Nos. 15-40238

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

UNITED STATES OF AMERICA; JEH CHARLES JOHNSON, Secretary, Department Of Homeland Security; R. GIL KERLIKOWSKE, Commissioner of U.S. Customs and Border Protection; RONALD D. VITIELLO, Deputy Chief of U.S. Border Patrol, U.S. Customs and Border of Protection; SARAH R. SALDAÑA, Director of U.S. Immigration and Customs Enforcement; LEON RODRIGUEZ, Director of U.S. Citizenship and Immigration Services,
Defendants-Appellants.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

BRIEF *AMICI CURIAE* OF BIPARTISAN FORMER MEMBERS OF CONGRESS IN SUPPORT OF DEFENDANTS-APPELLANTS & REVERSAL

Elizabeth B. Wydra*
Douglas T. Kendall
Simon Lazarus
Brianne J. Gorod
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th St., NW, Ste. 501
Washington, DC 20036
(202) 296-6889
elizabeth@theusconstitution.org
**Counsel of Record*

Counsel for Amici Curiae

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

No. 15-40238*, Texas et al. v. United States et al.*

Pursuant to Local Rules 29.2 and 28.2.1, the undersigned counsel of record for *amici* certifies that, to the best of undersigned counsel's knowledge, the following list of persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case, in addition to *amici* filing for the first time in this Court. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees

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
State of North Dakota
State of Ohio
State of Oklahoma
State of Florida
State of Arizona
State of Arkansas
State of Tennessee
State of Nevada
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
Attorney General Bill Schuette

Plaintiffs-Appellees' Appellate Counsel

Scott A. Keller, Solicitor
Office of the Solicitor General for the State of Texas
209 W. 14th Street
Austin, TX 78701

J. Campbell Barker
Deputy Solicitor General
Office of the Solicitor General for the State of Texas
7th Floor (MC 059)
209 W. 14th Street
Austin, TX 78701

April L. Farris
Matthew Hamilton Frederick
Deputy Solicitor General
Alex Potapov
Office of the Solicitor General for the State of Texas
209 W. 14th Street
Austin, TX 78701

Plaintiffs-Appellees' Trial Counsel (Not Present at Appellate Stage)

Andrew Stephen Oldham
Texas Attorney General's Office
PO Box 12548 (MC: 059)
Austin, TX 78711-2548

Adam Nicholas Bitter
Office of the Attorney General
PO Box12548
Austin, TX 78711-2548

Angela V. Colmenero
Texas Office Of The Attorney General
P O BOX 12548, Capitol Station
Austin, TX 78711-2548

Arthur D'Andrea
Office of the Attorney General
209 W 14th St
7th Fl
Austin, TX 78701

Eric Alan Hudson
Texas Attorney General
300 W. 15th St.
Austin, TX 78711

John Campbell Barker
Texas Attorney General's Office
PO Box 12548 (MC: 059)
Austin, TX 78711-2548

Jonathan F. Mitchell
11505 Georgian Oaks Dr.
Austin, TX 78739

Plaintiffs-Appellees' Additional Trial Counsel (Not Present at Appellate Stage)

State of Indiana:
Joseph C. Chapelle
Barnes & Thornburg LLP
11 South Meridian St
Indianapolis, IN 46204

Peter J. Rusthoven
Barnes & Thornburg LLP
11 South Meridian St
Indianapolis, IN 46204

State of Kansas:
Dwight Carswell
Kansas Attorney General's Office
120 SW 10th Avenue
2nd Floor
Topeka, KS 66612

State of Nebraska:
David A. Lopez
Office of Nebraska Attorney General
2115 State Capitol
Lincoln, NB 68509

Ryan S. Post
Office of Nebraska Attorney General
2115 State Capitol
Lincoln, NB 68509

State of Wisconsin:
Daniel P. Lennington
Wisconsin Department of Justice
17 West Main St
Madison, WI 53707

State of Ohio:
Eric E. Murphy
Ohio Attorney General Mike
DeWine's Office
30 E. Broad St
17th Fl
Columbus, OH 43215

State of Oklahoma:
Patrick R. Wyrick
Oklahoma Attorney General's Office
313 N.E. 21st St
Oklahoma City, OK 73105

C. L. "Butch" Otter, Governor, State of Idaho:
Cally Younger
Office of Governor CL "Butch" Otter
PO Box 63720
Boise, ID 83720

Defendants-Appellants

United States of America
Jeh Charles Johnson, Secretary of Homeland Security
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

Defendants-Appellants' Counsel

Scott R. McIntosh
U.S. Department of Justice
Civil Division, Appellate Staff
Room 7259
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Beth S. Brinkmann, Esq.
U.S. Department of Justice
Civil Division, Appellate Staff
Room 3135
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Jeffrey A. Clair, Esq.
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Kyle R. Freeny
U.S. Department of Justice
Civil Division
P.O. Box 883
Washington, DC 20044-0000

William Ernest Havemann
U.S. Department of Justice
Suite 7515
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Defendants-Appellants' Trial Counsel (Not Present at Appellate Stage)

