No. 15-674

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,

Petitioners,

v.

STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MONTANA, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WEST VIRGINIA, WISCONSIN; PAUL R. LEPAGE, GOVERNOR, STATE OF MAINE; PATRICK L. MCCRORY, GOVERNOR, STATE OF NORTH CAROLINA; C.L. "BUTCH" OTTER, GOVERNOR, STATE OF IDAHO; PHIL BRYANT, GOVERNOR, STATE OF MISSISSIPPI; BILL SCHUETTE, ATTORNEY GENERAL, STATE OF MICHIGAN,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

BRIEF FOR THE CATO INSTITUTE, PROFESSOR RANDY E. BARNETT, AND PROFESSOR JEREMY RABKIN AS *AMICI CURIAE* SUPPORTING RESPONDENTS

Josh Blackman
SOUTH TEXAS COLLEGE OF LAW
1303 San Jacinto St
Houston, TX 77002
(713) 646-1829
jblackman@stcl.edu

Ilya Shapiro
Counsel of Record
Randal J. Meyer
CATO INSTITUTE
1000 Mass. Ave. NW
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

QUESTIONS PRESENTED

1. Whether at least one plaintiff state has a stake in this case sufficient for standing, when evidence shows that the "Deferred Action for Parents of Americans and Lawful Permanent Residents" program (DAPA) will cause states to incur millions of dollars in costs.

2. Whether, as the lower courts held in enjoining it, DAPA—a historic change in immigration policy that grants lawful-presence status and work-authorization eligibility—is subject to notice-and-comment rulemaking under the Administrative Procedure Act.

3. Whether DAPA violates immigration law and related statutes, when it contravenes the detailed criteria that Congress enacted to determine which aliens may be lawfully present, work, and receive benefits.

4. Whether DAPA violates the president's duty to "take care that the laws be faithfully executed," otherwise known as the Constitution's Take Care Clause, Art. II, § 3.

Amici focus on the fourth question, as well as posing and answering an alternative question:

5. Whether the writ of certiorari should be dismissed as improvidently granted.

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INTEREST OF *AMICI CURIAE*[1]

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

Randy E. Barnett is the Carmack Waterhouse Professor of Legal Theory at the Georgetown University Law Center, where he directs the Georgetown Center for the Constitution and teaches constitutional law and contracts.

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

Amici's interest here lies in preserving the separation of powers that maintain the rule of law at the heart of the Constitution's protections for individual liberty. *Amici* agree that it is not for the president alone to make foundational changes to immigration law—in conflict with the laws passed by Congress and in ways that go beyond constitutionally authorized executive power.

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[1] Rule 37 statements: Petitioners and Intervenors-Respondents filed blanket consents to the filing of *amicus* briefs. Respondents consented to this filing in a separate letter. No party's counsel authored any part of this brief and no person or entity other than *amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

The question this Court has added to those presented in the petition was well-founded. "Deferred Action for Parents of Americans and Lawful Permanent Residents" (DAPA)—the president's euphemistically named policy of systematically suspending and rewriting federal law, is not an act of prosecutorial discretion. Instead, it is an effort, in the face of direct congressional opposition, to nullify the existing law because the president's preferred law was not enacted. Regardless of one's views on existing immigration law, DAPA conflicts with five decades of congressional policy as embodied in the Immigration and Naturalization Act (INA) and is inconsistent with previous uses of deferred action. Nor is it a good-faith effort to allocate prosecutorial resources in a manner best suited to enforcing the law. Instead, DAPA amounts to the president's refusal to enforce the law—in violation of his duty to take care that the laws be faithfully executed.

The Take Care Clause originated in response to the British monarch's practice of suspending the law, crossing the line between executive and legislative functions. As the Constitution's authors well knew, the English Bill of Rights reasserted Parliament's legislative power in the wake of the Glorious Revolution, eliminating "the pretended power of suspending . . . or the execution of laws by regal authority." The Bill of Rights, 1 W. & M., c. 2 (1689).

Nevertheless, King George III routinely refused his assent to laws enacted by colonial legislatures, insisting that they contain a clause authorizing the king to suspend their authority. This blurring of legislative and executive power yielded the first two

grievances in the Declaration of Independence. Many of the early state constitutions that predated the federal Constitution also mandated that their executives faithfully execute the laws—or prohibited governors from suspending them.

In Philadelphia in 1787, early versions of the Take Care Clause from the Committee of Detail focused on the president's "duly" executing the laws. Later revisions from the Committee of Style and Arrangement—staffed by James Madison and Alexander Hamilton—shifted the focus by emphasizing the President's obligation to "faithfully" execute the laws. 3 The Records of the Federal Convention of 1787, at 617, 624 (Max Farrand, ed. 1911); Federalist No. 77 (Hamilton).

A textualist examination of the Take Care Clause reveals that its fulcrum is the president's faithfulness to his enforcement duty. The Clause specifies that the president "shall take care that the laws be faithfully executed." This duty entails four distinct but interconnected components.

First, the president "shall" execute the law. The duty is mandatory, not discretionary.

Second, he must act with "care" or "regard" for his duty. *Kendall v. U.S. ex rel Stokes*, 37 U.S. (12 Pet.) 524, 612-13 (1838).

Third, the president must "execute" Congress's laws, not engage in a legislative act himself. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-78 (1804).

Fourth, and most importantly, the clause requires that the president act "faithfully"—literally, in good faith. While no president can perfectly execute the law, and he may have to prioritize his actions given

limited resources, he must nevertheless make a faithful effort to execute the laws.

For two primary reasons, DAPA is inconsistent with the president's duty to take care that the laws be faithfully executed. First, the circumstances that gave rise to DAPA demonstrate that it is not a good-faith exercise of prosecutorial discretion, but instead a blatant effort to nullify a law that the president sought unsuccessfully to repeal.

