NO. 15-40238

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS AT BROWNSVILLE
No. 1:14-cv-00254

***AMICI CURIAE* BRIEF OF MEMBERS OF CONGRESS, THE AMERICAN CENTER FOR LAW & JUSTICE, AND THE COMMITTEE TO DEFEND THE SEPARATION OF POWERS IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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CERTIFICATE OF INTERESTED PERSONS

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

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- *R. Gil Kerlinkowske, Commissioner of U.S. Customs and Border Protection*
- *Ronald D. Vitiello, Deputy Chief of U.S. Border Patrol, U.S. Customs and Border of Protection*
- *Sarah R. Saldana, Director of U.S. Immigration and Customs Enforcement*
- *Leon Rodriguez, Director of U.S. Citizenship and Immigration Services*

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- *State of South Carolina*
- *State of South Dakota*
- *State of Utah*
- *State of West Virginia*
- *State of Wisconsin*
- *State of North Dakota*
- *State of Ohio*
- *State of Oklahoma*
- *State of Florida*
- *State of Arizona*
- *State of Arkansas*
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- *The ACLJ's Committee to Defend the Separation of Powers*[2]

[1] *The American Center for Law and Justice has no parent corporation, and no publicly held company owns 10% or more of its stock.*

[2] *The ACLJ's Committee to Defend the Separation of Powers is made up of individual Americans who stand in favor of this action and has no parent corporation, and no publicly held company owns 10% or more of its stock.*

- *Sen. John Cornyn*
- *Sen. Ted Cruz*
- *Sen. John Barrasso*
- *Sen. Roy Blunt*
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INTEREST OF AMICI[3]

The American Center for Law & Justice ("ACLJ") is an organization dedicated to defending constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and state courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). The ACLJ has also participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court and lower federal courts. *E.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Van Orden v. Perry*, 545 U.S. 677 (2005).

The ACLJ has been active in advocacy and litigation concerning the need for strong and secure borders in addition to immigration reform passed by Congress, as Article I of the Constitution requires. The ACLJ has previously filed an amicus curiae brief defending the constitutional principles of federalism and separation of powers in the realm of immigration law in *Arizona v. United States*, 132 S. Ct. 2492 (2012), and participated as amici in the district court below, ROA.343.

[3] All parties have consented to this filing. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its respective counsel made a monetary contribution to the preparation or submission of this brief. Amici file under the authority of Fed. R. App. P. 29(a).

The ACLJ's Committee to Defend the Separation of Powers represents 218,000 Americans who have stood against Appellants' actions as an affront to the integrity of the Constitution. These individuals are also, as the district court held, negatively impacted by Appellants' actions.

Furthermore, this brief is filed on behalf of United States Senators John Cornyn, Ted Cruz, John Barrasso, Roy Blunt, John Boozman, Dan Coats, Thad Cochran, Tom Cotton, Mike Crapo, Michael Enzi, Orrin Hatch, James Inhofe, Johnny Isakson, James Lankford, Mike Lee, Jerry Moran, Mitch McConnell, David Perdue, James Risch, Pat Roberts, Marco Rubio, Dan Sullivan, John Thune, David Vitter, Roger Wicker, and Representatives Bob Goodlatte, Lamar Smith, Robert Aderholt, Brian Babin, Lou Barletta, Joe Barton, Gus M. Bilirakis, Mike Bishop, Diane Black, Marsha Blackburn, Charles Boustany, Mo Brooks, Michael Burgess, Bradley Byrne, Earl L. 'Buddy' Carter, John Carter, Steve Chabot, Curt Clawson, Tom Cole, K. Michael Conaway, Kevin Cramer, John Culberson, Ron DeSantis, Scott DesJarlais, Jeff Duncan, John Duncan, Blake Farenthold, John Fleming, Bill Flores, Randy Forbes, Virginia Foxx, Trent Franks, Bob Gibbs, Louie Gohmert, Paul Gosar, Trey Gowdy, Tom Graves, H. Morgan Griffith, Vicky Hartzler, Jeb Hensarling, Richard Hudson, Tim Huelskamp, Will Hurd, Lynn Jenkins, Sam Johnson, Walter Jones, Mike Kelly, Steve King, Raul Labrador, Doug Lamborn, Leonard Lance, Barry Loudermilk, Mia Love, Kenny Marchant, Tom Marino,

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All Amici are dedicated to the founding principles of separation of powers in this country. They believe that the laws of this nation do not empower Appellants to unilaterally "change the law" against the will of Congress.

