No. 21-40680

In The United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS; STATE OF ALABAMA; STATE OF ARKANSAS; STATE OF LOUISIANA; STATE OF NEBRASKA; STATE OF SOUTH CAROLINA; STATE OF WEST VIRGINIA; STATE OF KANSAS; STATE OF MISSISSIPPI,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, ACTING COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, ACTING DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; UR M. JADDOU, DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants-Appellants,

ELIZABETH DIAZ; JOSE MAGANA-SALGADO; KARINA RUIZ DE DIAZ; JIN PARK; DENISE ROMERO; ANGEL SILVA, MOSES KAMAU CHEGE; HYO-WON JEON; BLANCA GONZALEZ; MARIA ROCHA; MARIA DIAZ; ELLY MARISOL ESTRADA; DARWIN VELASQUEZ; OSCAR ALVAREZ; LUIS A. RAFAEL; NANCI J. PALACIOS GODINEZ; JUNG WOO KIM; CARLOS AGUILAR GONZALEZ; STATE OF NEW JERSEY,

Intervenor Defendants-Appellants,

On Appeal from the United States District Court for the Southern District of Texas

Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, and The Presidential Coalition, LLC in Support of Appellees and Affirmance

MICHAEL BOOS
CITIZENS UNITED
1006 Pennsylvania Avenue, S.E.
Washington, DC 20003
Co-Counsel for Amici Curiae

*Counsel of Record
February 14, 2022

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C
370 Maple Avenue W., Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorney for Amici Curiae

Case No. 21-40680

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS, *et al.*,

Plaintiffs-Appellees,

v.

UNITED STATES, *et al.*,

Defendants-Appellants.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit 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.

Texas, *et al*., Appellees

United States of America, *et al*., Appellants

New Jersey, Intervenor-Appellant

Elizabeth Diaz, *et al*., Intervenors-Appellants

Citizens United, Citizens United Foundation, and The Presidential Coalition, LLC, *Amici Curiae*.

William J. Olson, Jeremiah L. Morgan, Robert J. Olson, and Michael Boos, counsel for *Amici Curiae*.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and Fifth Circuit Rule 28.2.1, it is hereby certified that *amici curiae* Citizens United, Citizens United Foundation, and The Presidential Coalition, LLC are non-stock, nonprofit corporations, have no parent companies, and no person or entity owns them or any part of them.

/s/ William J. Olson
William J. Olson,
Attorney of Record for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*[1]

Citizens United and Citizens United Foundation are nonprofit organizations, exempt from federal taxation, respectively, under sections 501(c)(4) or 501(c)(3) of the Internal Revenue Code. The Presidential Coalition, LLC is an IRC section 527 political organization that was founded to educate the American public on the value of having principled leadership at all levels of government. Each of the *amici* is dedicated, *inter alia*, to the correct construction, interpretation, and application of law.

Citizens United and Citizens United Foundation have filed prior *amicus* briefs on the Deferred Action for Childhood Arrivals ("DACA") and related issues, including the following:

- *U.S. Department of Homeland Security v. Regents of the University of California*, Brief *Amicus Curiae* of Citizens United, *et al.*, U.S. Supreme Court, on petition for certiorari before judgment (Feb. 2, 2018);
- *Vidal v. Nielsen*, Brief *Amicus Curiae* of Citizens United, *et al.*, U.S. Court of Appeals for the Second Circuit (Mar. 14, 2018);
- *U.S. Department of Homeland Security v. Regents of the University of California*, Brief *Amicus Curiae* of Citizens United, *et al.*, U.S. Supreme Court (Petition Stage) (Dec. 6, 2018); and

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[1] The parties and intervenors have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

- *U.S. Department of Homeland Security v. Regents of the University of California*, Brief *Amicus Curiae* of Citizens United, *et al.*, U.S. Supreme Court (Merits Stage) (Aug. 26, 2019).

STATEMENT OF THE CASE

A decade ago, after Congress refused to pass the Development, Relief, and Education for Alien Minors ("DREAM") Act,[2] the Obama Administration, by unilateral executive action, issued the DACA[3] policy, refusing to enforce valid existing immigration law against a broad class of persons who were not legally present in the United States.

The original DACA policy was lawfully indistinguishable from the later Deferred Action for Parents of Americans ("DAPA")[4] policy, which incorporated and expanded DACA. DAPA was determined to have violated the notice-and-comment provision of the Administrative Procedure Act ("APA") (5 U.S.C. § 701, *et seq.*) by the U.S. District Court for the Southern District of Texas. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015). That decision, affirmed by this Court, took the

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[2] S. 952, DREAM Act of 2011, 112th Cong.