Second, DAPA is not an execution of the law, but amounts to a legislative act: the granting of lawful presence to a class of millions to whom Congress expressly denied that status. Further, DAPA is not consonant with congressional policy, nor has Congress acquiesced in it. On the contrary, it is a "measure[] incompatible with the expressed . . . will of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Ordinarily, this would mean that the president could "rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* But as Congress has virtually the entire power at issue here—and there are no claims of inherent executive power—that leaves the President with nothing.

Faced with a grave risk to the separation of powers, the Court should affirm the judgment of the Fifth Circuit and enjoin DAPA's enforcement. Alternatively, the Court should dismiss the writ of certiorari as improvidently granted.

ARGUMENT

I. The Take Care Clause Emerged from Opposition to the British Monarch's Suspension Power

One of the gravest abuses of the British monarch in the 17th and 18th centuries was his assertion of a "suspension" power. Most prominently, the Stuart regents, King Charles II and King James II, issued declarations suspending penal religious laws. At a time when the French monarch had likewise suspended enforcement of the Edict of Nantes—ending toleration of Protestants and leading to their mass emigration—Protestant Britons had great reason to fear the use of a "suspension" power in the hands of the abusive and Catholic Stuart monarchy. *See generally* Peter Ackroyd, *Rebellion* 455-59 (2014). Thus in the wake of the Glorious Revolution, Parliament promulgated the English Bill of Rights of 1689, which repudiated "the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament." The Bill of Rights, 1 W. & M., c. 2 (1689).

Despite this protection, the crown continued to exercise lawmaking power in the Americas. King George III insisted that no law enacted by colonial legislatures was valid without his assent. *See* Leonard Woods Labaree, *Royal Government in America: A Study of the British Colonial System Before 1783*, at 218-19, 266-67 (1934). Through his governors, he often withheld assent from laws passed by colonial legislatures unless the laws included a suspension clause allowing him to halt their execution. *See id*. at 224-27, 256-68. This insistence allowed the king not only to dispense with the

implementation of statutes, but also to force changes to their content—an essentially legislative power.

King George's executive overreach served as the basis for the first two grievances listed in the Declaration of Independence:

> He has refused his Assent to Laws, the most wholesome and necessary for the public good; He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

The Continental Congress was not merely concerned with the king abusing his royal prerogatives, but objected to his efforts to act as a lawmaker. *See* Federalist No. 47 (Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").

This cornerstone of the separation of powers was a guiding principle for the new state governments. The Virginia Declaration of Rights, authored by George Mason in June 1776, declared that "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." Va. Decl. of Rights § 7 (1776). The post-revolutionary constitutions of New York, Pennsylvania, and Vermont likewise imposed a duty of faithful execution on their executives, separating their role from the legislature's lawmaking powers.[2]

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[2] N.Y. Const. of 1777, art. XIX; Vt. Const. of 1777, ch. 2, § XVIII; Pa. Const. of 1776, § 20.

By 1787, six states "had constitutional clauses restricting the power [of the executive] to suspend or dispense with laws to the legislature." Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791*, 85 S. Cal. L. Rev. 1451, 1534 (2012) (citing constitutions of Delaware, Maryland, Massachusetts, North Carolina, New Hampshire, and Virginia).

This principle extended to the Constitutional Convention. Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing The Law*, 19 Tex. Rev. L. & Pol. 215, 226-30 (2015). Pierce Butler of South Carolina proposed "that the National Executive have a power to suspend any legislative act." 1 Records of the Federal Convention of 1787, at 103 (Max Farrand, ed. 1911). Elbridge Gerry of Massachusetts retorted that "a power of suspending might do all the mischief dreaded from the negative [veto] of useful laws; without answering the salutary purpose of checking unjust or unwise ones." *Id.* at 104. On the question of "giving this suspending power," the states unanimously voted no. *Id.*

The Framers instead modeled the newly created presidency on several of the state constitutions. The president was denied any legislative powers of suspension—other than a time-constrained veto that could be overriden—and was required to exercise his executive powers faithfully.

What ultimately became the Take Care Clause went through several revisions that highlight the importance the Framers placed on faithfulness. An early version of the provision appeared in the Virginia Plan. It vested the "National Executive" with the "general authority to execute the National laws." *Id.* at 21. The Convention adopted a revised

version of the clause: the executive was "with power to carry into execution the national laws." *Id.* at 63. There were no qualifications for faithfulness. A proposal to give the president the power "to carry into execution the nationl. [*sic*] laws" was unanimously agreed to. 2 *id.* at 32.

This provision was then sent to the Committee of Detail, which considered two different formulations: First: "He shall take Care to the best of his Ability." *Id.* at 137 n.6, 171. Second, John Rutledge of South Carolina suggested an alternate: "It shall be his duty to provide for the due & faithful exec[ution] of the Laws." *Id.* The final version reported out hewed closer to Rutledge's proposal: "He shall take care that the laws of the United States be duly and faithfully executed." *Id.* at 185. The Committee of Detail rejected the obligation that would have been linked to the "best of" the President's "ability," and instead focused on "due" and "faithful" execution.