Kathleen R Hartnett
U.S. Department of Justice
Civil Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

Bradley Heath Cohen
U.S. Department of Justice
Civil Div., Fed. Programs Branch
P.O. Box 883
Washington, DC 20044

Daniel David Hu
Office of the U.S. Attorneys Office
1000 Louisiana
Ste 2300
Houston, TX 77002

Amici Curiae and Counsel (Appellate)

American Center for Law and Justice, Certain Members of Congress, and Committee to Defend the Separation of Powers

Counsel:
Jay A. Sekulow, Esq.
American Center for Law & Justice
201 Maryland Avenue, N.E.
Washington, DC 20002

Governor of Louisiana, Governor of New Jersey, Governor of South Dakota and Governor of Texas

Counsel:
James Davis Blacklock, Senior Counsel
Office of General Counsel for the Governor of Texas
1100 San Jacinto
Austin, TX 78711-2548

District of Columbia, State of California, State of Connecticut, State of Delaware, State of Hawaii, State of Illinois, State of Iowa, State of Maryland, State of Massachusetts, State of New Mexico, State of New York, State of Oregon, State of Rhode Island, State of Vermont and State of Washington

Counsel:
Noah Guzzo Purcell
Office of the Solicitor General for the State of Washington
1125 Washington Street, S.E.
Olympia, WA 98504-0100

Judicial Watch, Incorporated

Counsel:
Paul Orfanedes, Esq.
Judicial Watch, Incorporated
Suite 800
425 3rd Street, S.W.
Washington, DC 20024

Amici Curiae and Counsel (Trial)

American Center for Law & Justice, Committee to Defend the Separation of Powers, and Select Members of Congress

Counsel:
Jay Alan Sekulow
American Center for Law & Justice
201 Maryland Ave., NE
Washington, DC 20002

Service Employees International Union, American Immigration Council, American Immigration Lawyers Association, Define American, National Immigrant Justice Center, National Immigration Law Center, New Orleans Workers' Center for Racial Justice, Southern Poverty Law Center, and United We Dream

Counsel:
Jonathan D Weissglass
Altshuler Berzon LLP
177 Post Street
Ste 300
San Francisco, CA 94108

Immigration Reform Law Institute

Counsel:
Dale L. Wilcox
Immigration Reform Law Institute

25 Massachusetts Ave. Ste. 335
Washington, DC 20001

Michael M. Hethmon
Immigration Law Reform Institute
25 Massachusetts Ave NW. Ste 335
Washington, DC 20001

Congressman Filemon Vela

Counsel:
Antonio Tony Martinez
Martinez Barrera & Martinez
1201 East Van Buren Street
Brownsville, TX 78520

Cato Institute and Law Professors Josh Blackman and Jeremy A. Rabkin

Counsel:
Ilya Shapiro
Cato Institute
1000 Massachusetts Ave NW
Washington, DC 20001

Leif A. Olson
The Olson Firm PLLC
4830 Wilson Rd Ste 300
PMB 188
Humble, TX 77396

Peter Margulies
Roger Williams University School of Law
Bristol, RI 02806

Major Cities Chiefs Police Association, et al.

Counsel:

Chirag G. Badlani
Hughes Socol Piers Resnick & Dym, Ltd.
70 W. Madison St. Ste. 4000
Chicago, IL 60602

States of Washington, California, Connecticut, Hawaii, Illinois, Iowa, Maryland, Massachusetts, New Mexico, New York, Oregon, and Vermont, and the District of Columbia

Counsel:
Anne E Egeler
Washington Office of Attorney General
1125 Washington Street SE
Olympia, WA 98504-0100

Joe Arpaio, Sheriff

Counsel:
Jonathon Alden Moseley
Freedom Watch Inc.
2020 Pennsylvania Avenue NW
Ste 345
Washington, DC 20006

Mayor of New York, Bill de Blasio, and the Mayors of Los Angeles and Thirty-One Additional Cities, the United States Conferences of Mayors, and the National League of Cities

Counsel:
Richard Dearing
New York Law Department
100 Church St
New York, NY 10007

Judicial Watch, Inc.

Counsel:
Mitchell Lee Herren
Hinkle Law Firm LLC
8621 East 21st Street North, Suite 200
Wichita, KS 67206-2991

Dated: April 6, 2015

Respectfully submitted,

/s Elizabeth B. Wydra
Counsel of Record for *Amici Curiae*

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are a bipartisan group of former members of Congress who served when key components of the nation's immigration laws were drafted, debated, and passed. Some *amici* were actively involved in the passage of these laws and served on committees with jurisdiction over topics related to our nation's immigration policy, and all *amici*, based on their experience in Congress and their familiarity with the relationship between the Congress and the executive branch, are mindful that Congress delegates discretion to the executive branch to interpret and administer the law, including by exercising prosecutorial discretion in areas such as immigration enforcement. Indeed, *amici* appreciate that the exercise of such discretion by the executive is particularly important in a field like immigration, which touches on our nation's foreign policy.

