen*, 476 U.S. at 676-78 (Congress's express preclusion of judicial review of the *amount* of benefits under Medicare Part B did not function to insulate from judicial review the *method* by which Part B benefits were computed).

Moreover, this Court has already held that § 1252(g) should be interpreted narrowly in accordance with Congress's purpose to protect "three discrete actions that the Attorney General may take: her 'decision or

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orders against any alien under this chapter." 8 U.S.C. § 1252(g) (emphasis added).

action' to *commence* proceedings, *adjudicate* cases, or *execute* removal orders" from second-guessing by the courts. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (quoting 8 U.S.C. § 1252(g)) (emphasis in original) (rejecting the government's contention that § 1252(g) "covers the universe of deportation claims" because "[i]t is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings. . . . We are aware of no other instance in the United States Code in which language such as this has been used to impose a general jurisdictional limitation. . . ."). Here, none of the actions Congress sought to address in including § 1252(g) in the INA are at issue, and § 1252(g) provides no "general jurisdictional limitation" that would apply to the States' challenge. *Id.*

The States here do not seek to challenge the basis of any individual removal proceedings or compel prosecution of specific individuals, and they do not seek to prolong removal proceedings in general. States' Brief at 43-44; *see Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 487 ("[8 U.S.C § 1252(g)] is *specifically directed* at the deconstruction, fragmentation, and hence prolongation of removal proceedings." (emphasis added)). Rather, the States challenge the Secretary's authority to issue the DAPA Directive in the first place – to make legislative policy, rather than interpret it. States' Brief at 1. The States' challenge is materially different from an individual alien's

attempt to reverse or prolong removal proceedings, and thus is not precluded by § 1252(g).

2. DAPA is not an action committed to agency discretion by law.

The APA's second exception, whether an action is "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), only applies where a statute is so broad as to make judicial review meaningless because there is no "meaningful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830. This Court has declined to second-guess agencies when they undertake "a complicated balancing of a number of factors which are peculiarly within its expertise." *Heckler*, 470 U.S. at 831 (decision not to undertake a specific enforcement action is not subject to judicial review); *Lincoln v. Virgil*, 508 U.S. 182, 192-93 (1993) (allocation of funds from a lump-sum appropriation is not subject to judicial review, so long as such appropriation meets permissible statutory objectives); *Webster v. Doe*, 486 U.S. 592, 599-601 (1988) (CIA director's decision to terminate an employee in the interests of national security is not subject to judicial review). The very fact that this Court can list on one hand the categories of cases where it held an agency action insulated from judicial review as discretionary demonstrates just how rarely the § 701(a)(2) exception applies. *See Lincoln*, 508 U.S. at 191-92; *see also McAlpine v. United States*, 112 F.3d 1429, 1435 (10th Cir. 1997) ("These 'rare circumstances' . . . include agency decisions not to

institute enforcement proceedings, to grant reconsideration of acts based on material error, to terminate employees for national security reasons, and to allocate of funds from lump sum appropriations." (quoting *Lincoln*, 508 U.S. at 191-92)).

Petitioners argue that DAPA is analogous to a run-of-the-mill decision not to deport an individual alien. Pet. Br. at 36. However, the President's ability to "terminate an after-the-fact prosecution or grant a pardon" is "very different from a power to dispense with the law." Price, *Enforcement Discretion*, 67 VAND. L. REV. at 695 (internal quotation omitted).[15] Additionally, to the extent Petitioners have prosecutorial discretion over immigration, such discretion

[15] Professor Price discusses the unique challenges presented in the immigration context, acknowledging that "a gross mismatch between the scope of prohibitions and the resources available to enforce them makes substantial nonenforcement of those laws inevitable." *Id.* at 761. Petitioners argue the resources point, repeatedly, as a justification for DAPA. Pet. Br. at 15, 43-47. But Price concludes that, "[e]ven so, just as in the criminal context, executive officials should properly understand their role in immigration enforcement to be a matter of priority setting rather than policymaking." Price, *Enforcement Discretion*, 67 VAND. L. REV. at 761. It is apparent where Petitioners overstepped that boundary. At the same time he announced DAPA, the Secretary also issued a priorities memoranda. Pet. Br. at 9. That memoranda directed Petitioners to "focus [your] limited resources . . . on serious criminals, terrorists, aliens who recently crossed the border, and aliens who have significantly abused the immigration system." *Id.*; Pet. App. 423a-428a. The differences between the priorities memoranda and DAPA illustrate the distinction between permissible priority setting, on one hand, and unlawful policy making, on the other.