Finally, the Committee of Style and Arrangement, which included James Madison and Alexander Hamilton, received a draft requiring the president to see that the laws be "duly and faithfully executed." 2 *Id.* at 554, 574. The Committee eventually dropped the term "duly," *id.* at 589–603, so the final version read, "he shall take care that the laws be faithfully executed," *id.* at 600.[3] This account

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[3] Although there is no record as to why "duly" was dropped, and the focus placed solely on "faithfully," it may have been an effort to avoid the ambiguity created by the use of "due" in "due process of law," a common term of art which was later added in the Fifth Amendment. *See* 2 E. Coke, *Institutes* *50. By eliminating "duly," the Framers directed attention to the President's faithfulness, rather than inviting dispute over what

is confirmed by the Hamilton Plan, which, though "not formally before the Convention in any way," proved to be influential. 3 Records of the Federal Convention of 1787, *supra*, at 617. Hamilton's plan eliminated the "duly" and focused on "faithfully"—that "He shall take care that the laws be faithfully executed." *Id.* at 624. A year later, Hamilton echoed this phrasing in Federalist No. 77, where he wrote about the President "faithfully executing the laws."

II. The Take Care Clause Imposes on the President the Affirmative Duty to Faithfully Execute the Laws

The text of the Take Care Clause imposes a duty comprising four distinct but connected components:

First, the president may not decline to execute the law, but "shall" execute it. *Second*, the president must act with "care" to discharge this duty: he may not act at whim, with favoritism, corruption, or arbitrariness. *Third*, the president must "execute" Congress's laws, not engage in legislative. *Fourth*, the president must execute the laws in good faith.

Only when the first three factors point toward a constitutional violation should the president's motivations be questioned. But at this stage, good-faith or bad-faith motivations become the cornerstone of the Take Care Clause. *See generally* Blackman, *Faithfully Executing*, *supra,* at 219-32.

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sorts of legal actions are "due," which is a question better suited for courts. Consistently with the Constitution's separation of powers, therefore, executive enforcement must be *faithful,* while judicial *process* of law must be *due.*

A. The President "Shall" Faithfully Execute the Law

It bears emphasis how strong the language of the Take Care Clause is. It is pitched at the highest register of constitutional obligation. The president *shall*—not may. He shall *take care*—not merely attempt. He shall take care that the laws be *executed*—not merely obeyed. And he shall take care that they are executed *faithfully*. No other constitutional provision mandates that any branch execute a power in a specific manner. Yet the Constitution mandates that the president execute the laws in a specific way: *faithfully*.

Most of the powers delegated by the Constitution are granted to the discretion of the officeholders. Congress, for example, has virtually *no* affirmative duties. "Congress shall have Power" to make certain laws, but need not do so. Likewise, Article II grants the president powers, but imposes few mandates. Even the duty to provide Congress with information on the state of the union is left to his discretion ("from time to time"). The Constitution imposes only two unambiguous duties: he *must* take the Oath of Office, U.S. Const. art. II § 1, and he "*shall* take Care that the Laws be faithfully executed." *Id.* art. II, § 3 (emphasis added).

These two provisions are closely parallel; the president's obligation and his authorization are commensurate. However "vast" his authority, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936), however much "force . . . speed," and "efficiency" he may muster, *Youngstown*, 343 U.S. at 629 (Douglas, J., concurring), however "broad" his "powers," *New York Times Co. v. United States*, 403

U.S. 713, 741 (1971) (Marshall, J., concurring), his obligation to execute the laws is equally vast, forceful, and broad.

Presidents have long understood the Clause in just this way. *Cf. NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President." (citing *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)). In 1792, President Washington wrote to Alexander Hamilton concerning the enforcement of unpopular tax laws that it was his "duty to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to it." Letter to Alexander Hamilton (Sept. 7, 1792), *in* 10 *Writings of George Washington* 292 (1847). Abraham Lincoln invoked the Clause as the basis of his obligation to put down the Confederate rebellion. Address to Congress, July 4, 1861, *in* 2 *Abraham Lincoln: Speeches and Writings* 252 (1989). Recently, the solicitor general acknowledged that the Take Care Clause imposes a presidential "duty." *See* Brief for the Petitioner at 63, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (No. 12-1281) ("That result would directly undermine the President's duty to 'take Care that the Laws be faithfully executed' . . . .").

The *only* possible exception is in cases where the president finds a law to be unconstitutional. Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1911 (2014). His oath, which requires that he preserve, protect, and defend the Constitution—and the Constitution's specification that only laws made

pursuant to it are the supreme law of the land—mandates that the president refuse enforcement to unconstitutional laws. In all other cases, he must take care that the laws be executed faithfully.

B. The President's Duty to "Take Care"

The Constitution does not more than oblige the president to act. It prescribes the manner in which he must discharge his duty: the president shall "take care." Prof. Natelson explains that at the Framing, "take care" was a term of art employed in "power-conferring documents" in which officials assigned tasks to agents. Robert G. Natelson, *The Original Meaning of the Constitution's "Executive Vesting Clause,"* 31 Whitt. L. Rev. 1, 14 & n.59 (2009).

Today, "care" has a similar meaning to what it bore two centuries ago. Dr. Johnson's 1755 dictionary provides five definitions of "care," including "concern," "caution," "regard," "attention," and "object of care." 1 Samuel Johnson, *A Dictionary of the English Language* 328 (1755). Noah Webster similarly defined "care" to include "[c]aution; a looking to; regard; attention, or heed, with a view to safety or protection, as in the phrase, take care of yourself." 1 Noah Webster, *American Dictionary of the English Language* (1828). Webster, like Johnson, explained that the verb "care" could be prefaced by "to," as in "[t]o *take care*, to be careful; to be solicitous for" and "[t]o *take care* of, to superintend or oversee; to have the charge of keeping or securing." *Id.* (emphasis added).

Read against this background, the Constitution imposes a presidential standard of care to supervise his subordinates, ensuring that they enforce the law with "caution" or "regard for the law."