[3] *See* Memorandum from Janet Napolitano, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012).

[4] Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., USCIS, et al. 3-4 (Nov. 20, 2014)

position that DAPA (and its expansion of DACA) likely violated both the APA and the Immigration and Nationality Act. *Texas v. United States*, 809 F.3d 134, 136, 170-196 (5th Cir. 2015) (*Texas I*). The judgment of the Fifth Circuit was affirmed by the U.S. Supreme Court on an equally divided vote. *United States v. Texas*, 136 S.Ct. 2271, 2272 (2016) (*per curiam*).

President Trump's Department of Homeland Security decision[5] to rescind the DACA policy on September 5, 2017, was immediately subjected to multiple legal challenges: (i) in the U.S. District Court for the Northern District of California (by the Regents of the University of California, *et al.*); (ii) in the District of Columbia (by the NAACP, *et al.*); and (iii) in the Eastern District of New York (by Batalla Vidal). These three cases led to the issuance of three nationwide injunctions against the rescission that was affirmed by the U.S. Supreme Court in *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

When it appeared that President Trump's efforts to rescind the DACA policy would be thwarted by the judiciary, Texas and the other plaintiff states filed suit in the U.S. District Court for the Southern District of Texas to challenge the legality of

[5] Memorandum on Rescission of Deferred Action for Childhood Arrivals, *Department of Homeland Security* (Sept. 5, 2017).

the DACA policy itself. That led to the district court's decision now here on appeal. *Texas v. United States*, 2021 U.S. Dist. LEXIS 133114 (S.D. Tex. 2021) (*Texas II*).

Since the district court's decision, there have been two significant developments. On his first day in office, President Biden signed a Presidential Memorandum entitled "Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA)." *See* 86 *Fed. Reg.* 7053 (Jan. 20, 2021). President Biden directed the Secretary of Homeland Security, in consultation with the Attorney General, to negate immediately all actions taken during the Trump Administration against DACA. Lastly, on September 27, 2021, DHS published its first Notice of Proposed Rulemaking on DACA, designed to cure invalidity for implementing the DACA policy without such an APA-required rulemaking.[6]

STATEMENT

If party admissions governed the outcome of Constitutional challenges, the Government's efforts to uphold DACA would be in vain. In October 2010, President Obama admitted he had no authority to reform immigration law as President: "I am

[6] Despite the Trump Administration's total rejection of DACA, the DHS press release represents that it has been "the consistent judgment that has been maintained by the Department — and by three presidential administrations since the policy first was announced — that DACA recipients should not be a priority for removal." *Id*.

not king. I can't do these things just by myself."[7] Then, in March 2011, President Obama admitted that with "respect to the notion that I can just suspend deportations through executive order, that's just not the case."[8] And for the trifecta, in May 2011, he acknowledged that he couldn't "just bypass Congress and change the [immigration] law myself.... That's not how a democracy works."[9] Nevertheless, the Obama Administration proceeded to do what they knew they had no authority to do: implemented DACA on June 15, 2012, and DAPA on November 14, 2014.

Understandably, rather than beginning with its legal arguments, the Introduction to the Government's brief seeks to divert this Court's attention to perpetuate President Obama's lawless non-removal of approximately 1.8 million persons illegally in the nation, as follows:

> [1] For nearly a decade, [2] the U.S. Department of Homeland Security (DHS) has deferred the removal of certain undocumented immigrants [3] who entered the United States years earlier as children and know only this country as home. [Appellant's Brief ("Fed. App. Br.") at 3.]

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[7] M. Muskal, "'I am not King': Obama tells Latino voters he can't conjure immigration reform alone," *L.A. Times* (Oct. 25, 2010). *See also*, H. von Spakovsky, "DACA is Unconstitutional, as Obama Admitted," *Heritage Foundation* (Sept. 8, 2017).

[8] Remarks by the President at Univision Town Hall (Mar. 28, 2011).

[9] Remarks by the President on Comprehensive Immigration Reform in El Paso, Texas (May 10, 2011).

None of these three claims support continuing DACA. 1. The fact that the "open border" forces within the federal government, aided by some judges, have protected the unconstitutional and lawless DACA policy for nearly a decade does not support its continuance, but rather demonstrates that swift and certain action to strike down DACA is well past due, and now required. 2. While DACA is described as implementing "deferral" of enforcement, the American people know that the "open border" forces within the government who have now deferred enforcement for a decade seek to defer enforcement permanently. 3. While the government invokes the image of helpless "children," those persons are now as old as 30. The camel's nose of this U.S. policy is the "children," but it has become obvious that the Obama-Biden policy was designed to ensure as many persons as possible illegally entering the country, including their parents under DAPA, would never be deported. Lastly, the Government's brief fails to identify any provision in the Immigration and Naturalization Act ("INA") which allows it to waive enforcement whenever illegal aliens have become accustomed to living in the United States.