SUMMARY OF ARGUMENT

Appellants' directive ("DHS directive") violates the Constitution and Congress's intent. *See* ROA.83. The Constitution vested in Congress the exclusive authority to make law and set immigration policies. Congress has created a comprehensive immigration scheme—which expresses its desired policy as to classes of immigrants—but the class identified by the DHS directive for

categorical relief is unsupported by this scheme. Moreover, the DHS directive, by the admission of the President, changes the law and sets a new policy, exceeding the Executive's constitutional authority and disrupting the delicate balance of powers.

The Government also exceeded the bounds of its prosecutorial discretion and abdicated its duty to faithfully execute the law. Instead of setting enforcement priorities, it created a class-based program that establishes eligibility requirements that, if met, grant unlawful immigrants a renewable lawful presence in the United States and substantive benefits. Furthermore, the lack of individualized review or guidelines by which an immigration officer could deny relief to those who meet the eligibility requirements demonstrates categorical nonenforcement and violates Supreme Court precedent.

Appellants wholly ignore the constitutional issues raised but reserved by the district court—issues that ultimately bear upon the likelihood of success on the merits. For the reasons stated, this Court should affirm the district court.

ARGUMENT

In line with Amici's expressed interest, should this Court necessarily reach the constitutional issues, this brief focuses on why the States are likely to succeed on the merits of their constitutional claim. The DHS directive creates a new class—the roughly 4 million parents of U.S. citizens (and lawful permanent residents) who

are unlawfully in the United States—and grants members of the class deferred removal (among other benefits) if they meet the basic eligibility requirements. ROA.235. The government's creation of a categorical, class-based program is neither moored in constitutional authority nor in authority delegated by a lawful statute passed by Congress.

By contradicting Congress's express and implied intent, the DHS directive violates the test articulated in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Furthermore, by enacting a sweeping new program under the guise of prosecutorial discretion, Appellants violated controlling precedent and abdicated their constitutional duty to faithfully execute the law.

I. THE STATES ARE LIKELY TO PREVAIL ON THE MERITS BECAUSE THE DIRECTIVE IS UNCONSTITUTIONAL AND VIOLATES CONGRESS'S EXPRESS AND IMPLIED INTENT.

Few enumerated powers are more fundamental to the sovereignty of the United States than the control of the ingress and egress of immigrants. The Constitution vested in Congress "[a]ll legislative Powers", U.S. Const. art. I, § 1, and particularly vested in Congress the exclusive authority to "establish an uniform Rule of Naturalization," *id.* § 8, cl. 4. In 1817, the Supreme Court recognized Congress's exclusive authority over naturalization. *Chirac v. Lessee of Chirac*, 15 U.S. (1 Wheat.) 259, 269 (1817). Beyond naturalization, the Supreme Court has

recognized that Congress has plenary power over immigration,[4] and has said that "over no conceivable subject is the legislative power of Congress more complete than it is over" immigration. *Reno v. Flores*, 507 U.S. 292, 305 (1993).

Similarly, the Supreme Court has recognized that it is Congress's exclusive authority to dictate policies pertaining to immigrants' ability to enter and remain in the United States. As Justice Frankfurter aptly said:

> Policies pertaining to the entry of aliens and *their right to remain here* are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the *formulation of these policies is entrusted exclusively to Congress* has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.

Galvan v. Press, 347 U.S. 522, 531 (1954) (emphasis added) (internal citations omitted). Thus, while the President has a constitutional obligation to faithfully execute the laws, U.S. Const. art. II § 3, the core congressional function is to devise general laws and policies for implementation.