This Court's most definitive statement of the president's duty to oversee his principal officers arose during the confrontational presidency of Andrew Jackson. *See Kendall v. U.S. ex rel. Stokes*. 37 U.S. (12 Pet.) 524 (1838). During the John Quincy Adams administration, the firm of Stockton & Stokes received important carrier contracts to assist the Postal Service. Upon taking office in 1829, President Jackson refused any service from the firm, which was loyal to Adams. Amos Kendall, appointed postmaster general in 1835, found that Stockton & Stokes had been overpaid in credits by the Adams administration and sought to correct it by eliminating the credits. Kendall wrote in his autobiography that when he raised the issue with the President, Old Hickory "remitted the matter to [his] discretion." Amos Kendall, *Autobiography of Amos Kendall* 350 (1872). Kendall knew what had to be done, and removed the credits from the ledgers.

Congress did not approve of the nonpayment, and passed a law requiring the solicitor of the Treasury Department to review the accounts, settle the differences, and order the postmaster general to apply the credits. *Kendall*, 37 U.S. (12 Pet.) at 605. Upon receiving the solicitor's judgment, Kendall paid out most of the credits, but withheld some that he believed to be outside the congressional edict. This act of defiance was purportedly done "by President Jackson's order." 2 Charles Warren, *The Supreme Court in United States History: 1836-1918*, at 44 (1926), *available at* https://goo.gl/juNJRT.

Stockton & Stokes continued to press their claims after Martin Van Buren became president in 1837, and "called on the President, under his constitutional power to take care that the laws were faithfully

executed, to require the postmaster general to execute this law, by giving them the further credit" to which they claimed entitlement. 37 U.S. (12 Pet.) at 538. The D.C. Circuit issued a writ of mandamus compelling the postmaster general to apply the credits in full. This Court agreed, and held that the postmaster general must comply with positive congressional edicts, lest the duty to take care become a "dispensing power." *Id*. at 608. The Court's analysis is worth quoting at length:

> It was urged at the bar, that the postmaster general was alone subject to the direction and control of the President . . . and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, *to take care that the laws be faithfully executed*. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which . . . would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice. 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.

Id. at 612-13 (emphasis added).

This Court has reiterated *Kendall*'s reasoning, calling its principles "fundamental and essential" and noting that without them, "the administration of

the government would be impracticable." *U.S. ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284, 304 (1854); *United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915) ("The Constitution does not confer upon [the President] any power to enact laws or to suspend or repeal such as the Congress enacts."). Inexplicably, the solicitor general does not even cite *Kendall* in his brief here.

C. The President Has Executive—Not Legislative—Powers

It is axiomatic that Congress enacts the laws, and the president faithfully executes them. As the history of the British monarchy demonstrates, when the president crosses the line into lawmaking, he is no longer merely executing the law—even where the legislature purports to vest the president with such lawmaking authority.[4] This construction of the Take Care Clause provides a strong textual basis for what has become known as the non-delegation doctrine.[5]

Chief Justice Marshall provided one of the first explanations of the scope of the president's executive

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[4] The president's *sole* involvement in the formal legislative process involves the veto power. *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) ("If there is to be a new procedure in which the President will play a different role in determining the final text of what may 'become a law,' such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution.").

[5] For this reason, the solicitor general is incorrect to state that the Take Care Clause "has no independent content," Reply Brief for the Petitioners at 11, *U.S. v. Texas* (2016) (No. 15-674) (cert. stage), and merely "collapses" into the statutory argument, Brief for the Petitioners at 73, *U.S. v. Texas* (2016) (No. 15-674) (merits stage).

power under the Take Care Clause in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). During the 1799 quasi-war with France, Congress enacted a statute that permitted the seizure on the high seas of any U.S. vessel bound *for* France or its dependencies. President Adams, in transmitting a copy of the act to his military officers, reinterpreted the statute to permit the seizure of U.S. vessels bound both "*to or from* French ports." *Id.* at 178 (emphasis added). On that basis, a U.S. naval vessel seized a Danish ship, the *Flying Fish*, as it traveled to Danish St. Thomas *from* French Jérémie (in present-day Haiti). This Court affirmed the Circuit Court's finding that the seizure was not authorized by Congress, notwithstanding President Adams's "guidance."

While President Adams's statutory revision may have been motivated by the fact that "[i]t was so obvious that if only vessels sailing to a French port could be seized on the high seas, that the law would be very often evaded," Chief Justice Marshall recognized that Congress was clear as to how the law ought to be executed. *Id.* at 178. The Adams appointee explained that a president's "high duty . . . is to 'take care that the laws be faithfully executed,'" and Congress has "prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port." *Id.* at 177-78. President Adams lacked the power to rewrite the law, for this would be a legislative act that violated the Take Care Clause.

D. The Execution Must Be Done in Good Faith

Most importantly, after imposing the duty to execute and the appropriate standard of care, the

Constitution defines *how* the president's duty should be executed: "faithfully." The clause's evolution during the Constitutional Convention speaks to the centrality of faithfulness to the Framers. As detailed above, the initial draft from the Virginia Plan imposed no qualifications. The president was simply to "execute the National laws."1 Records of the Federal Convention of 1787, *supra*, at 21. The Committee of Detail considered proposals that restricted the duty to either (1) "the best of his Ability" or (2) "the due & faithful exec[ution] of the Laws." 2 *Id.* at 171. It chose the latter. Finally, the Committee of Style chose "faithfully." *Id.* at 574.

The term "faithfully" also appears in the Oath Clause. But there it is modified by "to the best of my ability," a phrase notably absent from the Take Care Clause. This decision emphasizes the strength of the Take Care Clause's mandate: the oath's requirement that the president "preserve, protect and defend the Constitution of the United States" is phrased in *less* mandatory language than the command to "take Care that the Laws be faithfully executed."