As President Obama admitted, the Obama-Biden Administration lacked authority to impose DACA on the nation, rendering the act unlawful. Now, the Government strives mightily to defend its legitimacy, wholly ignoring its negative effects. DACA and DAPA which was and is equally unlawful both have imposed

enormous adverse, yet entirely foreseeable, almost certainly intended, immigration consequences on the nation. First, many of the DACA/DAPA beneficiaries would have returned to the country of their birth, and their citizenship, but for those actions. Second, hundreds of thousands if not millions of foreign nationals would never have tried to enter the country, but for the reasonable belief based on DACA/DAPA that they will also be allowed to stay. Third, these illegal aliens now of prime child-bearing age now are having children of their own who under the fabricated doctrine of birthright citizenship, supposedly become citizens at the moment of their birth in the United States, even though their parents are here not "subject to the jurisdiction thereof," but rather in defiance of the jurisdiction thereof.[10]

Additionally, there have been entirely foreseeable financial consequences, as the federal determination that these persons were "lawfully present" has led to lawbreakers receiving automatic federal and state benefits, draining the public fisc adding to the reasons that our national debt exceeds a crushing $30 trillion. Lastly, having succeeded in maintaining the DACA/DAPA ruse, the Biden Administration was encouraged to adopt other policies which have given our nation an open border with the world. The fact that the courts will not stop DACA causes Americans to lose

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[10] *See* W. Olson, H. Titus & A. Woll, "Immigration Policy Children Born in the United States to Aliens Should Not, by Constitutional Right, Be U.S. Citizens," *U.S. Border Control* (December 13, 2005).

faith in the courts and in the federal government. Even the mandate given President Trump to reverse these policies — who as a candidate opposed illegal immigration beginning with his announcement speech — was thwarted negated by "open border" politicians and judges.[11] The truth is that not a single public policy program in the nation can be cured so long as we have open borders — organized crime, street crime, healthcare, education, child trafficking, human trafficking, public debt — but they can facilitate the agenda of a federal government controlled by Democrats who believe that Democrat candidates will overwhelmingly benefit from their support, particularly when an unknown number of illegal aliens illegally vote in federal elections, and increasingly can vote in state and local elections.[12]

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[11] When the People were given a choice between the open-border policy of Hillary Clinton, and "build-the-wall" Donald Trump, they chose borders. From the moment Donald Trump announced his candidacy for the Presidency on June 16, 2015,when he descended the escalator at Trump Towers, he declared what many consider the dominant theme of his campaign — protecting the border. "Donald Trump Presidential Campaign Announcement Full Speech," *C-SPAN* (Jun. 16, 2015). That theme continued throughout his campaign. Just days after his inauguration, on January 25, 2017, President Trump declared that "a nation without borders is not a nation." President Trump: A nation without borders is not a nation," *YouTube* (Jan. 25, 2017). After the American People voted for borders, opposing forces in the federal government played every card to run-out-the-clock on Trump policies, and now still continue to defend the unlawful DACA and other open border policies.

[12] *See* BallotPedia, "Laws permitting noncitizens to vote in the United States." "Fifteen municipalities across the country allowed noncitizens to vote in local elections as of January 2022. Eleven were located in Maryland, two were located in Vermont, one was New York City, and the other was San Francisco, California."

ARGUMENT

I. THE STATES HAVE STANDING TO CHALLENGE DACA.

The federal Appellants challenge the standing of the nine Appellee states on a variety of grounds. First, Appellants assert that the states claim only "Unproven, Incidental Healthcare And Education Costs." Fed. App. Br. at 13. In response, Appellees detail the various types of real and concrete financial burdens that they suffer at the hands of federal neglect of immigration laws, easily establishing this prong of standing. Appellees Br. at 15-24.

Interestingly, immediately after denying that the states have suffered harm, Appellants assert a grave threat to federal power if the court were to recognize that states have suffered real harm sufficient to seek federal court review. Appellants rely on *Arizona v. United States*, 567 U.S. 387, 395 (2012), for the proposition that "immigration policy is a national matter that the Constitution entrusts to one national sovereign, not the 50 separate states.'" Fed. App. Br. at 14. Appellants bristle at the thought that states could challenge federal nonenforcement of immigration laws, viewing the states as meddling in an exclusive federal power. *Id*. at 14-15. Appellants badly misread the *Arizona* decision.