The founding fathers intentionally separated these powers among the branches, fearing that a concentration of power in any one branch, being unchecked, would become tyrannical. Their conscious design to strengthen the government through

[4] *See, e.g., Sale v. Haitian Council, Inc.*, 509 U.S. 155, 201 (1993) ("Congress . . . has plenary power over immigration matters."); *INS v. Chadha*, 462 U.S. 919, 940-41 (1983) ("The plenary authority of Congress over aliens under Art. I, §8, cl. 4, is not open to question."); *Boutilier v. INS*, 387 U.S. 118, 123 (1967) (same).

this separation of powers is articulated in *The Federalist Papers*[5] and visible in the structure of Articles I, II, and III of the U.S. Constitution. In this design, the powers were not separated to ensure governmental efficiency, but to restrain the natural tendency of men to act as tyrants. As the district court noted, President Obama recognized these limits on more than twenty occasions. *See* ROA.4391. Yet despite this recognition, President Obama boldly proclaimed that the DHS directive "change[d] the law." ROA.234.

A. The DHS Directive Fails the Constitutional Test in *Youngstown*.

The DHS directive created a categorical deferred action program that conflicts with Congress's expressed and implied intent in existing law and its exclusive authority to legislate and set immigration policy. When the President acts within an area generally considered to be under the constitutional authority of Congress, as he has done here, courts have applied Justice Jackson's three-tier framework articulated in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579. According to *Youngstown*, when the President acts pursuant to an authorization from Congress, his power is "at its maximum." *Id.* at 635-36. When Congress is silent on the matter, "there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637. Yet, when the

[5] *See* THE FEDERALIST NO. 47, at 269 (James Madison) (Clinton Rossiter ed., rev. ed. 1999) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").

President acts in conflict with Congress's expressed or implied intent, his power is at its "lowest ebb, for then he can rely only upon his own constitutional power minus any constitutional powers of Congress over the matter." *Id.*

Tier one of the framework, which entails consent by Congress, is inapplicable to the present analysis by the President's own admission. He claims that he had to act because Congress failed to act. ROA.234; *see also infra* I. B. (discussing lack of statutory delegated authority). Nor is the DHS directive saved by the "zone of twilight." Critically, Congress's refusal to enact President Obama's preferred policy is not "silence"; it represents the constitutional system working as intended. Congress has enacted extensive immigration laws—they are simply not enacted in the manner President Obama prefers. Differing policy preferences do not provide license to, as President Obama said, "change the law."

Congress has created a comprehensive immigration scheme, which expresses its desired policy as to classes of immigrants—but the class identified by the DHS directive for categorical relief is unsupported by the scheme. The Supreme Court, in no ambiguous terms, has recognized Congress's "sole[] responsibility" for determining "[t]he condition of entry of every alien, the particular classes of aliens that shall be denied entry, the basis for determining such classification, [and] the right to terminate hospitality to aliens." *Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 596-97 (1952) (Frankfurter, J.,

concurring)). In this same vein, Congress also has exclusive authority to determine through legislation when hospitality should be extended to a broad class of immigrants. As Justice Frankfurter said, the Constitution "entrusted exclusively to Congress" the formulation of who has the "right to remain here." *Galvan*, 347 U.S. at 531. Importantly, Congress has elected not to create an avenue of immigration relief, such as deferred action, for the class defined in the directive, and specifically legislated against the right of this class of individuals to remain in the United States.

Congress has been anything but silent on who has the right to remain in the United States and to whom immigration relief should be granted. Congress has created a complex scheme of who has the right to lawfully remain in the United States, and has expressly prescribed limited avenues for the extension of immigration relief. *See, e.g.*, 8 U.S.C. § 1182(d)(5)(A) (2012) (providing that the Attorney General may "only on a case-by-case basis" parole noncitizens into the United States for "urgent humanitarian reasons or significant public benefit"). Provisions of the Immigration and Naturalization Act ("INA") also furnish immigration relief to survivors of domestic violence, *id.* § 1229b(2), victims of trafficking, *id*. § 237(d)(2), refugees, *id.* § 1158(b)(1)(A), and for a spouse, parent, or child of certain U.S. citizens who died as a result of honorable service, National

Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, § 1703(c), (d) (2003).