The word "faithfully" is best understood to impose a standard of good faith, a legal principle that stretches back to antiquity.[6] The concept of good

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[6] Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 Seton Hall L. Rev. 70, 80 & n.26 (1993) ("Good faith in dealings and negotiation practices was the element of binding value in these ancestral societies . . . ."); Robert H. Jerry, II, *The Wrong Side of the Mountain: A Comment on Bad Faith's Unnatural History*, 72 Tex. L. Rev. 1317, 1319 (1994) ("The essence of a duty of good faith existed at least two thousand years ago in the law of the Romans.").

faith was well-known in the 17th- and 18th-century English common law of contracts.[7]

Professor Burton's canonical work on the common-law duty of good-faith contractual performance helps to explicate the design of the Take Care Clause. Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369 (1980). Good faith performance "occurs when a party's discretion is exercised for any purpose within the reasonable contemplation of the parties at the time of formation—to capture opportunities that were preserved upon entering the contract." *Id.* at 373.

Acting in good faith does not—indeed cannot—require 100-percent compliance with all legal duties. The issue for courts to consider is not whether a party does or does not have discretion. The question of good-faith performance arises precisely when a party *has* discretion. The "same act will be a breach of the contract if undertaken for an illegitimate (or bad faith) reason." *Id.* The focus, then, is placed on the promisor's motivation for exercising the discretion, and whether the compact permits it. In order to determine good faith, an inquiry must be made into the *motivations* of the promisor's actions.

When a contract allows one party some discretion in its performance, it is bad faith for that party to

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[7] *See e.g.,* Carter v. Boehm, (1766) 3 Burr. 1905, 1909 (Mansfield, L.J.) ("Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary."). Palmieri, *supra*, at 84 ("[G]ood faith and fair dealing increasingly became a part of the common law of contract.").

use that discretion to get out of the commitment to which he originally consented. *Id.* Likewise, a party to a contract who deliberately refuses to make efforts to discharge his contractual duties—where he is able to do so—is not acting in good faith.

To put this in constitutional terms, courts should ask whether the president is acting within the realm of prosecutorial discretion that Congress contemplated when it enacted the statute. If the answer is yes, the deviation from the law is in good faith, and is thus permissible. However, if the departure from the law is "used to recapture opportunities forgone upon contracting"—to accomplish ends rejected by Congress—then the action is not in good faith. When the president bypasses a statute by relying on a claim to authority Congress withheld from him, this is evidence that the president is violating his constitutional duty.

Under this theory, what "matters is the purpose or motive for the exercise of discretion." *Id.* Good faith exercises of discretion—such as efforts to prioritize the limited resources available for enforcement—are within the executive's proper authority. But the same action is unlawful when it is intended to evade the law-making authority of Congress, based on a disagreement with the law being enforced. An official's deliberate refusal to abide by the law—even if he professes an implausible fidelity to it—runs afoul of the Take Care Clause. It is not that any deliberate deviation is presumptively forbidden. Instead, the deviation must be done in bad faith, as an intentional means to bypass the legislature. Motivation is therefore the factor that distinguishes genuine prosecutorial discretion from a pretextual usurpation. The determination of whether

a party has acted in good or bad faith is the sort of ordinary judicial function whereby courts employ a totality-of-the circumstances analysis.

III. DAPA Violates the President's Duty to Faithfully Execute the Laws

DAPA is inconsistent with the president's duty to take care that the laws be faithfully executed for two primary reasons.[8] First, the circumstances that gave rise to DAPA show that it is a blatant effort to undermine a law that the president tried and failed to repeal. Second, DAPA is not an execution of the law, but a legislative act. It is not consonant with congressional policy, nor has Congress acquiesced to this unprecedented executive action. Instead the executive branch has acted as a lawmaker, in violation of its duty under the Take Care Clause.

A. DAPA Was Announced after Congress Rejected the President's Immigration Agenda

Like the mythical phoenix, DAPA arose from the ashes of congressional defeat. On June 30, 2014, the

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[8] The government's citation to *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1867), for the proposition that the president's actions are "not subject to judicial direction," is non-responsive to the question presented in this case. Brief for the Petitioners at 73-74, U.S. v. Texas (2016) (No. 15-674). The *Johnson* Court, which approvingly cited *Kendall*, rightly noted that the courts could not issue orders directing the president's "exercise of judgment," 71 U.S. (4 Wall.) at 499. But the plaintiff states here do not seek such an order—or any injunction compelling the president to act in *any* way. They have sued the principal officers responsible for administering DAPA and have asked this Court to enjoin the policy. The executive branch's faithful execution is well within the Court's purview.

Speaker of the House announced that he would not bring to a vote the comprehensive immigration bill that passed the Senate a year earlier. Steven Dennis, *Immigration Bill Officially Dead*, Roll Call (June 30, 2014), http://goo.gl/fnMtSf. Within hours of learning that the bill was dead, the president announced that he would act unilaterally. He explained that "I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing. . . . [I will] fix as much of our immigration system as I can on my own, without Congress." Remarks on Immigration (June 30, 2014), *available at* http://goo.gl/5CeR2G. Of course, Congress did not "do nothing"; its decision to reject the president's bill was an exercise of its constitutional authority.[9]

That presidential declaration commenced an eight-month process where the White House urged its legal team to use its "legal authorities to the fullest extent." Michael D. Shear & Julia Preston, *Obama Pushed 'Fullest Extent' of His Powers on Immigration Plan,* N.Y. Times (Nov. 28, 2014), http://goo.gl/pgmfSK. By one account, the president reviewed "more than [60] iterations" of the proposed

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[9] This is not the first time the Court has been confronted by an unprecedented executive action that the administration has justified based on congressional intransigence. *See*, *e.g.*, *Noel Canning*, 134 S.Ct. at 2599 (Scalia, J., concurring) ("The majority protests that [the idea that the President gains no new powers when Congress refuses to act] 'should go without saying—except that Justice SCALIA compels us to say it'; *ibid*., seemingly forgetting that the appointments at issue in this very case were justified on those grounds and that the Solicitor General has asked us to view the recess-appointment power as a *'safety valve' against Senatorial 'intransigence.'* Tr. of Oral Arg. 21.") (emphasis added).

executive action, expressing his disappointment because they "did not go far enough." Carrie Budoff Brown, *How Obama Got Here,* Politico (Nov. 20, 2014), http://goo.gl/Xc4q56. Finally, on November 20, 2014—two weeks after mid-term elections—he revealed DAPA.