These *amici* believe that the *Arizona* decision was an erroneous outlier in federal immigration jurisprudence, but even as decided, *Arizona* does not provide

support for the proposition cited by Appellants. In *Arizona*, the Supreme Court viewed the Constitution's Art. I, Sec. 8, cl. 4 power "To establish an uniform Rule of Naturalization..." as granting the federal government exclusive enforcement power over the nation's borders, even though clause 4 never even mentions immigration, and Section 1 of the Fourteenth Amendment grants the federal government no such power either. Viewed correctly, each of the nation's 50 sovereign states have inherent power over immigration, as does the federal government. Justice Scalia's dissent in *Arizona* brilliantly explained that the American tradition has been that states have primary responsibility to enforce borders, and the federal government was a latecomer to that area of authority. *Arizona*, 567 U.S. at 418-38 (Scalia, J., concurring and dissenting). His Bench Statement delivered on the issuance of that decision was to the point:

> **For almost a century** after the Constitution was ratified, **there were no federal immigration laws** except one of the infamous Alien and Sedition Acts that was discredited and allowed to expire. **In that first century all regulation of immigration was by the States**, which excluded various categories of would-be immigrants, including convicted criminals and indigents. Indeed, many questioned whether the federal government had any power to control immigration — that was Jefferson's and Madison's objection to the Alien Act.
>
> **The States' power to control immigration, however, has always been accepted,** and is indeed reflected in some provisions of the Constitution.
>
> Federal power over immigration comes from the same source as state power over immigration: it is an **inherent attribute** — perhaps the

> fundamental attribute — **of sovereignty**. [*Arizona v. U.S.*, No. 11-182, Justice Antonin Scalia Bench Statement (June 25, 2012) (emphasis added).]

Nevertheless, even under the majority opinion in *Arizona*, which viewed the federal immigration power as exclusive and the state power to be non-existent, *Arizona* does not support Appellants' attack on the standing of the states to challenge DACA. Indeed, if the federal Executive chooses not to enforce an exclusive power, the states would have an even greater justification to go into federal court to demand the Executive enforce the law. *See* Appellees' Br. at 28. By any measure, the states have standing to bring this challenge.

II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DETERMINATION THAT DACA VIOLATES THE INA BOTH PROCEDURALLY AND SUBSTANTIVELY.

In addition to concluding that DACA failed to comply with the APA requirement for notice-and-comment rulemaking, the district court went further and ruled that DACA is contrary to the terms of the Immigration and Nationality Act. *See Texas II* at *72-102. Since the Government has recently undertaken a notice-and-comment rulemaking to follow APA informal rulemaking procedures, the district court "elect[ed] to address and rule on the alleged substantive flaws so DHS has a better appreciation of what it must address on remand."

These *amici* agree with the district court's ruling that DHS had no statutory authority to adopt either DACA or DAPA (as this Court ruled in *Texas I*). When the Supreme Court reviewed the Trump rescission, it neither considered nor resolved the legality of the original DACA policy. *DHS* at 1910-11. Since that threshold issue now has been raised squarely, the district court addressed it and these *amici* believed concluded correctly that "Congress has not given DHS the power to implement DACA, nor can DACA be characterized as authorized by DHS's inherent authority to exercise prosecutorial discretion." *Texas II* at *83.

Likewise, these *amici* believe that the district court was correct in concluding that the DACA-required enforcement deferrals violated the comprehensive immigration scheme enacted by Congress in INA (*id*. at *83). The district court followed this Court's analysis in *Texas I* that "the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present," and beyond that, DHS has no authority to modify those classes. *See Texas II* at *86 (citing *Texas I* at 179). These *amici* urge this Court to also address the constitutionality of DACA, and not limit its focus to the APA issue. If courts have a duty to "say what the law is," in the case of DACA, this Court should also address, not avoid, the constitutionality of DACA so that it can say what the law is not, lest the DACA challenge again be put off for another day.

III. DACA WAS AND IS BOTH UNLAWFUL AND UNCONSTITUTIONAL.

The court below invalidated DACA because: (i) "DHS was required [by APA] to undergo notice and comment rulemaking in order to adopt DACA" (*Texas II* as *71-72); and (ii) "DACA violates the substantive provisions of the APA" because it does not comport with the statutory structure established by Congress (*id*. at *72-115). Even if DHS had followed the notice-and-comment provisions of the APA, the constitutional issues in DACA would not be corrected unless the DACA policy had been jettisoned. The same is true with DHS' belated notice-and-comment rulemaking. *See* 86 *Fed. Reg.* 53736 (Sept. 28, 2021). Reasonably assuming that the Biden Administration will not retreat from DACA despite the over 16,000 comments it has received, it still will suffer the fatal constitutional infirmities that infected it from its inception. Whether adopted with or without notice and comment rulemaking, DACA acts as an amendment to the Immigration and Nationality Act, violating the constitutional principle of the separation of powers.