Amici have an interest in ensuring that the courts respect the executive branch's authority to exercise discretion consistent with the laws passed by Congress because, as they well know, the exercise of that discretion is often critical to the effective enforcement of the nation's laws. *Amici* know that the directives at issue in this litigation implement enforcement priorities embraced by previous Administrations and are consistent with the immigration laws passed by Congress;

[1] *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

indeed, they employ an administrative mechanism—case-by-case exercise of discretion to defer removal—that has been long employed by Administrations of both parties and repeatedly endorsed by Congress. More generally, *amici* believe that the position adopted by the court below would dramatically undermine the executive branch's ability to effectively enforce the nation's laws in this and many other contexts and is not legally required.

Amici are as follows:

- Michael Barnes, Former Representative of Maryland (1979-1987); Chair of the Western Hemisphere Subcommittee of the House Committee on Foreign Affairs
- Howard Berman, Former Representative of California (2003-2013); Chair of the House Committee on Foreign Affairs, and member of the Committee on the Judiciary
- Victor H. Fazio, Former Representative of California (1979-1993); Chair of the House Democratic Caucus
- Charles Gonzalez, Former Representative of Texas (1999-2013); Chair of the Hispanic Caucus
- Raymond H. ("Ray") LaHood, Former Representative of Illinois (1995-2009), member of the House Permanent Select Intelligence Committee,

and the Republican Mainstream Partnership, and former United States Secretary of Transportation (2009-13)

- James A. Leach, Former Representative of Iowa (1977-2007); Chair of the House Committee on Financial Services, member of the Committee on International Relations, Chair of the Subcommittee on Asian-Pacific Affairs; Chair of the National Endowment of the Humanities (2009-13)
- George Miller III, Former Representative of California (1975-2015); Chair of the House Committee on Education and Labor
- Silvestre Reyes, Former Representative of Texas (1997-2013); Chair of the Permanent Select Committee on Intelligence; U.S. Border Patrol (1969-95); Sector Chief, Chief Patrol Agent, El Paso Sector
- David Skaggs, Former Representative of Colorado (1987-1999); member of the House Permanent Select Committee on Intelligence and Chair of the Democratic Study Group
- Henry A. Waxman, Former Representative of California (1975-2015); Chair of the House Committees on Oversight and Government Reform, and Energy and Commerce

SUMMARY OF ARGUMENT

On November 20, 2014, the Secretary of the Department of Homeland Security ("DHS") issued a series of directives to establish priorities for DHS

officials' exercise of their discretion when enforcing federal immigration law. Promulgated pursuant to the Secretary's authority under the Immigration and Nationality Act ("INA") and the Homeland Security Act of 2002, these directives clarified that the federal government's enforcement priorities in the immigration context "have been, and will continue to be national security, border security, and public safety."[2] They further directed that in light of those priorities, and given limited enforcement resources, federal officials should exercise their discretion, on a case-by-case basis, to defer removal of certain parents of U.S. citizens or lawful permanent residents.[3]

Appellee States challenge these directives, which prioritize and otherwise shape *how* the executive enforces the nation's immigration laws, arguing that the directives, in fact, amount to a *failure* to enforce the nation's immigration laws at all. Appellee States therefore argue that the directives violate the Constitution's

[2] Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., for Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, et al., Re: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants 2 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [hereinafter Policies Memo.].

[3] Memorandum from Jeh Charles Johnson, Sec'y, U.S Dep't of Homeland Sec., for León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., et al., Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [hereinafter DAPA Memo.].

Take Care Clause, which provides that the President "shall take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and the Administrative Procedure Act's requirement that rules only be promulgated following notice-and-comment procedures, 5 U.S.C. § 553.[4] In granting the preliminary injunction, the court below ruled only on the APA issue, concluding that Appellee States were likely to succeed on their claim that notice-and-comment procedures were required because, in the court's view, DHS's application of the long-established and well-defined practice of temporary deferred action to the removal of certain parents of U.S. citizens and legal residents is, "in effect, a new law." Record Excerpts [hereinafter R.E.] at 204. According to the court below, "no specific law or statute . . . authorizes [that directive]," and "it was the failure of Congress to pass such a law that prompted [the President] . . . to 'change the law.'" *Id.* at 183.

Amici submit this brief to explain that these DHS directives do not "change the law," much less constitute a new law. Rather, they implement existing laws—some of which have been on the books for years, others of which were enacted as recently as 2015—that the President is obligated to respect and enforce. *Amici* are

[4] The United States argues that Appellee states lack standing to challenge the directives (Appellants' Br. 19-32), and that they have no right to judicial review under the APA (Appellants' Br. 33-35). *Amici* do not concede that the states have standing, or that there is a right to judicial review under the APA. Rather, *amici* submit this brief only to argue that, *if* this Court were to conclude that there is standing and a right to review, it should also reverse the grant of a preliminary injunction because the directives are plainly lawful.

former members of Congress who served when Congress enacted and amended major components of the body of immigration law that the current Administration is responsible for administering. Based on their experience in Congress and their appreciation for the important role that executive discretion plays in the enforcement of the nation's laws, *amici* know that these statutes not only allow, but in fact require, the President to exercise discretion in determining how those laws can most effectively be enforced. They further understand that Congress routinely confers such discretion on the President because the executive branch is often in the best position to determine how to weigh competing enforcement priorities, and that executive branch discretion is particularly important in the context of immigration, a field that has significant implications for the nation's foreign policy.

