No. 17-1003

IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *ET AL.*, *Petitioners*,
v.
REGENTS OF THE UNIVERSITY OF CALIFORNIA, *ET AL.*, *Respondents*.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Ninth Circuit

Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, Conservative Legal Defense and Education Fund, Public Advocate of the United States, The Senior Citizens League, English First, English First Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Restoring Liberty Action Committee, and Policy Analysis Center in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Citizens United, Public Advocate of the United States, The Senior Citizens League, English First, and Gun Owners of America, Inc., are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation, Conservative Legal Defense and Education Fund, English First Foundation, Gun Owners Foundation, and Policy Analysis Center are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). Restoring Liberty Action Committee is an educational organization. These organizations were established, *inter alia*, for purposes related to participation in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Some of these *amici* filed two *amicus curiae* briefs in a case addressing issues relating to the DACA policy:

- Arizona Dream Act Coalition v. Brewer, Brief *Amicus Curiae* of English First Foundation, *et*

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

al., U.S. Court of Appeals for the Ninth Circuit (May 31, 2016).

- Brewer v. Arizona Dream Act Coalition, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, U.S. Supreme Court (May 1, 2017) (currently pending before this Court).

Amici also filed *amicus curiae* briefs in support of the State of Arizona's authority to enforce federal immigration laws:

- Arizona v. United States, Brief *Amicus Curiae* of U.S. Border Control, *et al.*, U.S. Supreme Court, in support of petition for certiorari (Sept. 12, 2011).

- Arizona v. United States, Brief *Amicus Curiae* of U.S. Border Control, *et al.*, U.S. Supreme Court, on the merits (Feb. 13, 2012).

These *amici* filed *amicus curiae* briefs in the lawsuit against the Deferred Action for Parents of Americans ("DAPA") policy:

- Texas v. United States, Brief *Amicus Curiae* of Citizens United, *et al.*, U.S. Court of Appeals for the Fifth Circuit (May 11, 2015).

- United States v. Texas, Brief *Amicus Curiae* of Citizens United, *et al.*, U.S. Supreme Court (Apr. 4, 2016).

STATEMENT

The district judge, William H. Alsup,[2] included in his decision the following key facts relating to the Obama Administration's implementation, and the Trump Administration's revocation, of the policy known as DACA — "Deferred Action for Childhood Arrivals." Regents of the Univ. of Cal. v. U.S. Dept. of Homeland Sec., 2018 U.S. Dist. LEXIS 4036 (Jan. 9, 2018) *14-28.

1. The DACA policy was adopted by the Obama Department of Homeland Security on June 15, 2012, to allow certain illegal aliens brought to the United States as children to apply for deferred action for a two-year period. Applicants must have illegally entered the United States before the age of 16, and be under the age of 31 on June 15, 2012. The policy was amended on November 20, 2014 as part of the Obama Administration's adoption of the DAPA policy —

[2] Judge Alsup was appointed by President Bill Clinton, assuming office in 1999. Judge Alsup clerked for Associate Justice William O. Douglas. In his autobiography, Justice Douglas described an exchange with Chief Justice Charles Evans Hughes, who he reported had told him: "At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections." William O. Douglas, The Court Years, 1939-1975: The Autobiography of William O. Douglas (Random House, 1980) p. 8.

Deferred Action for Parents of Americans.[3] Regents at 31.

2. DACA status could be terminated at any time, and gave no substantive right, immigration status, or pathway to citizenship. Regents at 25. Nevertheless, Judge Alsup, in effect, ruled that the DACA status could not be terminated by the Trump Department of Homeland Security ("DHS").

3. No provision of federal law requires the DACA policy. It was implemented as a so-called exercise of the Executive's "discretion" in establishing enforcement priorities. Regents at *15-27. Nevertheless, in effect, Judge Alsup has ruled that the Trump DHS may not exercise its discretion in a manner different from the Obama Administration's exercise of discretion.