Beyond the compelling political narrative, this history resonates on a deeper constitutional plane. From 2012 to 2014, while Congress considered the legislation, the president consistently maintained that he lacked the power to defer deportations of the parents of U.S. citizens. He asserted that he had already pushed the boundaries of his discretion to the limit with Deferred Action for Child Arrivals (DACA). His comments ranged from broad statements about executive power to a very specific description of what would become DAPA. *Faithfully Executing*, *supra*, at 267-280.

To quote one example, the president stated on March 5, 2014, that "until Congress passes a new law, then I am constrained in terms of what I am able to do." *Univision News Transcript: Interview with President Barack Obama*, http://goo.gl/Nr2JJa. Specifically, he conceded that the government could not halt the deportation of non-citizen parents with citizen-children. Citing congressional power to distribute funding, he reiterated, "I cannot ignore those laws any[]more than I could ignore, you know, any of the other laws that are on the books." Yet this was precisely what DAPA accomplished.[10]

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[10] The president's public statements, while not dispositive of his constitutional obligations, are relevant to the Take Care Clause calculus. *See Warafi v. Obama*, No. CV 09-2368, 2015

Such public statements were meant to indicate to Congress that if it rejected the bill, the president would comply with existing law (and not defer the deportations of parents of citizens). But rather than vindicating that expectation, the president suddenly "discovered" authority to take precisely the action Congress had refused to approve. In the face of legislative defeat, the president decided to evade the congressional commitment based on his own policy differences. *Cf. Youngstown,* 343 U.S. at 583. At the very least, this episode rebuts the presumption that the president's defense of DAPA was in good faith.

B. DAPA Is a Legislative Act that Is Inconsistent with Congressional Policy

The administration would have this Court believe that on November 20, 2014—two weeks after the midterm election and four months after the House of Representatives rejected the president's preferred reform bill—it suddenly determined that it was not correctly prioritizing removals, and that it needed to shake things up with new policy guidance. This defies credulity, and "does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2239 (2015) (Kagan, J., concurring). In fact, DAPA would have the effect of granting lawful presence to some four

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WL 4600420, at *5 (D.D.C. July 30, 2015) ("But war is not a game of 'Simon Says,' and the President's position, while *relevant*, is not the only evidence that matters to this issue.") (emphasis added). Critically, these statements-against-interest are not "self-serving press statements." *Youngstown*, 343 U.S. at 647 (Jackson, J., concurring); *cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 623 n.52 (2006) (refusing the invitation to "defer[] to comments made by [Executive] officials to the media").

million aliens who are otherwise not lawfully present in the United States, and grant them work authorization. This policy is best viewed as a legislative act because it is contrary to congressional policy and inconsistent with past executive practice.

1. DAPA is not consistent with congressional policy.

DAPA flouts congressional immigration policy, embodied in the Immigration and Nationality Act (INA), in two distinct ways. First, Congress has singled out the potential beneficiaries of DAPA—parents of citizens and lawful permanent residents—for formidable obstacles to the receipt of legal status. Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 Geo. L.J. Online 96, 102-110 (2015). Congress inserted these provisions specifically to allow the United States to remove unlawful entrants with post-entry U.S.-citizen children. *See Faustino v. INS*, 302 F. Supp. 212, 215–16 (S.D.N.Y. 1969). Congress has provided only limited avenues for visa availability and relief—and, for the most part, the classes of alien contemplated by DAPA fall outside the bounds of these provisions. DAPA is meant to effectively nullify these statutory provisions with which the Executive does not agree, thereby rewriting the law in a way that better comports with this Administration's policy preferences.

Immigration scholars whom the government favorably cites take the position that "the structure of modern immigration law simply leaves us with no discernable congressional enforcement priorities." Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 Yale L.J. 104, 155

(2015). If this is true—and nary an "intelligible principle" can be found—then the relevant immigration-law provisions constitute an invalid delegation of legislative power to the executive.

The government has embraced a species of this argument, finding a near-limitless font of authority in 6 U.S.C. § 202(5) and 8 U.S.C § 1103(a). Critically, the Office of Legal Counsel (OLC) did not rely on such expansive interpretations of these provisions in its *initial* defense of DAPA. Karl R. Thompson, OLC Memorandum Opinion for the Secretary of Homeland Security and the Counsel to the President, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, at 3-5 (Nov. 19, 2014) [hereinafter OLC Opinion]. But the Justice Department changed its tack during the course of litigation. Brief for the Petitioners at 42, *U.S. v. Texas* (2016) (No. 15-674).

The Court should hesitate before reading these provisions as granting the government the unbounded authority it claims here. Such a construction would render much of the INA superfluous. Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). The source of the government's purported statutory authority could not hide an elephant, let alone the Leviathan that is DAPA. To avoid constitutional doubts, these provisions should be read as they are written—to permit only authority within "the provisions of this chapter." 8 U.S.C. § 1103(a)(3) (2015); *see Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009).