Amici recognize that the DHS directives at issue in this litigation reflect priorities that were developed by Administrations representing both political parties and have been consistently endorsed by Congresses on a bipartisan basis. Likewise, these directives (collectively denominated "Deferred Action For Parents of American Citizens and Lawful Permanent Residents" or "DAPA") implement these policies through a long-established, well-defined, and circumscribed means of enforcement prioritization—deferred action on removal—that has been consistently employed by Administrations of both parties and repeatedly endorsed

by Congress. Significantly, the DAPA directives do not, contrary to the district court's assertion otherwise, confer affirmative benefits such as work authorizations on undocumented immigrations. While individuals for whom removal is deferred may apply for work authorization, that result follows from preexisting authority that Congress specifically granted to the executive branch to allow employers to hire non-permanent-resident aliens whom it would otherwise be unlawful to hire. In sum, the exercise of prosecutorial discretion reflected in the DAPA directives does not create a change in the law or binding norms that would trigger the procedural requirements of the Administrative Procedure Act.

When the Framers drafted our enduring Constitution, their design sharply departed from the precursor Articles of Confederation in its creation of a strong executive branch headed by a single President who would have sole responsibility for executing the nation's laws. To ensure that the President could effectively fulfill that responsibility, the Constitution conferred on him the power and the obligation to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3. As the Supreme Court has long recognized, this responsibility to "take Care that the Laws be faithfully executed" includes the power to exercise discretion to determine how the nation's laws should be best enforced. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821 (1985).

The DHS directives at issue in this litigation are a paradigmatic example of prosecutorial discretion. Significantly, Congress has made a substantial number of noncitizens deportable—there are roughly 11.3 million undocumented immigrants in this country[5]—but it has not mandated that every single undocumented immigrant must be removed and, indeed, has only appropriated funds to remove roughly 400,000 per year, Office of Legal Counsel Op., *supra* note 5, at 1. As a result, the executive branch necessarily must make decisions about what the nation's enforcement priorities should be and exercise discretion in determining who should be removed consistent with those priorities.

Having reaffirmed, consistent with past administrations and the laws passed by Congress, that the country's enforcement priorities should be "national security" and "public safety," the DAPA directives provide guidance to officers in the field regarding the application of those priorities by authorizing deferred action on removal, on a case-by-case basis, to certain individuals who are unlikely to pose a threat to national security and public safety.

Because these directives are simply guidance for the exercise of case-by-case prosecutorial discretion, they are completely consistent with the procedural

[5] Memorandum Opinion from Karl R. Thompson, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, for the Sec'y of Homeland Sec. 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* 1 (Nov. 19, 2014) [hereinafter Office of Legal Counsel Op.].

requirements of the APA. The APA does not require notice-and-comment procedures for "general statements of policy," and the DHS directives setting forth the federal government's enforcement priorities and guidance for field officials on how they should be applied on a case-by-case basis are straightforward examples of "general statements of policy." Although the district court asserted that these directives reflect a change in the law that creates a new "binding norm," R.E. at 201, this assertion is simply not accurate. These directives are explicit that the enforcement priorities and specific criteria they specify are to be administered on a case-by-case basis, and, like all such exercises of executive branch discretion, create no new legal rights and do not confer legal presence on those for whom removal is deferred, DAPA Memo., *supra* note 3, at 5. Indeed, deferral of removal can be revoked at any time. *Id.* at 2. Thus, notice-and-comment procedures were not required.

Both Appellees and the court below seem to view these DHS directives as reflecting conflict between the President and Congress. This is incorrect. Properly understood, these directives reflect collaboration between the President and all of the Congresses that have contributed to our nation's immigration laws. These Congresses, in many of which *amici* have served, have, over time, created a complicated statutory scheme that confers significant discretion on the President to determine how that scheme should be enforced in light of humanitarian concerns,

foreign affairs, and available enforcement resources. The DHS directives are a lawful exercise of that discretion, and the district court's decision to enjoin their full implementation should be reversed.

ARGUMENT

I. THE EXECUTIVE HAS AUTHORITY TO EXERCISE SIGNIFICANT DISCRETION IN DETERMINING HOW BEST TO ENFORCE THE LAWS PASSED BY CONGRESS

Article II of the U.S. Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1. The Constitution's establishment of a "single, independent Executive" was a direct response to perceived infirmities of the precursor Articles of Confederation. The Articles of Confederation had vested executive authority in the Continental Congress, Articles of Confederation of 1781, art. IX, paras. 4, 5, and, as a result, the nation's laws were not effectively enforced, *see* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* 32-33 (2008) ("The American experience with vesting executive power in a plural body proved just as problematic under the Articles of Confederation as it had under the earliest state constitutions."). Because of these experiences under the Articles of Confederation, by the time the Framers drafted what became the Constitution, "the general antipathy toward executive power that dominated the post-1776 period immediately following independence had given way to a 1787

consensus in favor of an executive that was far more independent and energetic." *Id.* at 33; *see* Saikrishna B. Prakash & Michael D. Ramsey, *The Goldilocks Executive*, 90 Tex. L. Rev. 973, 982 (2012) (reviewing Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (2010)) ("The Founders had experience with extraordinarily weak executives . . . and had judged them to be failures.").