A. DACA Is an Unconstitutional Exercise of Legislative Power.

The INA does not delegate to the Executive the power to invalidate immigration laws, either temporarily or permanently. Although the DACA policy advised beneficiaries that their status (or lack thereof) could be revoked at any time, DACA nevertheless made available a renewable two-year deferred action status, and

the benefits that go with that status, to nearly 2 million aliens who are present in the United States in defiance of the immigration laws enacted by Congress.[13] DACA thus changed the nation's immigration law in a fundamental way — a change that began in 2012 and continues to this day.

Any notion that the Obama Administration implemented DACA pursuant to congressional authority is not plausible. President Obama repeatedly failed to persuade Congress to enact the DREAM Act, which would have gone a long way towards eviscerating many of the nation's immigration laws. Thrice, Congress has made known its position with respect to the provisions of DACA. First, Congress explicitly legislated with regard to the legality of aliens' presence and the grounds for their removal. *See Arizona v. United States*, 567 U.S. 387, 396-97 (2012). As the U.S. Department of Justice Office of Legal Counsel's own Memorandum ("OLC Memo")[14] notes, "[i]n the INA, Congress established a comprehensive scheme governing immigration and naturalization." *Id.* at 3. Second, Congress implicitly

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[13] As of March 31, 2021, there were 616,030 active DACA recipients. *See* U.S. Citizenship and Immigration Services, Count of Active DACA Recipients (Mar. 31, 2021).

[14] *See* K.R. Thompson, "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," U.S. Department of Justice, Office of Legal Counsel (Nov. 19, 2014).

rejected President Obama's DACA scheme in refusing to take any steps toward enacting the DREAM Act and thus ratifying the program. Third, the President has only narrow, statutorily defined circumstances whereby he may grant deferred-action status for certain specified illegal aliens.

Even the Ninth Circuit, in upholding an injunction against the Trump Administration's rescission of DACA, admitted that "[u]nlike most other forms of relief from deportation, deferred action is not expressly grounded in statute." *Regents of the Univ. of Cal. v. DHS*, 908 F.3d 476, 487 (9th Cir. 2018). In fact, President Obama publicly announced that he did not believe he had the power to implement a DACA-type policy,[15] but he implemented DACA anyway. President Obama's assumption of a broad general power to waive the nation's immigration laws for large numbers of persons is simply incompatible with the narrow and detailed statutory scheme. With DACA, President Obama not only established new national immigration policy outside of the legislative process, but also he acted contrary to Congress' clear desires, where his power is clearly "at its lowest ebb"[16] and, indeed, its exercise is unconstitutional.

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[15] K. Pavlich, "His Own Words: Obama Said He Doesn't Have Authority For Executive Amnesty 22 Times," *TownHall.com* (Nov. 19, 2014).

[16] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

B. DACA Violates Separation of Powers Principles.

DACA is not just inconsistent with the INA, as the court below ruled, but it also violates the constitutional principle of the separation of powers by unilaterally and executively amending the INA. As the court below stated, "each member of the *Regents* Court implicitly or explicitly acknowledged that DACA is not a general statement of policy." *Texas II* at *71. But DACA is not the equivalent of legislation adopted pursuant to the bicameral approval and presentment process set out in Article I, Section 7 that govern the exercise of legislative power. *See Dept. of Transportation v. Ass'n. of American R.R.*, 575 U.S. 43, 61 (2015) ("*DOT*") (Thomas, J., concurring).

Legislative power is vested by Article I, Section 1 of the Constitution in Congress alone, and Congress "cannot delegate its 'exclusively legislative' authority at all." *Id.* The question for the Court, then, is whether DACA is an exercise of legislative power to create immigration policy or, as the federal appellants claim, "is an appropriate measure to effectively carry out the Secretary's priorities that are themselves in line with broad congressional directions." Fed. App. Br. at 39.

Although DACA is a rule governing the Secretary and DHS agents in the administration and enforcement of INA, it is also a rule governing private conduct. First, DACA requires an alien to apply for lawful presence status. Second, DACA requires the alien to affirmatively demonstrate that he is entitled to the deferred action

status because he or she meets "other key guidelines."[17] And third, presumably if an applicant fails to stay outside of those enforcement priorities, he would be outside of the DACA qualifications, and subject to priority removal. In sum, DACA established a law — a generally applicable rule of private conduct that applies generally to all aliens — but benefits only certain of those aliens who "have no lawful immigration status on th[e] date" of application. *Id.* That action violated the separation of powers.