In legislating these limited avenues for the exercise of discretion, Congress neither expressly nor implicitly authorized the creation of a non-statutory avenue of relief for a broad class of immigrants whom the law deems unlawfully present. *Cf. F.C.C. v. NextWave Personal Commc'n, Inc.*, 537 U.S. 293, 302 (2003) (holding that when Congress has intended to create an exception to a code, "it has done so clearly and expressly"). The clash between the DHS directive's categorical relief and the INA's comprehensive scheme eliminates Appellants' recourse under either the first or second tier of the *Youngstown* framework.

Turning to the third tier, the creation of a new avenue for immigration relief for parents of a U.S. citizen or permanent resident conflicts with Congress's expressed and implied intent. Congress has not authorized deferred action for the class the DHS directive targets. To the contrary, Congress enacted burdensome requirements to allow these parents entry and the ability to remain in the United States. *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1182(a)(9)(B)(i)(ii), 1201(a), 1255. The Government may not "disregard legislative direction in the statutory scheme that [it] administers." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985). Finding itself in conflict with Congress's intent, under the third tier of *Youngstown*, the Government is left to rely exclusively on the powers vested in the Executive under

Article II of the Constitution. Yet, the Supreme Court has consistently stressed Congress's plenary power over immigration law and policy, except in rare cases of foreign affairs, an interest that is not implicated here. Importantly, case law recognizes neither executive power to alter Congress's finely calibrated balance nor Appellants' authority to change the law, which the President has openly admitted to doing here.

The comprehensive nature of the INA and Congress's pre-determination of limited avenues for immigration relief leave no room for the Government's creation of a categorical avenue of relief to those designated by law as unlawfully present. To find otherwise would allow executive action to disrupt the delicate balance of separation of powers, obliterate the Constitution's Presentment Clause, U.S. Const. art. I, § 7, cl. 2, and ignore the exclusive authority of Congress to set laws and policy on immigration matters.

B. The DHS Directive Conflicts with Congressional Intent and Exceeds Any Statutorily Delegated Authority.

The DHS directive defies Congress's exclusive authority over immigration with the intention, as President Obama has admitted, of setting a new policy and creating new law. The Government has misplaced its reliance on authority generally granted to the Secretary of Homeland Security in section 103(a)(3) of the INA. *See* 8 U.S.C. § 1103(a)(3) (2012). Section 103(a)(3) specifically limits the

delegated authority of the Secretary for those actions that are "necessary for carrying out [its] authority under the provisions of this chapter." *Id.* This chapter in no way gives the Government the authority to create out of whole cloth an extensive, categorical deferred action program that grants affirmative legal benefits. Nor, as the district court correctly held, would such a program be *necessary* to carry out the authority delegated to the Secretary.[6] ROA.4469.

Similarly, while the Homeland Security Act does make the Secretary of DHS responsible for "[e]stablishing national immigration enforcement policies and priorities," 6 U.S.C. § 202(5) (2012), there is a substantial difference between priorities for enforcement, which allow the agencies tasked with carrying out the law to focus their limited resources, and creating enforcement-free zones for entire categories of unlawful immigrants. Yet, the Government maintains its authority derives from this delegation, App. Br. 5, 52, and equates section 202 discretion

[6] The Government has also tried to justify the DHS directive by relying on the history of past executive actions, App. Br. 7-8; ROA.84, but an overwhelming majority of past executive actions on immigration granting broad deferred action were country-specific (thus implicating the President's authority under foreign affairs) or directly implemented existing law. Only on rare occasions has the Government defined a class of individuals for non-country specific relief from removal. *See* Ruth Ellen Wasem, Cong. Research Serv., RS7-5700, Discretionary Immigration Relief 7 (2014). Notably, these past actions were never challenged or upheld by the Supreme Court and thus represent at most mere political examples—not legal precedent—and are irrelevant to the constitutional analysis. The district court correctly reasoned that "[p]ast action previously taken by the DHS does not make its current action lawful." ROA.4475. The Supreme Court in *Youngstown* squarely held that past executive actions could not "be regarded as even a precedent, much less authority for the present [action]." *Youngstown*, 343 U.S. at 648-49 (rejecting then-President Truman's argument that although Congress had not expressly authorized his action the "practice of prior Presidents ha[d] authorized it"). Thus, this Court should not give undue weight to these arguments.