The Constitution thus vested "executive Power" in an independent President in order to ensure that the government would be able to effectively enforce the nation's laws. *See, e.g.*, *The Federalist No. 70* (Alexander Hamilton) ("all men of sense will agree in the necessity of an energetic Executive"); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 Yale L.J. 541, 599-603 (1994) ("the Constitution's clauses relating to the President were drafted and ratified to energize the federal government's administration and to establish one individual accountable for the administration of federal law"); *cf.* Akhil Reed Amar, *America's Constitution: A Biography* 131 (2005) ("The Constitution's 'President' . . . bore absolutely no resemblance to the 'president' under the Articles of Confederation.").

This new President was given the responsibility to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, which the Supreme Court has long recognized is "essentially a grant of the power to execute the laws," *Myers v.*

United States, 272 U.S. 52, 117 (1926). One long-standing manifestation of this "power to execute the laws" is the power to determine how best those laws should be enforced within the statutory limits set by Congress. As the Supreme Court recognized in *Heckler v. Chaney*, agency decisions about how best to enforce the law "share[] to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict," and that is a decision that "has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" *Chaney*, 470 U.S. at 832 (quoting U.S. Const. art. II, § 3). As the Court further explained in *Chaney*, the executive branch is particularly well-positioned to make such decisions because it "is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.* at 831-32; *id.* at 831 ("the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another . . . whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all").

The executive branch thus generally enjoys the discretion to determine how the nation's laws can best be enforced, including what the nation's enforcement priorities should be, unless Congress explicitly prohibits the exercise of such

discretion. *See* Saikrishna Bangalore Prakash, *The Statutory Nonenforcement Power*, 91 Tex. L. Rev. See Also 115, 117 (2013) ("the enacting Legislature may grant [discretion not to enforce a law] in its statute, either explicitly or implicitly. Typically, such discretion will be implicit and not explicit."); *see id.* ("The highway patrol need not ticket every speeder they trap. If legislators desired total, unremitting, and discretionless enforcement, they would have to specify as much in their enacting law."). To be sure, the executive branch cannot, as a general matter, "'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities," *Chaney*, 470 U.S. 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973)). But the Administration's DAPA initiative, which articulates and provides implementation guidance for a set of enforcement priorities to which both the district court and the Appellees States claim literally no objection, surely cannot be fairly characterized as "abdicating," as distinguished from appropriately ordering and implementing, the executive branch's statutory responsibilities. *See* R.E. at 185 ("The States do not dispute that Secretary Johnson has the legal authority to set these priorities, and this Court finds nothing unlawful about the Secretary's priorities.").

II. CONGRESS HAS CONFERRED BROAD DISCRETION ON THE EXECUTIVE TO DETERMINE HOW BEST TO ENFORCE THE NATION'S IMMIGRATION LAWS

Based on their experience serving in Congress, *amici* are familiar with the nation's immigration laws and, just as important, the important role that executive branch discretion plays in implementing the laws passed by Congress in this and other fields. They thus know that these laws vest considerable discretion in the executive branch to determine the nation's priorities in immigration enforcement and to determine how those priorities should be reflected in the on-the-ground enforcement of those laws. Moreover, based on their experience in Congress and their familiarity with our immigration system, they also understand that it is critically important that they do so.

As the Supreme Court has noted, immigration law is a field in which "flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (quoting *Lichter v. United States*, 334 U.S. 742, 785 (1948)). It is also a field that is "vitally and intricately interwoven with . . . the conduct of foreign relations," *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952); *see INS v. Chadha*, 462 U.S. 919, 954 (1983); *cf. Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) (noting that the federal government's authority over immigration "rests, in part, on the National Government's

constitutional power to 'establish an uniform Rule of Naturalization' and its inherent power as sovereign to control and conduct relations with foreign nations" (internal citations omitted)), and the proper conduct of foreign affairs is something particularly within the President's expertise, *cf. Medellin v. Texas*, 554 U.S. 759, 765 (2008) (noting the "President's responsibility for foreign affairs"). For all of these reasons, the executive branch must have discretion to determine how best to enforce the nation's immigration laws by "balancing . . . a number of factors which are peculiarly within its expertise," *Chaney*, 470 U.S. at 831, including foreign relations, humanitarian considerations, and protecting the nation's borders and security.

Reflecting these considerations, Congress has repeatedly conferred authority on executive branch officials to exercise discretion in enforcing the nation's immigration laws. For example, in the INA, Congress authorized the Secretary of Homeland Security to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the statute. 8 U.S.C. § 1103(a)(3). Further, in the Homeland Security Act of 2002, Congress directed the Secretary to establish "national immigration enforcement policies and priorities," Pub. L. No. 107-296, § 402(5), 116 Stat. 2135, 2178 (2002) (codified at 6 U.S.C. § 202(5)).