2. Congress has not acquiesced to DAPA's expansion of executive action.

Contrary to the government's assertion, Congress has not acquiesced in the unprecedented usage of deferred action with DAPA. The government has identified four prior exercises of deferred action for certain classes of aliens that had been supported by Congress: deferred action for (1) self-petitioners under the Violence Against Women Act, (2) T and U visa applicants, (3) foreign students affected by Hurricane Katrina, and (4) widows and widowers of U.S. citizens. Blackman, *The Constitutionality of DAPA Part I*, *supra* at 112-121. But these past practices do not support DAPA's legality.

The scope of Congress's acquiescence in the executive's use of deferred action is far more constrained than the government suggests. Each instance of deferred action was sanctioned by Congress—and in each of them, one of two qualifications existed: (1) the alien had an *existing* lawful presence in the U.S., or (2) the alien had the *immediate prospect* of lawful residence or presence in the U.S. In either case, deferred action acted as a temporary bridge from one status to another, where benefits were construed as arising after deferred action. These conditions bring deferred action within the scope of congressional policy.

Neither limiting principle exists for DAPA. While deferred action historically served as a temporary *bridge* from one status to another—where benefits were construed as arising within a reasonable period after deferred action—DAPA acts as a *tunnel* to dig under and through the INA. Unlike previous uses of deferred action, DAPA beneficiaries have no prospect

of a formal adjustment of status unless they become eligible for some other statutory grant of relief.

For a fifth precedent, the government has placed increasing weight throughout this litigation on the 1990 Family Fairness Program. However, the OLC Opinion released contemporaneously with the announcement of DAPA, demonstrated—perhaps unwittingly—that Family Fairness fits within the "bridge" construct. That opinion noted that Family Fairness "authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens *who had been granted legal status under the Immigration Reform and Control Act of 1986 [IRCA].*" OLC Opinion at 14 (emphasis added).[11]

Precisely! The temporary relief afforded by Family Fairness was "ancillary to *Congress's* grant of legal status to millions of undocumented persons in IRCA." Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and*

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[11] Repeating the 1.5 million figure, the solicitor general notes that the "INS could only estimate how many people were potentially eligible and how many would actually come forward." Brief for the Petitioners at 56, *U.S. v. Texas*, (No. 15-674). The actual estimate was closer to 100,000. *See* Glenn Kessler, *Obama's Claim that George H.W. Bush Gave Relief to '40 percent' of Undocumented Immigrants*, Wash. Post (Nov. 24, 2014), http://goo.gl/gBvcEC. The origin of the 1.5-million estimate seems to be an error in congressional testimony. INS Commissioner Gene McNary himself told the *Post*, "I was surprised it was 1.5 million when I read that. I would take issue with that. I don't think that's factual." *Id.* Ultimately, INS had received only 46,821 applications by October 1, 1990. *Id*. The next month, President Bush signed the Immigration Act of 1990, ending the temporary Family Fairness program.

Immigration Law, 64 Am. U. L. Rev. 1183, 1217 (2015) (emphasis added). That is, "those legalized by . . . IRCA would become eligible to petition for the admission of their spouses and children through the already existing immigration system." Cox & Rodríguez, *supra*, at 121 n. 39. But there is no ancillary statutory relief awaiting beneficiaries of DAPA after the three-year grant of deferred action.

Further, unlike the Family Fairness plan, which could be viewed as being consistent with congressional policy in 1990,[12] DAPA has been expressly repudiated. After the president announced the program, the House of Representatives resolved that the executive action was "without any constitutional or statutory basis." Preventing Executive Overreach on Immigration Act of 2015, H.R. 38, 114th Cong. (2016), *available at* https://goo.gl/naJviy.[13] Audaciously, the president

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[12] Regardless of what Congress may have acquiesced to in 1990, in 1996 Congress repudiated that prior position through subsequent legislation which had the effect of eliminating most federal benefits for unlawfully present aliens that the government had not yet removed. Brief for the Respondents at 49-51, U.S. v. Texas (2016) (No. 15-674) (merits stage).

[13] This Court has recognized that congressional disapprobation offered after the president's assertion of authority is relevant in the separation-of-powers inquiry. *Youngstown*, 343 U.S. at 583 (noting that "Congress has taken no action" after President Truman's communications); *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981) ("We are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority" after the suspension of the claims); *Noel Canning*, 134 S. Ct. at 2563 ("[N]either the Senate considered as a body nor its committees, despite opportunities to express opposition to the practice of intra-session recess appointments, has done so").

then threatened to veto this obvious denial of his executive power. Statement of Administration Policy – H.R. 5759 – Preventing Executive Overreach on Immigration Act of 2014 (Dec. 4, 2014), *available at* http://goo.gl/3GMTQo. This sequence of events could not more clearly put us in Justice Jackson's third tier, where presidential power is at its nadir. It is as if Congress in 1952 had passed a bill declaring that the seizure of the steel mills was unconstitutional, and President Truman vetoed it!

Finally, with "a hardball twist, the administration set up [DAPA] so that it was self-funded through applicant fees . . . . That meant Congress could not block it by refusing to appropriate taxpayer dollars for it." Charlie Savage, *Power Wars* 660 (2015). The administration even boasted about how DAPA's fiscal invulnerability clipped Congress's purse strings. OLC Opinion at 26 ("But DHS has informed us that the costs of administering the proposed program would be borne almost entirely by USCIS through the collection of application fees.") (citations omitted). Not even shutting down the federal government—or defunding the Department of Homeland Security—could halt it. *House GOP panel: Defunding Immigration Order 'Impossible,'* The Hill (Nov. 20, 2014), http://goo.gl/97XxCq. This chutzpah demonstrates the president's intent to evade his duty to enforce duly enacted laws. Not only has DAPA not received congressional approval, it is expressly designed to flout Congress! Indeed, the House of Representatives recently voted to authorize an *amicus* brief supporting plaintiff states here. H.Res. 639, 114th Cong. (2016), https://goo.gl/QKgQxv.