4. The one appellate court considering the issue — the U.S. Court of Appeals for the Fifth Circuit — has determined that a virtually indistinguishable policy, DAPA, was illegal for several reasons. Thereafter, four justices of this Court voted to affirm the decision of the Fifth Circuit, leaving that decision standing. United States v. Texas, 579 U.S. ___ (2016). Nevertheless, in effect, Judge Alsup ruled in this case

[3] The name given this policy by the Obama Administration implies that the applicants would be parents of American citizens, but actually the policy was open to those who were parents of lawful permanent residents.

that his view that the DACA policy was lawful should deny to DHS the discretion to end it.[4]

5. DACA was rescinded by the Secretary of Homeland Security on September 5, 2017,[5] by memorandum stating: "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA policy should be terminated. In the exercise of my authority in establishing national immigration policies and priorities, except for the purposes explicitly identified below, I hereby rescind the June 15, 2012 memorandum." *See* Regents at 91.

6. The 2012 DACA policy and the 2014 amendments were announced "without any notice or opportunity for public comment." The 2017 rescission of the DACA policy was announced in the same manner. Regents at 27.

7. Judge Alsup concluded that "the Acting Secretary rescinded DACA ... not based on any policy criticism.... Instead, it was based on the legal

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[4] As President Ronald Reagan famously stated, government programs "once launched, never disappear" and are "the nearest thing to eternal life we'll see on this earth!" http://ronaldreaganquote.com/ eternal-life- on-earth- government-programs/.

[5] Department of Homeland Security, Memorandum on Rescission Of Deferred Action For Childhood Arrivals (DACA) (Sept. 5, 2017) https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca.

determination by the Attorney General." Regents at *33. This one sentence became the linchpin of his decision, as he ruled: "the agency's decision to rescind DACA was based on a flawed legal premise...." *Id.* at *61. For that conclusion, he relied on a 2014 determination of the Office of Legal Counsel of the United States Department of Justice issued during the same Obama Administration which issued DACA. He supplemented that reliance with his own legal views that run contrary to the decision of the Fifth Circuit in the DAPA case, as supported by four Justices of this Court.

SUMMARY OF ARGUMENT

In 2012 when Janet Napolitano was Secretary of the Department of Homeland Security ("DHS") in the Obama Administration, she justified the implementation of her DACA policy as an exercise of prosecutorial discretion. Five years later in this litigation, now Plaintiff Napolitano charged Trump Administration Acting Secretary of DHS Kirstjen Nielsen of having abused her discretion when on September 5, 2017, Nielsen used her discretion to rescind the same DACA policy. As the Acting Secretary began to "wind down" the program, she was besieged by a flurry of law suits, including this one in the Northern District of California. The difficulty for the plaintiffs in making their case was convincing the court that the Trump Administration should be barred from using the same authority to rescind DACA that the Obama Administration used to create it – grounded in immigration law as well as its

discretionary power under Article II, Section 3 to "take care that the laws be faithfully executed."

Seizing on the Attorney General's opinion that DACA must be rescinded because DACA was unlawful, the court below sought to cleanse the record of all supporting "policy" considerations and the consequences of the 2016 presidential election, concluding that, while DACA could have been terminated on purely "policy grounds," it was, in fact, terminated over a point of law that DHS had exceeded its statutory and constitutional authority. Because "determining legality is a quintessential role of the courts," Judge Alsup ruled that the Attorney General's opinion that DACA was illegal constituted a "mistake of law" and, therefore, was unlawful. And because rescission was based upon a flawed legal premise, the court owed no deference to the agency decision.

Upon this basis, the court not only granted plaintiff's request for injunctive relief, but extended that relief nationwide, setting itself up as overseer of the DACA program, requiring the DHS and its Secretary to administer the program according to the court's instructions. In so doing, the court has unconstitutionally usurped the executive power vested by Article II, Section 3 in the President to take care that the law is faithfully executed, in disregard of Article II, Section 1 which vests all executive power in a single executive office — the President of the United States. Under the court's nationwide injunction, the DHS serves two masters, not one, in disregard of the constitutional policy that a single executive is essential to the American republic.

The court thus erred, having assumed that, because it is the province and duty of courts to say what the law is, what it said in its Order is law, and therefore, justifies a nationwide injunction to ensure that the nation's immigration policy is "uniform" throughout the United States, avoiding thereby "administrative confusion" and provoking "individual lawsuits all over the country." But it is not within the province and duty of courts to assume exclusive governmental authority to determine and apply the law. What a judge says is not, *per se*, the law, for it is well established that a court may "mistake" the law. That fact alone is sufficient reason to respect the limitation of Article III that vests the judicial power limiting its exercise to individual cases and controversies, binding only on the parties to the case, not on the whole nation.