with absolute authority over all immigration actions, even those inconsistent with codified law. As the district court correctly found, under the Government's rationale of its authority, nothing would prevent it from creating a similar program exempting all 11.3 million unlawful immigrants from removal. ROA.4469. Such a nonsensical understanding of this delegation of discretion to enforce the law is inconsistent with a Constitution devoted to the Rule of Law—a Constitution that dedicates plenary legislative authority to Congress.[7] *See Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (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."). The district court correctly held that this general grant of discretion cannot be read to delegate authority to rewrite the law. Section 202 of the INA cannot thus be the basis for creating a program for a class of immigrants otherwise removable that allows them a renewable period of lawful presence in the United States and "also awards over four million individuals . . . the right to work, obtain Social Security numbers, and travel in and out of the country." ROA.4467.

[7] Absolute and unfettered discretion that results from Appellants' interpretation of its authority to provide substantive benefits to any immigrant granted deferred action may also "run[] afoul of the non-delegation doctrine even in its moribund state." John C. Eastman, *Federalism & Separation of Powers: Did Congress Really Give the Secretary of Homeland Security Unfettered Discretion Back in 1986 to Confer Legal Immigrant Status on Whomever He Wishes?*, Engage, Jan. 4, 2015, at 27, 30, http://www.fed-soc.org/publications/detail/did-congress-really-give-the-secretary-of-homeland-security-unfettered-discretion-back-in-1986-to-confer-legal-immigrant-status-on-whomever-he-wishes.

The removal of unlawful immigrants carries enormous importance to the overall statutory scheme, but the DHS directive does not just articulate priorities for removal;[8] it grants legal benefits on a categorical basis to current unlawful immigrants.[9] As the district court recognized, the DHS directive grants "legal presence" in the United States for the duration of the deferral. ROA.4470. Despite Appellants' contention here, "legal presence" is not simply "remaining free of the government's coercive power," App. Br. 46, but rather a change in the codified law on how the Government calculates an immigrant's unlawful presence for purposes of future admissibility. Thus, while this status is allegedly revocable and temporary, the DHS directive granted lawful presence to an entire class of immigrants otherwise deemed removable under law. This grant of lawful presence runs contrary to expressed limits on the Government's discretion provided in the INA.

[8] Neither Appellants' expressed enforcement priorities nor their authority to set these priorities has been challenged in this suit, and the district court expressly preserved Appellants' authority to set enforcement priorities enjoining only the DAPA and modified DACA programs. ROA.4498.

[9] Appellants and their Amici ignore the causal relationship between the DHS directive and the substantive benefits granted (work authorization, travel benefits, social security, and lawful presence for the purpose of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I)). App. Br. 46-49 & n.6. The DHS directive is the causal link. The directive effectively legislates that a new class of immigrants, which the INA otherwise deems removable, is lawfully present for the duration granted and eligible for these substantive benefits. Such action is akin to the Executive legislating a new non-immigrant work visa that allows a foreign national to remain in the United States for a specified duration.

By granting unlawful immigrants lawful presence (for purposes of 8 U.S.C. § 1182(a)(9)(C)(i)(I)) during the deferred period, Appellants violate the express and implied intent of Congress. *See* ROA.101. Congress expressly limited Appellants' ability to grant waivers of grounds of admissibility for any unlawful immigrant present in the United States for over a year and who has been previously removed. *Id.* § 1182(a)(9)(C)(iii) (waivers of grounds of admissibility limited to those eligible under VAWA and those seeking lawful entry from outside the U.S. with Secretary approval after 10 years from last departure). Thus Appellants' blanket grant of "lawful presence" to immigrants who would otherwise be inadmissible for the prescribed time exceeds the Executive's authority and contravenes Congress's intent.