The consequence of these delegations and other provisions of the immigration laws enacted by Congress is to "delegat[e] tremendous authority to the President to set immigration screening policy." Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 463 (2009). Significantly, because Congress has made a substantial number of noncitizens deportable, but has nowhere mandated that every single undocumented immigrant must be removed (or, perhaps more important, appropriated the funds that would be necessary to effectuate such a mass removal), it has effectively made a "huge fraction of noncitizens deportable at the option of the Executive." *Id.* As a result, the executive branch necessarily must exercise discretion in determining who should be removed consistent with the nation's "national immigration enforcement policies and priorities," Pub. L. No. 107-296, § 402(5).

The Supreme Court has repeatedly recognized the broad discretion that Congress has conferred on the executive branch in the immigration context. As recently as 2012, the Court noted that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials," *Arizona*, 132 S. Ct. at 2499, and that "[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all," *id.* As the Court explained, the discretion enjoyed by the executive branch allows its officers to consider many factors in deciding when removal is appropriate, including both "immediate human

concerns" and "foreign policy." *Id.*; *see also id.* ("[t]he dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities"); *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005) ("Removal decisions . . . 'may implicate our relations with foreign powers' and require consideration of 'changing political and economic circumstances.'" (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976))).

Particularly relevant here, the practice of deferring removals of certain individuals when doing so is consistent with the nation's immigration enforcement policies and priorities is a long-standing manifestation of the executive branch's responsibility to exercise discretion in enforcing the nation's immigration laws. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) [hereinafter *AADC*] (the executive branch has long "engag[ed] in a regular practice (which ha[s] come to be known as 'deferred action') of exercising [its] discretion for humanitarian reasons or simply for its own convenience").[6]

[6] Appellees argued before the district court that the "DHS Directive differs by orders of magnitude in both scope and scale from those that came before it." Plaintiffs' Motion for Preliminary Injunction and Memorandum in Support at 15 (Dec. 4, 2014), ECF No. 5 [hereinafter Pls.' Mot. for Prelim. Inj.]. While the population of immigrants covered by the nation's immigration laws has continually increased, the nature of the DAPA program—guidelines for the exercise of case-by-case discretion that are consistent with established national priorities for immigration enforcement—is not novel. It is, in fact, entirely consistent with those that came before it. Indeed, Congress has previously "implicitly approved" a

Significantly, as the Office of Legal Counsel noted in its opinion on this issue, "Congress has long been aware of the practice of granting deferred action, including in its categorical variety . . . and it has never acted to disapprove or limit the practice." Office of Legal Counsel Op., *supra* note 5, at 18. To the contrary, Congress has repeatedly acknowledged the existence of such programs. *See, e.g.*, INA, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (noting that Violence Against Women Act self-petitioners may be "eligible for deferred action"); *id.* § 1227(d)(2) (noting that denial of a stay request does not "preclude the alien from applying for . . . deferred action"); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c), (d) (2003) (identifying individuals who are "eligible for deferred action"); *see also AADC*, 525 U.S. at 485 (concluding that Congress enacted 8 U.S.C. § 1252(g) "to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations"). Indeed, *amicus* Congressman Berman sponsored one piece of legislation that explicitly referenced a deferred action program for certain bona fide visa applicants and directed DHS to compile a report on how quickly a particular service center processed deferred

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similarly large-scale program (INS's 1990 Family Fairness policy) which "made a comparable fraction [approximately 1.5 million of the contemporary cohort of approximately 3.5 million] undocumented aliens . . . potentially eligible for discretionary extended voluntary departure relief." Office of Legal Counsel Op., *supra* note 5, at 31. In any event, it is the nature of the program—not the absolute number of immigrants potentially affected—that is relevant to the legal issues presented in this appeal.

action applications. Office of Legal Counsel Op., *supra* note 5, at 19. The bill passed both houses of Congress without objection.[7]

As *amici* are well aware, these indicia of congressional recognition of and support for deferred removal programs reflect Congress's repeated determinations that such programs can aid the executive branch in exercising its discretion to determine how best to enforce the nation's immigration laws. Because the DHS directives are straightforward exercises of that discretion, they are fully consistent with the APA, as the next Section discusses.

III. BECAUSE THEY ARE SIMPLY EXERCISES OF PROSECUTORIAL DISCRETION, THE DHS DIRECTIVES ARE FULLY CONSISTENT WITH THE ADMINISTRATIVE PROCEDURE ACT

As just discussed, Congress has conferred significant discretion on the executive branch to determine how best to enforce the nation's immigration laws. The DHS directives at issue are an exercise of that discretion and are thus fully consistent with the APA.