Tossing aside all prudence and humility with the issuance of his nationwide injunction, Judge Alsup has presumed upon the authority of his fellow district judges, assuming that they would embrace the the theory on which he usurped executive power. It is certainly at least hoped that there should be little support anywhere for his central position that a decision entrusted to the discretion of the executive branch may be overruled by a judge even if that decision violates no provision of the Constitution or federal law, but only if that judge finds that it is based on a view of the law different from the personal view of the judge.

ARGUMENT

I. THIS CASE CONCERNS THE POLITICIZATION OF LAW AND THE NATURE OF JUDICIAL POWER IN THE ENFORCEMENT OF THE NATION'S IMMIGRATION POLICY.

Beginning with the inauguration of President Trump and continuing through the President's first State of the Union address, the nation has seen unprecedented judicial usurpation and politicization of the law governing immigration. Beginning in January 2017, there began a concerted effort by those who oppose the Trump agenda to use the lower federal courts to block the President's changes to the Obama Administration's lax immigration policies.[6]

In the early days of the Trump presidency, while President Trump's nominee for Attorney General was being held up by the Democratic opposition in the Senate, the Department of Justice remained in the hands of Obama holdovers who felt emboldened to

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[6] *See, e.g.,* Jonathan Turley, "California judge jumped the gun in rush to block Trump's immigration order," The Hill (April 26, 2017) http://thehill.com/blogs/pundits-blog/immigration/330584-california-judge-jumped-the-gun-in-rush-to-block-trumps; Daniel Horowitz, "Dirty Dozen: The 12 most insane court rulings of 2017," Conservative Review (Dec. 29, 2017), https://www.conservativereview.com/articles/dirty-dozen-12-insane-court-rulings-2017/.

defend the past.[7] Consequently, when lawsuits were initially filed, claiming the Trump immigration measures to be illegal and unconstitutional, the government's defense was at best tepid. For example, even when the President was sued by name and enjoined personally, the government did not bother to object, even though "[n]o federal court has the power to enjoin the President in a case such as this, and thus President Trump never should have been named in his official capacity as a party."[8]

Beginning with the challenge to the new Administration's first "travel ban," and continuing with the Administration's opposition to the "sanctuary-cities," and then the second and third travel bans, many lower federal trial courts were quick to act, granting nationwide preliminary injunctive relief, based upon novel legal and constitutional theories.[9] This was not coincidence. Rather, a pattern soon emerged, as district court judges pounced on the several complaints, in wholesale disregard of the traditional "prudential barriers that restrict suits against the executive" branch. These courts virtually shut down the Trump Administration's effort to follow the mandate given it by the American people to change

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[7] *See* J. Blackman, "The Legal Resistance to President Trump" (Oct. 11, 2017) http://www.nationalreview.com/article/452506/donald-trump-courts-lawyers-legal-resistance.

[8] *See* Brief *Amicus Curiae* of U.S. Justice Foundation, *et al*., in Hawaii v. Trump, U.S. Court of Appeals for the Ninth Circuit (Apr. 21, 2017).

[9] *See* Blackman's "Legal Resistance."

course in American immigration enforcement policies and practices. *Id*.

However, it is not just "prudence" that is being swept into the dust bin. It is also the rule of law. Tossed aside, policy choices have been mischaracterized as legal issues to justify judicial intervention. As one commentator has observed, "the judiciary simply can't substitute its own policy judgment for that of our elected representatives, no matter how well-informed judges may be or how misguided they think our political leaders may be."[10] Although some federal courts curtsy before Lady Justice, to make it appear that they are engaged in "sober legal analysis," they nevertheless find:

> "snowflake standing" to bring the lawsuit for individuals who haven't personally been harmed but are experiencing "feelings of disparagement and exclusion" [and] bypass the more technical analysis regarding statutory authorizations and restrictions on the executive power over immigration in order to pontificate on sexier constitutional claims (the opposite of the standard "constitutional avoidance" that courts practice).... [*Id.*]