C. DACA Is the Product of the Exercise of Raw Prerogative Power, a Power that Is Not Recognized by the Constitution.

Federalist No. 47 explained the significance of the constitutional separation of the powers and its relation to the continued liberty of the American People:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the **very definition of tyranny**. Were the federal constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a **universal reprobation of the system**. [J. Madison, Federalist No. 47 (emphasis added).]

Columbia Law School Professor Phillip Hamburger explains that the U.S. Constitution established a government vested with three types of powers:

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[17] "Frequently Asked Questions: Consideration of Deferred Action for Childhood Arrivals (DACA)," U.S. Citizenship and Immigration Services (visited Feb. 11, 2022).

> A legislative power to make law, a judicial power to adjudicate cases in accord with law, and an executive power to execute the lawful force of the government. [P. Hamburger, Is Administrative Law Unlawful? 125 (Univ. of Chi. Press: 2014) (hereinafter "Hamburger").]

None of these "three types of power ... includes a power to excuse persons from the obligation of law." *Id.* Such power to dispense with the law "does not exist in the Constitution," but rather belongs to the past when kings "waived" the requirements of the law, singling out "favored persons telling them that, notwithstanding the rule, they need not comply." *Id.* at 120-21. Such is the case with DACA.

Although the Government insists that DACA is just management "guidelines to help agency employees identify individuals who may warrant temporary forbearance from removal because they are low priorities for enforcement," the Government concedes that they are more than that — such guidelines being among other unspecified things that purportedly advance the new DHS immigration enforcement policies. *See* Fed. App. Br. at 26, 30. Indeed, the court below explained that, along with prosecutorial deferral, "DACA recipients ... are eligible to apply for Social Security and Medicare and a pre-existing regulation defining 'lawfully present in the United States' includes 'alien currently in deferred action status." *Texas II* at *13-14 (citations omitted). The district court followed this Court's decision in *Texas I* and "gave little consideration to the agency's actual label and proceeded to analyze

the factors by which a court distinguished between general statements of policy and rules that require informal rulemaking." *Id*. at *61.

The Government criticizes the district court's reasoning that "DACA conflicts with the INA because, even though DACA recipients are removable under the INA, DACA prevents their removal by treating them as 'lawfully present.'" Fed. App. Br. at 50-51. Indeed, the Government insists, "that is inconsistent with the meaning of 'lawful presence' and its significance for removal." *Id.* Thus, the Government belittles the district court's decision, claiming that "'lawful presence' ... is simply a determination that an individual's presence in the United States is tolerated for the time being and for certain purposes, notwithstanding his or her removability." *Id.* at 51.

However, as the district court found, "lawful presence" is not just an incidental consequence of the Secretary's decision to defer action. *See Texas II* at *61-62. Rather, the district court noted that the Supreme Court "found that the DACA Memorandum 'did not merely "refus[e] to institute proceedings" against a particular entity or even a particular class.'" *Id.* at *61. The district court followed the Supreme Court's lead and "recognized that '[t]he benefits attendant to deferred action provide further confirmation that DACA is more than simply a non enforcement policy.'" *Id.* at *62.

Although the Government equivocates in its brief whether those aliens who qualify for DACA are still subject to the enforcement of the immigration law that they are violating (*see* Fed. App. Br. at 50-52), the district court recognized that "[a]n award of deferred action, lawful presence, work authorization, and the other benefits attendant to DACA status 'is not a subject for prosecutorial discretion.'" *Texas II* at *79-80. In other words, the Executive has determined that, notwithstanding the rules, certain illegal aliens need not comply.[18]

Thus, DACA cannot be excused as an exercise of prosecutorial discretion because, by definition, the exercise of prosecutorial discretion "cannot guarantee relief from the obligation of the law itself." *See* Hamburger at 122. In fact, DACA marks "the return of extralegal legislation ... accompanied by the return of the dispensing power"[19] once wielded by English monarchs, whose claim to prerogative rule included the right to "waive" laws respecting "favored persons," which is the very antithesis of the law of separation of powers and, thus, unrecognized by the Constitution. *See generally* Hamburger at 66-72, 125-26.

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[18] *See* Hamburger at 120.

[19] *Id*. at 120-21.

The DHS Secretary's attempt to implement the DACA waiver is not the only instance wherein the Obama Administration employed such extra-constitutional dispensing power:

> [A]lthough the Affordable Care Act required so-called mini-med insurers to provide guaranteed levels of insurance, the Department of the Health and Human Services gave waivers to favored corporations, relieving them of the duty to meet the regulatory and thus also the statutory levels. [Hamburger at 124.]