As the directives make clear, they were issued to identify the federal government's priorities in enforcing current immigration law, and to provide guidance to officers in the field about how to exercise case-by-case discretion in a manner that is consistent with those priorities. As the directives explain, "[d]ue to

[7] *See Major Actions: H.R. 7311—110th Congress (2007-2008)*, Congress.gov, https://www.congress.gov/bill/110th-congress/house-bill/7311/actions?q=%7B%22search%22%3A%5B%22Pub+L+No+110-457%22%5D%7D.

limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States." Policies Memo., *supra* note 2, at 2. Therefore, DHS, like "virtually every other law enforcement agency," must "exercise prosecutorial discretion in the enforcement of the law." *Id.*

Because "DHS's enforcement priorities are, have been, and will continue to be national security, border security, and public safety," *id.*; *see id.* at 1, the executive branch decided to allow for the "case-by-case use of deferred action for those adults who have been in [the United States] since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities." DAPA Memo., *supra* note 3, at 3.[8] The directives also explain why such deferred action is consistent with the nation's enforcement

[8] Significantly, as the government noted below, these priorities not only make perfect sense, they are also reflected in the immigration laws Congress has passed. *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at 43 (Dec. 24, 2014), ECF No. 38 [hereinafter Defs.' Memo. in Opp'n] (citing provisions of the INA that establish "'expedited removal' for aliens apprehended at the border" and provide mandatory detention for certain criminals and suspected terrorists, as well as a recent appropriation that required DHS to "'prioritize the identification and removal of aliens convicted of a crime by the severity of that crime'"). Moreover, other provisions of the INA "reflect a concern for promoting family unity among U.S. citizens and their undocumented families." *Id.* In the court below, Appellees argued that "Congress *expressly adopted the opposite objective*" of keeping families of United States citizens and immigrants united. Pls.' Mot. for Prelim. Inj., *supra* note 6, at 14. This is plainly not true. The provisions Appellees cite govern the attainment of Legal Permanent Resident status, *see* Defs.' Memo. in Opp'n, *supra* note 8, at 36, a status that those applying for deferred removal expressly do not acquire.

priorities: "The reality is that most individuals [in that category] are hard-working people who have become integrated members of American society," and "[p]rovided they do not commit serious crimes or otherwise become enforcement priorities, these people are extremely unlikely to be deported given this Department's limited enforcement resources—which must continue to be focused on those who represent threats to national security, public safety, and border security." DAPA Memo., *supra* note 3, at 3.

Appellee States argue that "claims [of prosecutorial discretion] do not afford the executive a blank check to dispense with the law." Pls.' Mot. for Prelim. Inj., *supra* note 6, at 9. This is surely true as a general matter, but is irrelevant here. As the directives make clear, they do not "dispense with the law." Indeed, one of the directives specifically states that "[n]othing in this memorandum should be construed to prohibit or discourage the . . . removal of aliens unlawfully in the United States who are not identified as priorities." Policies Memo., *supra* note 2, at 5; *see id.* (individuals not identified as a priorities for removal may be removed "provided, in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest").

The directives simply identify the federal government's enforcement priorities and provide guidance on how those priorities should be implemented in light of the limited resources available for enforcement. And enforcement

resources are unquestionably limited: there are roughly 11.3 million undocumented immigrants in the country, and resources are available to deport only 400,000 per year. Office of Legal Counsel Op., *supra* note 5, at 1. As a result, the executive branch cannot possibly deport every undocumented immigrant in the country. Rather than simply deport the first 400,000 identified, the executive branch has determined that "resources should be dedicated, to the greatest degree possible, to the removal of aliens described in the priorities" because removal of those aliens best serves the national interest in public safety and national security. Policies Memo., *supra* note 2, at 5; *cf.* H.R. Rep. No. 111-157, at 8 (2009) (directing DHS not to "simply round[] up as many illegal immigrants as possible," but to ensure "that the government's huge investments in immigration enforcement are producing the maximum return in actually making our country safer").

The executive branch has also provided guidance to officers in the field to help them exercise case-by-case discretion in a manner consistent with those priorities. DAPA Memo., *supra* note 3, at 5 ("immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis"); *see* Policies Memo., *supra* note 2, at 5 ("DHS personnel [must] exercise discretion based on individual circumstances"). Having collectively served in Congress for many years and witnessed firsthand both the

passage—and subsequent implementation of—many of the nation's key immigration laws, *amici* know that such exercise of executive discretion is perfectly consistent with—indeed, necessary to effectively implement—the laws passed by previous Congresses and reflects not a failure to enforce the law, but rather one particular means of enforcing it.

The APA requires notice-and-comment procedures for most rules, but generally exempts from that requirement "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A). The court below concluded that the Appellee States were likely to prevail on the argument that the DHS directives did not qualify for this exemption because, in the court's view, they established a "binding norm." R.E. at 201. According to the district court, the directives' explicit provision for the exercise of case-by-case discretion was belied by "the record," which made "clear . . . that the only discretion that has been or will be exercised is that already exercised by Secretary Johnson in enacting the DAPA program and establishing the criteria therein." *Id.* The court further concluded that notice-and-comment procedures were required because the directives were "in effect, a new law" and thus amounted to a "legislative rule," one that "effects a substantive change in existing law or policy," for which notice-and-comment procedures are required. *Id.* at 203-

04. According to the court, the directives created a new right—the "right to be legally present in the United States." *Id.* at 203.