was granted by Congress and must be exercised consistent with that delegation. *See* Lessig & Sunstein, *The President and the Administration*, 94 COLUM. L. REV. at 70 ("Prosecution is not among the list of enumerated executive powers. . . . According to the nineteenth century conception, prosecution is a power incidental to Congress[ ], and Congress may vest such authority wherever 'proper.' "). Thus, Petitioners must demonstrate that Congress intended, in the INA, to grant them broad authority to suspend the INA's application to over one-third of the illegal aliens in this country and affirmatively grant those aliens lawful status. As Justice Marshall recognized in *Heckler*:

> Discretion may well be necessary to carry out a variety of important administrative functions, but discretion can be a veil for laziness, corruption, incompetency, lack of will, or other motives, and for that reason "*the presence of discretion should not bar a court from considering a claim of illegal or arbitrary use of discretion.*"

470 U.S. at 848 (Marshall, J., concurring) (emphasis in original) (quoting L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 375 (1965)). These potentials for abuse justify requiring Petitioners to make a "clear and convincing demonstration" that Congress intended to grant them discretion. *Id.* at 848-49 ("For these and other reasons, reliance on prosecutorial discretion, itself a fading talisman, to justify the unreviewability of agency action is inappropriate." (Marshall, J., concurring)).

Heckler emphasized that an agency's discretion does not include instances where an agency has "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)). In *Adams*, the D.C. Circuit rejected the agency's attempt to adopt a "general policy" of nonenforcement as inconsistent with the agency's statutory duty to enforce Title VI of the Civil Rights Act of 1964. 480 F.2d at 1162. The court distinguished between an action that would have challenged the agency's decisions "with regard to a few [school] districts in the course of a generally effective enforcement program" with the case before it alleging that the agency had adopted a general policy of nonenforcement. *Id.* The former was an exercise of agency discretion, the latter was not. *Id.*

Following *Heckler*, the circuit courts maintained *Adams*' distinction in determining whether agency discretion insulates agency action from judicial review. *See, e.g.*, *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 166-71 (2d Cir. 2004) (agency's failure to enact specific licensing requirements advocated by plaintiff did not constitute an abdication of its "overall statutory mandate to provide adequate protection to nuclear plants[ ]"); *Crowley Caribbean Transport, Inc. v. Peña*, 37 F.3d 671, 676 (D.C. Cir. 1994) (Agency decision not to waive Merchant Marine Act requirements for plaintiff's cargo service was nonreviewable as a "single-shot non-enforcement decision" rather

than "a general enforcement policy" expressed "as a formal regulation" or "universal policy statement."); *McAlpine*, 112 F.3d at 1433-35 (Secretary of the Interior's decision regarding trust land acquisition was not exempt from judicial review because there was "law to apply" in determining whether the Secretary's exercise of discretion was based on a consideration of relevant factors.). The President has nonenforcement discretion on an individual basis, but this authority "extends neither to prospective licensing of prohibited conduct nor to policy-based nonenforcement of federal laws for entire categories of offenders." Price, *Enforcement Discretion*, 67 VAND. L. REV. at 671.

DAPA is quite clearly an abdication of Petitioners' statutory duty to implement the INA. DAPA would exempt more than a third of the nation's illegal aliens from deportation under the INA, and is therefore far removed from the individualized enforcement decisions entitled to prosecutorial discretion. *Adams*, 480 F.2d at 1163 (Agency's consistent failure to enforce statute is "a dereliction of duty reviewable in the courts."). Additionally, DAPA cites an alleged basis for the Secretary's authority to issue the directive under the INA, and thus provides a statutory yardstick by which to measure Petitioners' compliance with INA's mandates regarding removal and deportation. 8 U.S.C. §§ 1125, 1182, 1227, 1229a; *cf. Overland Park*, 401 U.S. at 410 (judicial review is unavailable where the statute is drawn in such broad terms that there is no law to apply). Because DAPA is not a valid exercise of prosecutorial discretion, this Court should hold

that DAPA is an unlawful agency action under the APA.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals and hold that the States are entitled to a preliminary injunction.

Respectfully submitted,

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