One would have hoped that this Court's unanimous action taken last June 2017 lifting the Fourth Circuit's preliminary injunction would have "restore[d] the scope of Trump's executive power to

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[10] I. Shapiro, "Courts Shouldn't Join the #Resistance" (May 29, 2017), https://www.cato.org/blog/courts-shouldnt-join-resistance.

deny entry to aliens he deemed detrimental to American interests." However, it appears that the "lower courts ... have not yet taken the hint."[11] Instead, the battle has just shifted to a different front — from keeping national security threats out of the country, to allowing 800,000 illegal aliens to remain within.[12]

For several months, the Trump Administration cajoled Congress to address and solve the issue of removal of aliens who were living on American soil and who were brought into the United States illegally as minor children. Under the DACA policy inherited by President Trump, the federal government was only deferring enforcement, permitting such aliens to work and to receive benefits, even though they did not enjoy lawful immigrant status. Congress, however, failed to act, whereupon on September 5, 2017, the Justice Department rescinded DACA, spelling out an orderly transition over a 12-year period, "while also giving Congress a six-month window to possibly save the policy."[13]

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[11] Blackman, "Legal Resistance," *supra.*

[12] *See* T. Watanabe, "California educational leaders vow to protect immigrant students from deportation," *Los Angeles Times* (Sept. 5, 2017) http://www.latimes.com/local/lanow/la-me-daca-schools-20170905-story.html.

[13] A. Edelman, "Trump Ends DACA Program, No New Applications Accepted," NBC News (Sept. 5, 2017) https://www.nbcnews.com/politics/immigration/trump-dreamers-daca-immigration-announcement-n798686

In a statement released to the press, President Trump stated:

> I am not going to just cut DACA off, but rather provide a window of opportunity for Congress to finally act. We will resolve the DACA issue with heart and compassion – but through the lawful democratic process – while at the same time ensuring that any immigration reform we adopt provides enduring benefits for the American citizens we were elected to serve. [*Id.*]

Within three weeks President Trump's policy decision was attacked with five lawsuits.[14] Among them is the case now before this Court on Petition for Certiorari. One of the parties to the Complaint is Janet Napolitano, President of the University of California and former Secretary of Homeland Security at the time that the DACA policy was originated. Complaint for Declaratory and Injunctive Relief at 7, para. 25. In contrast with President Trump's expressions of concern for the persons affected by rescission of DACA, President Napolitano charged that:

> As a result of Defendant's actions, the Dreamers face expulsion from the only country that they call home, based on nothing more

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[14] *See* A. Giaritelli, "Trump's DACA decision hit with five lawsuits in three weeks," *Washington Examiner* (Sept. 26, 2017) http://www.washingtonexaminer.com/trumps-daca-decision-hit-with-five-lawsuits-in-three-weeks/article/2635595.

> than unreasoned executive whim.... It is hard to imagine a decision less reasoned, more damaging, or undertaken with less care. [Complaint at 1, para. 2.]

In recognition that this politically charged allegation standing alone would not constitute a legal claim, Napolitano's Complaint pressed forward, maintaining that (i) when she was Secretary of Homeland Security in the Obama Administration, the DACA policy was a legitimate exercise of prosecutorial discretion, but (ii) the rescission of her DACA policy when placed in her successor's hands was an unlawful abuse of discretion. *Compare* Complaint at 1-2, para. 3 *with* p. 13 at paras. 50-58. Indeed, as Professor Jonathan Turley put it in relation to a sister case to protect Dreamers, "any challenge faced the obvious difficulty in arguing that Trump is barred from using the same authority to rescind DACA that President Obama used to create it." J. Turley, "New York's lawsuit to protect Dreamers is doomed to fail," The Hill (Sept. 9, 2017):[15]

> The challengers ... need[] to show the federal court that they had serious legal objections rather than policy disagreements with the current administration. Federal courts follow the "political question doctrine," which bars the ruling on political as opposed to legal disputes. [*Id.*]

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[15] http://thehill.com/blogs/pundits-blog/immigration/349912-opinion-new-york-files-weak-case-against-trump-on-daca.