In light of this clear disjunction between the executive and legislative branches, DAPA operates in

what Justice Jackson referred to as the president's "lowest ebb" of authority, which "must be scrutinized with caution" by the courts. *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring). Such scrutiny reveals that while deferred action has been authorized by Congress in the abstract, here the president has employed the practice to bypass Congress. DAPA is not a humdrum exercise of prosecutorial discretion, based on modest new guidance so DHS can prioritize resources. Instead it is an unprecedented effort to bypass Congress, to executively enact a policy the legislature rejected.

IV. Alternatively, the Court Should Dismiss the Writ of Certiorari as Improvidently Granted

Were this a run-of-the-mill case, the government's petition for certiorari would almost certainly have denied due to vehicle problems. First, as the Fifth Circuit noted, "the government did not seek an evidentiary hearing, nor does it argue on appeal that it was error not to conduct such a hearing." *Texas v. United States*, 809 F.3d 134, 175-76 (5th Cir. 2015). The parties vigorously contest the factual bases concerning the claims for standing, procedural and substantive unreasonableness, and violation of the separation of powers. *Amici* predict that oral argument will be dominated by the very sort of factual disputes that could have been resolved by an evidentiary hearing. While we are persuaded that the record amply supports the district court's injunction, this is not an auspicious ground on which to resolve such a serious constitutional dispute.

Upholding or invalidating DAPA will set a monumental precedent. The Court should not do that unless it is convinced that the factual predicates

support such a ruling. Dismissal is warranted if the Court finds that the record is not "'sufficiently clear and specific to permit decision of the important constitutional question[] involved.'" Eugene Gressman et al., S. Ct. Practice 359 (9th ed. 2007) (quoting *Mass. v. Painten,* 389 U.S. 560, 561 (1968)).

Second, a DIG is appropriate because this case could come back to the Court following summary judgment. Third, the government's own actions show that immediate resolution is not essential. In its petition for certiorari, the administration asserted that "[t]he great and immediate significance of the Secretary's Guidance, the irreparable injury to the many families affected by delay in its implementation, and the broad importance of the questions presented, counsel strongly in favor of certiorari now." Petition for a Writ of Certiorari at 25, *U.S. v. Texas*, 136 S. Ct. 906 (2016) (No. 15-674). Yet the urgency seems misplaced because the government inexplicably did not even request emergency relief from this Court after being denied a stay by the Fifth Circuit. Why a lower-court stay was requested—but not one from this Court—is difficult to fathom in light of DAPA's nationwide scope.

Had the government requested emergency relief in June 2015—with the *same* factual record—this Court would likely have already resolved the underlying legal issues. *See*, *e.g., Perry v. Perez*, 132 S.Ct. 934 (2012) (stay application filed 11/28/11, granted 12/9/11; case argued 1/9/12, decided 1/20/12). Had the government prevailed, DAPA would *already* be in effect. By not seeking a stay, the earliest DAPA could go into effect would be June 2016, "just as the presidential campaign heats up." *Immigration Ruling Stymies Obama and Those Seeking His Job*,

N.Y. Times (May 28, 2015), http://goo.gl/AVI7fb. The government's dilatory approach suggests that DAPA's immediate implementation is not as important as the solicitor general now suggests. The Court should not prematurely resolve a separation-of-powers dispute when the government did not even deem it worthwhile to seek a stay.

There is one final reason—particularly suited to our unique circumstances—for dismissing the writ as improvidently granted: DAPA as it exists today will likely not exist after January 20, 2017. Both of the Democratic presidential candidates have announced that they would expand the program to grant deferred action to the parents of DACA beneficiaries (despite the fact that that OLC has stated that this would be unlawful). If DAPA is thus expanded, the plaintiff states may amend their complaint to challenge the altered policy. Alternatively, the leading Republican presidential candidates have announced that they would rescind DAPA in its entirety. If that happens, the Court will *never* have to resolve these contested questions. A decision not to decide now may be a decision not to decide ever. *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

Critically, unlike other separation-of-powers cases that reach the Court, a dismissal of the writ here maintains the status quo. No recess appointments would be invalidated. No detainees would need to be tried or released. No independent prosecutions would cease. No passports would be altered. No foreign-settlement tribunals would be scuttled.

A dismissal would not force any removals of aliens, or force changes in immigration-policy

priorities. It would not limit the president's ability to discipline his workforce to implement those priorities. A dismissal would simply preserve long-standing executive-branch practices while allowing factors beyond the Court's control to play out—perhaps permanently resolving this dispute.

CONCLUSION

During the height of the Korean War, this Court rejected the president's efforts to bypass Congress and engage in executive lawmaking. Not even asserting national-security interests could save the steel seizures. The Constitution, said the Court, shows that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown*, 343 U.S. at 587. Justice Jackson closed his iconic opinion with timeless wisdom for the courts:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. *But it is the duty of the Court to be last, not first, to give them up.*

Id. at 655 (Jackson, J., concurring) (emphasis added).

This Court must be the "last, not first" to give up. DAPA should be stopped before the next president can rely on it as a precedent for constitutional evasions "presently unimagined, [which] will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for

the separation of powers." *Noel Canning*, 134 S.Ct. at 2550 (Scalia, J., concurring).

A judgment for respondents would return the ball of change to the court where it belongs: Congress.

The judgment of the court of appeals should be affirmed or, in the alternative, the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

Josh Blackman
SOUTH TEXAS
COLLEGE OF LAW
1303 San Jacinto St.
Houston, TX 77002
(713) 646-1829
jblackman@stcl.edu

Ilya Shapiro
Counsel of Record
Randal J. Meyer
CATO INSTITUTE
1000 Mass. Ave. NW
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

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