As Professor Hamburger has acutely observed, "[w]aivers or dispensations are profoundly dangerous" and "doubly lawless," in that the DHS Secretary acts "outside the law to permit others to act above the law." *Id.* at 126-27. Additionally, the DACA waiver is an exercise of prerogative power of "favoritism,"[20] dispensing with the law in favor of a class of persons who are expected to be "aligned" with the President's political party.[21] The use of the DACA policy, coupled with the promised benefits accruing to illegal aliens the status of "lawful presence," is designed to "co-opt political support for [a] politically insupportable law[]," providing relief to some at the expense of others, "shifting the cost of objectionable laws from the powerful

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[20] *See* Hamburger at 127.

[21] *See, e.g.*, M. Oleaga, "Immigration Executive Action: House Democrats Release 'Toolkit' for Eligible DACA, DAPA Immigrant Applicants," latinpost.com (Mar. 28, 2015); J. Jordan, "Obama's immigration amnesty," Foxnews.com (Nov. 28, 2014); E. Schultheis, "Immigration reform could be bonanza for Dems," Politico (Apr. 22, 2013).

to others, with the overall effect of entrenching"[22] the failure of the Government to enforce its immigration laws. *See* Hamburger at 128. Although normally not the recipient of special entitlements, DACA awards to an alien subclass political and economic privileges characteristic of a title of nobility[23] which is expressly forbidden by Article I, Section 9 of the Constitution. *See* 2 J. Story, Commentaries on the Constitution §1350-1351, pp. 223-24 (Little, Brown, 5th ed.: 1891) ("Distinctions between citizens in regard to rank would soon lay the foundation of odious claims and privileges, and silently subvert the spirit of independence and personal dignity, which are so often proclaimed to be the best security of a republican government.").

IV. DACA VIOLATES THE PRESENTMENT AND TAKE CARE CLAUSES OF THE CONSTITUTION.

The district court declined to rule on the plaintiffs' allegation that the DACA policy violated the U.S. Constitution's Take Care Clause: "Given that the [U.S. Supreme] Court has made a full disposition of the case without addressing the constitutional claim, it need not address this issue." *Texas II* at *116.

Although the appellants do not seek review of the Take Care Clause, the appellees identify this as an issue for the court's consideration (*see* Brief of Appellees

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[22] *See* Hamburger at 127.

[23] *See also* St. George Tucker, A View of the Constitution of the United States, 160-66 (Liberty Fund: 1999).

at 4), since this Court may affirm on any grounds supported by the record. *See id.* at 47. Appellees only briefly explain how the DACA policy violates the Take Care Clause, but the principles here deserve elaboration.

A. The Interplay between the Clauses.

The President's role in the exercise of the legislative function is strictly confined. The Presentment Clause in Article I, Section 7 requires that, for a bill to become law, it must pass both houses of Congress, and then "be presented to the President" who may either "sign it" or "return it" (employing his veto power), at which point two-thirds of both houses still may override that veto.[24] Thus, aside from "recommend[ing]" legislation under Article II, Section 3, the right to sign or veto a bill is the only legislative power the Constitution grants to the President.

After a bill becomes law, other constitutional provisions govern. The Take Care Clause of Article II, Section 3 requires the President to "take Care that the Laws be faithfully executed," and the President's Oath of Office requires him to "preserve, protect and defend the Constitution of the United States." So long as a law was duly enacted, and so long as it comports with the Constitution, the President lacks discretion in choosing whether to implement or enforce the law. Indeed, the Take Care Clause requires that the law be enforced.

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[24] The provision for a "pocket veto" is not relevant here.

The Supreme Court has noted that "[a]lthough the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes." *Clinton v. New York*, 524 U.S. 417, 439 (1998). The Supreme Court viewed this silence as "equivalent to an express prohibition" on the post-enactment executive meddling with enacted statutes. *Id.* Whenever a President acts to "effect the repeal of laws ... without observing the procedures set out in Article I, § 7 ... he is rejecting the policy judgment made by Congress and relying on his own policy judgment." *Clinton* at 444-45.

Indeed, in the debates on the Constitution, Hamilton and other advocates of a strong Executive proposed that "[t]he Executive ought to have an absolute negative" over laws passed by Congress. Records of the Federal Convention, June 4, 1787, reprinted in P. Kurland & R. Lerner, The Founders' Constitution (Univ. of Chicago Press: 1987), vol. 2, p. 389 ("Founders"). However, other delegates thought that "[t]his was a mischievous sort of check," and that "[t]o give such a prerogative would certainly be obnoxious to the temper of this country," and the proposal was expressly considered and unanimously rejected by a vote of the state delegations. *Id.* at 390. Since the Framers specifically rejected the idea that the President should have an

absolute veto, it certainly could not be argued that they would have favored absolute executive power to disregard a law for policy reasons after it has been enacted.