Thus, the threshold question before this Court in this petition is whether the district court issued its injunction on legal or political grounds.

II. THE DISTRICT COURT USURPED THE EXECUTIVE POWER VESTED EXCLUSIVELY IN THE PRESIDENT TO TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED.

Repeatedly, the district court insisted that the Trump Administration's decision rested solely on the Attorney General's opinion that DACA was illegal. *See* Regents at *31-33. As proof, the court found that "without prior notice" the DHS Secretary announced the DACA rescission just one day after she had been notified by the Attorney General that DACA was an "unconstitutional exercise of authority by the Executive Branch." *Id.* at 32. Later in its Order, the court dropped its guard, asserting that DACA's "supposed illegality" was just the "main," but not the "exclusive, rationale for ending DACA." *Id.* at 48. And for good reason. The court's order is replete with historical references to DACA and prior immigration policies, all of which stressed the discretionary power conferred by statute on those government officials responsible for the administration of the nation's immigration programs. *See* Regents at 14-31.

Yet, the court maintained that DACA rescission, unlike any other "deferred action" measure, "was not based on any policy criticism." *Id.* at 33. In support of this claimed exception, the court referred to what it envisioned to have been the role of the Attorney

General's legal opinion provided to get the rescission of DACA over the finish line. *See id*. at 32-34. In that limited sense, the Trump "administration didn't terminate DACA on policy grounds," as the court asserted. *Id*. at 34. However, it would be naive to think that the Attorney General's opinion eclipsed all prior considerations of DACA policy and priority, including the rescission action previously taken by the DHS Secretary with respect to DAPA and expansion of DACA. *See id*. at 30-31. Indeed, the court itself admitted that "deferred action originated without any statutory basis apart from the discretion vested by Congress in connection with the agency's enforcement of the immigration laws." *Id*. at 63-64.

But the court bulldozed its way past such discretionary considerations in an unrelenting drive to isolate the DACA rescission as an exception to the discretionary deference rule. The court believed it achieved that objective:

> In sum, the new administration didn't terminate DACA on policy grounds. It terminated DACA over a point of law, a pithy conclusion that the agency had exceeded its statutory and constitutional authority. An important question now presented is whether that conclusion was a mistake of law. [*Id*. at 34.]

Having teed up the question as one of law, the court assumed that it got to take a swing because: "determining illegality is a quintessential role of the courts." *Id*. at 48.

Presumably, the district court believed that, had the DHS Secretary decided to rescind the DACA policy without any legal input from the Attorney General, then there would have been no basis upon which the district court could intervene, there being no issue of "mistake of law" within the exclusive power of the district court to decide. *Id*. at 32-33. In such a case where only policy matters, not law, the "courts owe substantial deference to the immigration determinations of the political branches...." *Id*. at 48. But where the court believes rescission is based upon a "flawed legal premise" — not policy — all pretense of deference disappear[ed] as the district court virtually [took] over, restoring the DACA policy to what it was before rescission, requiring DHS to post reasonable notice and summary reports every three months to ensure compliance with its nationwide injunction. *See* Pet. Cert. at 9-10.

In other words, while the court's injunction is in force, it will be Judge Alsup, not President Trump, who will perform the ultimate duty to take care that DACA is faithfully executed.[16] By its nationwide injunction, the district court has assumed that executive function, usurping a power vested in the President alone by Article II, Section 3 of the Constitution. It is no accident that this power is vested in the Constitution's singular executive office. Rather it was deliberately chosen and defended as an

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[16] *See* R. Duchon, "Government to resume processing DACA renewals, citing judge's ruling" (Jan. 14, 2018) https://www.nbcnews.com/politics/immigration/government-resume-processing-daca-renewals-citing-judge-s-ruling-n837566.

essential safeguard from the threat of a hydra-headed executive department and essential to the nature of a republic. *See W.* Rawle, A View of the Constitution of the United States, reprinted in 4 The Founders' Constitution at 129 (item # 9) (P. Kurland & R. Lerner, eds., Univ. of Chicago Press:1987):

> Limited and restrained as the president is, creature of the people, and subject to the law, with all power to do right, he possesses none to do wrong; his general responsibility by being undivided, is complete.... [*Id.*]

Under the ongoing injunction in this case, the executive power is divided between the President and an unelected district judge not accountable to the people, who is governed by different standards and subject to different sanctions. As parties to the case, the DHS and its Secretary are directly responsible to the court's rules, as spelled out in the Scope of Provisional Relief in the Order at 46-49. For example, the DHS is required to "post reasonable public notice that it will resume receiving DACA renewal applications and prescribe a process consistent with this order." Presumably failure to comply with this command, and others spelled out in the Order, would be subject to the court's contempt power. No longer would DHS continue to be subject to the authority of the President and the Attorney General.