The district court's conclusions simply disregard the actual wording and legal effect of the directives. Deferred action does not create a "binding norm," and the DAPA directives do not create a new "right." Indeed, they expressly provide that "[t]his memorandum confers no substantive right, immigration status or pathway to citizenship," and explain that "[o]nly an Act of Congress can confer these rights." DAPA Memo., *supra* note 3, at 5.

The district court's assertion to the contrary appears to be based primarily on a forecast that the DAPA memorandum so "severely restricts" DHS officers' implementation options that, in practice, they will have no meaningful discretion. R.E. at 201-03. But, as noted, the directives make clear that officers in the field retain discretion in implementing the guidance, and the district court's insistence that the program will operate otherwise is entirely speculative. Such speculation is improper, and is also inconsistent with what little evidence exists on this score: the district court looked to how a different deferred action program has operated, and even the available evidence in relation to that program belies the district court's conclusion, as the government's brief points out, *see* Appellants' Br. 44. In short, there is simply no basis for a court to enjoin a program that explicitly requires the exercise of case-by-case discretion in enforcing the nation's laws based on pure

speculation that case-by-case discretion will not be exercised in practice. These directives are exactly what they purport to be—guidelines for the exercise of executive branch discretion that create no new rights.

Nor do these directives create a new right because beneficiaries of deferred action may apply for work authorization. Rather, that result follows from pre-existing statutory authority that is not challenged in this litigation: Congress has specifically conferred discretion on the DHS Secretary to allow employers to hire non-permanent-resident aliens whom it would otherwise be unlawful to hire. *See* 8 U.S.C. § 1324a(h)(3) (defining an "unauthorized alien" who cannot be hired as one who is not lawfully admitted for permanent residence nor "authorized to be . . . employed by this chapter or by the Attorney General [now the Secretary of Homeland Security]"). Thus, as the Office of Legal Counsel explained in its opinion on this issue, "the ability to apply for work authorization . . . do[es] not depend on background principles of agency discretion . . . , but rather depend[s] on independent and more specific statutory authority rooted in the text of the INA." Office of Legal Counsel Op., *supra* note 5, at 21.

It is precisely because the directives create no new rights that "[d]eferred action does not confer any form of legal status in this country, much less citizenship," and "may be terminated at any time at the agency's discretion." DAPA Memo., *supra* note 3, at 2. The district court acknowledged this fact, but

dismissed it, stating that the directives' language "may make these rights revocable, but not less valuable." R.E. at 203.[9] This is plainly incorrect: the prospect of deferred removal in the exercise of the executive branch's discretion is categorically distinct from, and drastically less valuable than, a guarantee that the person will be able to remain in this country forever. These directives expressly provide no such binding guarantee and instead are precisely the type of "general statement of policy" that does not require notice-and-comment rulemaking. The district court was wrong to conclude otherwise.

* * *

As *amici* know based on their experience in Congress, the nation's enforcement of its immigration laws is a delicate and complicated enterprise—one in which the executive branch's expertise in determining how best to enforce those

[9] Given the district court's acknowledgement that the enforcement priorities and procedures reflected in the DHS directives were within DHS's lawful discretion, it appears that, in that court's analysis, it is the written articulation of these policies that made notice-and-comment rulemaking necessary. That view is plainly mistaken. "Where the President has discretion not to enforce . . . of course he can announce rules to be used in the exercise of that discretion, rather than leaving enforcement to chance or to the varied enforcement priorities of individual immigration officers." Prakash, *supra*, at 116. Indeed, putting the guidelines in writing not only meets the government's internal need of ensuring that DHS officials clearly understand the enforcement policies they are charged with implementing, it also serves the rule of law by ensuring greater transparency, as well as equitable and consistent exercise of discretion across cases. Further, such transparency enables members of Congress to understand how the executive branch is exercising the discretion it has been granted, which facilitates meaningful oversight.

laws is essential. It is for precisely this reason that Congresses have long conferred significant discretion on the executive branch to determine how best to enforce those laws. These DHS directives are simply an example of the executive branch exercising that discretion to ensure that immigration enforcement best serves the national interest in public safety and national security.

CONCLUSION

For the foregoing reasons, the preliminary injunction should be reversed.

Respectfully submitted,

/s/ Elizabeth B. Wydra

Elizabeth B. Wydra*
Douglas T. Kendall
Simon Lazarus
Brianne J. Gorod
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th St., NW, Ste. 501
Washington, DC 20036
(202) 296-6889
elizabeth@theusconstitution.org
**Counsel of Record*

Counsel for Amici Curiae

Dated: April 6, 2015

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 6,280 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached brief *amici curiae* 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.

Executed this 6th day of April, 2015.

/s/ Elizabeth B. Wydra___
Elizabeth B. Wydra

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on April 6, 2015.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 6th day of April, 2015.

/s/ Elizabeth B. Wydra___
Elizabeth B. Wydra

Counsel for Amici Curiae