In addition, the structure and text of the INA express Congress's intent that those inadmissible immigrants who are not eligible for statutorily created immigration relief remain subject to removal. *See id.* § 1225. Disturbingly, however, the district court found that the Government has announced that it is "doing nothing to enforce" the removal laws against an entire class of removable immigrants and has "publicly declared that it will make no attempt to enforce the law against even those denied deferred action (absent extraordinary circumstances)." ROA.4474. As the district court correctly held, the Government

"announced [a] program of non-enforcement of the law that contradicts Congress' statutory goals." ROA.4473.

Moreover, the Government misplaces its reliance on an implied general policy of family unification. Past legislative actions, enacted through Congress's constitutional authority, do not justify Appellants' unilateral creation of a new avenue for immigration relief that affirmatively grants legal benefits to unlawful immigrants. Conversely, Congress has enacted numerous provisions that prioritize penalizing unlawful entry over the immigrant's familial ties. *See, e.g.*, 8 U.S.C. § 1255(a) (2012) (providing that immigrants who entered the United States illegally cannot adjust status in the United States to that of permanent residence, even if they qualify for a green card such as by marrying a U.S. citizen); *id.* § 1182(a)(9)(B), (C) (providing that immigrants who have been unlawfully present for certain periods of time are inadmissible to the United States, even if they qualify for a green card such as by marrying a U.S. citizen); *id.* § 1153(a) (setting forth the numerical limitations on many family-based green card categories). The Government cannot splice from context a congressional policy to justify creating a categorical program for immigration relief to a class of immigrants the law deems unlawful. The Government stretches the enabling sections to their absolute breaking point to enact the Executive's agenda over that of Congress.

The DHS directive is neither moored in constitutional authority, either express or implied, nor can it be moored to a delegation of statutory authority. President Obama expressly acknowledged this fact on no less than twenty-two occasions. *See* ROA.230-33. Nevertheless, the Government subverted the very law that it was charged with enforcing and, as the President admitted, created new law.

II. THE DIRECTIVE EXCEEDS THE BOUNDS OF PROSECUTORIAL DISCRETION AND VIOLATES THE DUTY TO FAITHFULLY EXECUTE THE LAW.

The Government asserts that creating the deferred action program falls under its prosecutorial discretion. But claiming prosecutorial discretion does not render its action constitutional; instead, it triggers a new analysis: did the Government abuse its discretion by creating a categorical deferred action program of this magnitude, which is not backed by any statutory authority? For the reasons set forth below, we conclude that it did.

Drawn from the Executive's constitutional obligation to faithfully execute the law, U.S. Const. art. II, § 3, and the doctrine of separation of powers,[10] the Supreme Court has recognized that the Executive has broad prosecutorial discretion. *See*, *e.g.*, *Wayte v. United States*, 470 U.S. 598, 607 (1985); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *see also Arizona*, 132 S. Ct. at 2498.

[10] In addition to the Take Care Clause, some have opined that prosecutorial discretion is also rooted in the Executive Power Clause, U.S. Const. art. II, § 1, cl. 1, the Oath of Office Clause, *id.* § 2, cl. 8, the Pardon Clause, *id.* § 2, cl. 1, and the Bill of Attainder Clause, *id.* § 9, cl. 3. *See In re Aiken County*, 725 F.3d 255, 262-63 (D.C. Cir. 2013).

But this discretion, while broad, is not unfettered. *United States v. Batchelder*, 442 U.S. 114, 125 (1979).