Although it is true that it is "the province and duty of the judicial department to say what the law is,"[17] federal courts are not authorized to exercise their power to declare and apply the law apart from a case or controversy between two contending parties.[18] "In modern times, the Take Care Clause has been cited most frequently ... as a reason for strictly enforcing Article III's case or controversy requirement."[19] According to the district court, however, the role of the courts contemplated by the Constitution's Article III is just the opposite. Instead of awaiting an individual "challenge [to] any particular removal" of a person claiming a legal right to remain on American soil, respondents are "challeng[ing] the abrupt end to a nationwide deferred-action and work-authorization program." Regents at 48. But courts do not have authority to exercise their judicial power apart from the jurisdiction conferred by Congress.

In short, the federal courts are not roving tribunals open to anyone who might dispute the legality of government action or inaction. *See* Prakash, *supra*. Rather, judicial power is limited, a principle that is especially pronounced in immigration matters. As the Solicitor General has summarized in his brief:

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[17] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[18] *See* Exodus 18:16 ("When they have a matter, they come unto me; and I judge between one and another, and I do make them know the statutes of God, and his laws.")

[19] S. Prakash, "Take Care Clause," The Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/articles/2/essays/98/take-care-clause.

"Congress intended to foreclose collateral review of the Acting Secretary's prospective rescission of a discretionary deferred-action policy is consistent with Congress's treatment of other kinds of discretionary DHS actions." Pet. Cert. at 23.

What the district court has overlooked, then, is the role of law outside the four walls of the courtroom. The court implicitly assumed that law is what Oliver Wendell Holmes believed it was — "nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court."[20] Thus, under the Holmes view, the Attorney General's opinion is that DACA is "supposed[ly] illegal" (Regents at 48) or "purportedly illegal" (*id*. at 78), but cannot be actually illegal until a court says so. After all, law in its quintessential form does not exist, as the district court suggests, except in courts. Rather, as President Andrew Jackson wrote in defense of his message vetoing the Bank bill:

> The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality

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[20] O. Holmes, "The Path of the Law," reprinted in his Collected Legal Papers at 169 (1952).

> of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve. [Andrew Jackson, Veto Message (July 10, 1832).]

Both the Attorney General Jeff Sessions and district court judge William Alsup took the same oath of office — to support this Constitution. General Sessions vowed his best to assist the President in his duty to "take care that the laws be faithfully executed"; and Judge Alsup to judge impartially. Both are equally constrained by the rule of law, but serving different functions.

III. IN THE EXERCISE OF ITS POWER OF OVERSIGHT OF THE FEDERAL COURTS, THIS COURT SHOULD GRANT THIS PETITION, SENDING A MESSAGE OF RESTRAINT.

In a time when judges are known and lauded for aggressive assertions of judicial power,[21] it would be wise to heed the words of Alexander Hamilton in Federalist No. 78: "[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them." Inspired by these words, Yale Law Professor Alexander Bickel wrote his classic treatise entitled The Least Dangerous Branch, in which he cautioned this Court, urging it to "wield its power carefully so as not to degrade republican virtue and compromise self-government."[22] To achieve this goal, Hamilton identified two major principles embedded in the exercise of judicial power. First, Hamilton asserted that "courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." Federalist No. 78 (G. Carey & J. McClellan, eds., The Federalist,

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[21] *See* A. Winkler, "The Return of the Passive Virtues," American Constitution Society for Law and Policy (Sept. 18, 2014) http://www.acslaw.org/acsblog/the-return-of-the-passive virtues-etc.