If the DACA policy is allowed to stand, then any future President would be empowered, at any time, to refuse to enforce any given law, even laws he conceded to be constitutional. This would effectively grant the President an ongoing, unlimited, and unchecked **veto at-will** over any law ever enacted thereafter. This "threat of nonenforcement gives the President improper leverage over Congress by providing a second, postenactment veto." R. Delahunty & J. Yoo, "Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause," 91 TEX. L. REV. 781, 795 (2013).

B. The DACA Policy Does Not Only Negate a Law, but It also Creates New Law.

Under English law, the Executive's veto "has not any power of *doing* wrong, but merely of *preventing* wrong from being done. The [Executive] cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses." W. Blackstone, Commentaries, 1:149-51, 155 (1765), reprinted in Founders, vol. 2, p. 388. Here, however, with DACA, President Obama altered the status quo — without congressional approval. President Obama did not simply stop Congress from

changing current law; instead, "the DACA Memorandum does not announce a passive non-enforcement policy; it created a program for conferring affirmative immigration relief [and t]he benefits attendant to deferred action provide further confirmation that DACA is more than simply a non-enforcement policy." *DHS* at 1906. Under current law, the presence of millions of illegal aliens is illegal. Yet, "[p]ursuant to other regulations, deferred action recipients are considered 'lawfully present' for purposes of, and therefore eligible to receive, Social Security and Medicare benefits." *DHS* at 1902. Thus, President Obama did not just decline to enforce a duly enacted and constitutional law. Rather, the President has **created a new law**, in violation of the Article I, Section 7 process by which our laws are made, including the concepts of bicameralism, majority vote, presentment, and signature. Even worse, with DACA, President Obama unilaterally and *de facto* enacted portions of the congressionally rejected DREAM Act.

C. When Legitimate Prosecutorial Discretion Becomes a Take Care Clause Violation.

The notion of "prosecutorial discretion" — relied upon by the Government here — has deep roots in the common law, and permits the Executive leeway to rigid enforcement of criminal laws, for certain reasons in certain cases. As applied here, however, it provides no support for the government's position.

The continuum of prosecution and enforcement of laws is best viewed as a sliding scale. On one end of the scale, it is inflexible, 100 percent enforcement in every case. Next to that is the exercise of legitimate prosecutorial discretion not to enforce the law in a particular case as to a particular person. On the other end of the scale is the wholesale refusal to enforce the law in all cases as to any persons — 0 percent enforcement — which constitutes a clear violation of the President's duty under the Take Care Clause. The Supreme Court has agreed there is a line that cannot be crossed, determining that the President cannot adopt a "'policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985). *See* OLC Memo at 7. Whereas Article II vests the entire "executive power" in the President, the Take Care Clause operates as a limit on that power, and as such, a violation thereof is clearly reviewable by the courts.[25]

Prosecutorial discretion does not trump the Take Care Clause where, as here, discretion is used as mere cover for abdication of executive authority. This is such a case. This is precisely the "abdication of ... statutory responsibilities" of which the Supreme Court warned in *Heckler* (at 833 n.4).

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[25] Even though it triple-qualifies its statement, the Congressional Research Service appears to agree, stating that "[a] policy of non-enforcement that amounts to an abdication ... could potentially be said to violate the Take Care Clause." K. Manuel & T. Garvey, "Prosecutorial Discretion in Immigration Enforcement: Legal Issues," Congressional Research Service (Dec. 27, 2013), R42924, summary page.

CONCLUSION

For all the reasons that DAPA was deemed unlawful by the district court, and for the foregoing reasons, this Court should affirm the ruling of the district court below.

Respectfully submitted,

MICHAEL BOOS
CITIZENS UNITED
1006 Pennsylvania Avenue, S.E.
Washington, DC 20003
Co-Counsel for Amici Curiae

*Counsel of Record
February 14, 2022

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief Amicus Curiae of Citizens United, *et al*. in Support of Appellees and Affirmance, was made, this 14th day of February, 2022, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae*

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief Amicus Curiae of Citizens United, *et al*. in Support of Appellees and Affirmance complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,371 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This 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), as well as Circuit Rule 32.1, because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 21.0.0.81 in 14-point Times New Roman.

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae*

Dated: February 14, 2022