The Supreme Court has constrained prosecutorial discretion to the decision whether to prosecute, or in the case of immigration, whether to enforce the law, in an individual case. *See Arizona*, 132 S. Ct. at 2499 (recognizing the need for discretion to consider "immediate human concerns" and to preserve the "equities of an individual case"); *Chaney*, 470 U.S. at 831. Expounding on this requirement, the Supreme Court warned in *Heckler v. Chaney* that the conscious and express adoption of a categorical exemption might reflect a "general policy that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4 (internal quotation marks omitted). Lower courts applying *Chaney* have indicated that a nonenforcement decision applied broadly raises suspicion of whether the Executive has exceeded its prosecutorial discretion. *See, e.g.*, *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996); *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994); *see also Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973); ROA.95 (OLC advised categorical policy of nonenforcement poses "special risks"). Despite this requirement, Appellants knowingly exceed their discretion "and enter[] the legislature's domain," and "use[] enforcement discretion to categorically suspend enforcement" to their

preferred class of offenders. Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 676 (2014).

There is a dramatic difference between setting enforcement priorities and rendering guidelines for enforcement (as DHS did in a separate directive, *see supra* n.5), and creating a categorical program with base-line eligibility requirements. The former requires individualized assessment; the latter does not. Under the new DHS directive, DHS has provided no guidance by which an officer may exercise discretion and reject an application that meets the eligibility criteria that have been set forth. Drawing analogy from the approvals under the DACA program—a program the DHS directive said would be the model for DAPA, ROA.4388—the district court found that less than five percent of all applicants were denied. ROA.4385. The Government admitted "most" of these denials "were based on a determination that the requestor failed to meet certain threshold criteria." ROA.4148. The district court had requested specific evidence of the "number, if any, of requests that were denied even though the applicant met the [eligibility] criteria," but the Government failed to provide such evidence. ROA.4385 & n.8. Thus, the deferred action program for roughly four million unlawful immigrants is nothing more than a conveyer belt of rubberstamping, or more aptly put, a categorical exemption hidden under the guise of prosecutorial discretion. *See* ROA.94 (advising that Appellants could not "under the guise of exercising

enforcement discretion, attempt to effectively rewrite the laws to match [their] policy preference").

Moreover, the Government's prospective nonenforcement—or rather its public announcement to decline enforcement of the law in the future—is particularly offensive to Congress's legislative supremacy because it undermines the intended deterrent effect of immigration laws. Such prospective, categorical nonenforcement programs like the DHS directive far exceed the bounds of prosecutorial discretion and amount to a violation of Appellants' duty to faithfully execute the law. "Similarly, categorical nonenforcement for policy reasons," to which the President has admitted here, "usurps Congress's function of embodying national policy in law." Price, *Enforcement Discretion*, *supra* at 705.[11]

The Government ignored the limits of prosecutorial discretion, and if this Court does not affirm the preliminary injunction, such unbound authority "could substantially reorder the separation of powers framework. . . . [b]y permitting [Appellants] to read laws, both old and new, out of the Code . . . [and] provide Presidents with a sort of second veto." *Id.* at 674.

[11] "[T]hese two forms of executive action most closely approximate the two forms of executive power that the historical background suggests the Framers sought specifically to prohibit: prospective licensing resembles the royal dispensing power, while categorical nonenforcement resembles an executive suspension of statutory law." Price, *Enforcement Discretion*, *supra* at 705 (discussing at length the historical background and limits of prosecutorial discretion).

CONCLUSION

The States are likely to succeed on the merits of their constitutional claim because the DHS directive violates the Constitution, impermissibly disrupts the separation of powers, and amounts to an abdication of the Executive's constitutional and statutory duties. Appellants unconstitutionally legislated by creating a categorical, class-based program not supported by law or established congressional immigration policy. The Government also exceeded its prosecutorial discretion by creating a categorical exemption in the form of nonenforcement of an entire class of removable immigrants. Finally, Congress's refusal to enact the Executive's preferred policies does not provide a lawful pretext for violating our nation's vital restraints on executive authority. For these reasons, this Court should affirm the district court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

In compliance with Fed. R. App. P. 25, 5th Cir. R. 25, and 5th Cir. I.O.P. 25, I hereby certify that on this 11th day of May, 2015, I electronically filed the foregoing Amici Brief with the Clerk of the Court by using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served via regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 5,008 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 5th Cir. R. 32.2.

I further certify that the attached brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

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