[22] *See* A. White, "The Lost Greatness of Alexander Bickel," Commentary Magazine (Mar. 1, 2012) https://www.commentarymagazine.com/articles/the-lost-greatness-of-alexander-bickel/.

Liberty Fund: 2001) p. 405. Second, he opined: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." Federalist No. 78 (p. 407).[23] Neither of these guiding principles was honored by the district court below.

First, the court issued a nationwide preliminary injunction for the benefit of approximately 689,800 DACA beneficiaries who were outside the jurisdiction of the district court — not just for the sake of the plaintiffs named in the complaint. Such relief was justified, the court claimed, because "limiting the geographic scope of an injunction on an immigration enforcement policy 'would run afoul of the constitutional and statutory requirements for uniform immigration law and policy." Regents at 93. Limiting relief to the plaintiffs, the court concluded, "would result in administrative confusion and simply provoke many thousands of individual lawsuits all over the country." *Id.* at 94. With such logic, it appears that Judge William Alsup of the Northern District of California has assumed the role of the President of the United States, and that only by his "taking care" to grant nationwide injunctive relief will the "law" be "faithfully executed."

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[23] *But see* C. Hamilton, "'Extreme,' 'vicious' Trump Statements Put DACA Decision on Different Level, Judge Says" (Jan. 30, 2018) http://www.law.com/nationallawjournal/sites/newyorklawjournal/2018/01/30/extreme-vicious-trump-statements-put-daca-decision-on-a-different-level-judge-says/.

Second, Judge Alsup was so confident in his holding that the rescission of DACA "was based on the flawed legal premise that the agency lacked authority to implement DACA," that he believed that his ruling was, and still is, the "law" — not just his opinion — and that, as law, it is "binding" not only on the parties in this case, but also on the entire country. Regents at 61. According to Hamilton, however, the district court's ruling is "merely judgment," not "law." Indeed, in Hamilton's day, Judge Alsup's ruling is only "evidence" of law. As Blackstone put it, "the law, and the opinion of the judge are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law." 1 W. Blackstone, Commentaries on the Laws of England at 71 (Univ. of Chi., facsimile ed.: 1765). According to Judge Alsup, the question before him was whether the rescission of DACA was "in compliance with the law" or "based on a mistake of law." Regents at 14. Judge Alsup concluded that the Attorney General was mistaken and rescission of DACA was a mistake of law. If so, then why could not Judge Alsup also be mistaken? Did he believe that Attorneys General can be wrong, but district court judges cannot? As Alexander Bickel pointed out, there is "need for Burkean prudence and humility carrying out the judicial task *in practice*." A. White, "The Lost Greatness of Alexander Bickel." Judge Alsup exhibited neither in his decision below.

IV. JUDGE ALSUP'S DECISION WAS GROUNDED ON A FALSE CONSTRUCT.

The unstated assumption made by Judge Alsup was that a policy decision of the Executive Branch within its discretion actually ceases to be a policy decision within discretion once a federal judge takes the position that it is based on a view of the law different from that of the Executive. That is a flawed assumption. If a matter is entrusted by the Constitution or by statute to the discretion of the Executive, there are precious few bases on which that policy decision can be impeded by a judge. If the policy of the Executive violates a federal law, that fact could provide a legitimate basis for judicial remedy, but that ground is certainly not present here, as not even the plaintiffs are contending that the DACA policy is mandated by federal law.[24] *See* Pet. Cert. at 13.

Rather, here the Department of Homeland Security has taken the position that a discretionary policy implemented during the Obama Administration constituted an unconstitutional and illegal exercise of authority. The Trump Administration is entirely free to take that legal position, and even to make it the basis for an exercise of discretion different from the prior administration, and no federal judge has the constitutional or statutory authority to override it. In other words, the construct that Judge Alsup established by which he decided this case is entirely

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[24] Moreover, there was absolutely no reliance by Judge Alsup on allegations of supposed animus, so those claims provide no support whatsoever for the judge's decision. *See* Regents at 88.

false. Since the repeal of the DACA policy does not violate either a provision of the Constitution or the mandate of a statute, Judge Alsup was duty bound to grant the Government's motion to dismiss.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari before judgment should be granted.

Respectfully submitted,

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February 2, 2018