Nos. 18-587, 18-588, 18-589

IN THE

Supreme Court of the United States

DEP'T OF HOMELAND SECURITY, *et al., Petitioners*
v.
REGENTS OF THE UNIV. OF CALIFORNIA, *et al., Respondents*

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al., Petitioners*
v.
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al., Respondents*

KEVIN K. MCALEENAN, ACTING SECRETARY OF HOMELAND SECURITY, *et al., Petitioners*
v.
MARTIN JONATHAN BATALLA VIDAL, *et al., Respondents*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE NINTH, D.C., AND SECOND CIRCUITS

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This dispute concerns the policy of immigration enforcement discretion known as Deferred Action for Childhood Arrivals (DACA). In 2016, this Court affirmed, by an equally divided vote, a decision of the Fifth Circuit holding that two related Department of Homeland Security (DHS) discretionary enforcement policies, including an expansion of the DACA policy, were likely unlawful and should be enjoined. *See United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam). In September 2017, DHS determined that the original DACA policy was unlawful and would likely be struck down by the courts on the same grounds as the related policies. DHS thus instituted an orderly wind-down of the DACA policy. The questions presented are as follows:

1. Whether DHS's decision to wind down the DACA policy is judicially reviewable.

2. Whether DHS's decision to wind down the DACA policy is lawful.

This *amicus curiae* brief addresses the second question presented.

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the fundamental *separation of powers* principles implicated by these cases. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing similar separation of powers issues, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S.Ct. 2271 (2016); and *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1213 (2015).

SUMMARY OF ARGUMENT

Janet Napolitano, the former Secretary of Homeland Security who issued the DACA Memo at issue in these cases, brought suit against her successor in office alleging, primarily, that her prior handiwork could not be undone without going through the Notice and Comment rulemaking procedures that she herself had not followed. Complaint ¶ 15, Joint Appendix Vol. 2:561. These cases thus have a bizarre, through-the-looking-glass aspect to them. *Cf.* Lewis Carrol, Through the Looking Glass (1871). To understand the full scope of the incongruity, a review of the prior ac-

[1] Pursuant to this Court's Rule 37.3(a), this amicus brief is filed with the consent of the parties. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief, and no person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

tions, both of former Secretary Napolitano and her immediate successor, former Secretary Jeh Johnson (who issued the parallel DAPA Memo), is necessary.

That assessment reveals that the prior DACA and DAPA memos were both illegal and even unconstitutional. They both pushed the idea of prosecutorial discretion beyond the point where discretion becomes suspension of the law, in violation of the President's duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3. And even were such a categorial refusal to enforce the law within the bounds of prosecutorial discretion (or, more to the point, not susceptible to judicially-manageable criteria), the additional benefits conveyed on DACA and DAPA recipients by the memos—including a "lawful presence" in the United States and eligibility for work authorization—cannot plausibly be subsumed under a prosecutorial discretion umbrella.

Given the patent infirmities of the DACA and DAPA programs, the notion that the *current* administration could not exercise its own prosecutorial discretion to actually enforce the laws on the books is, well, rather bizarre. The lower court decisions so holding simply must be reversed.

ARGUMENT

I. The DACA Program That President Trump's Administration Seeks to Rescind Was Itself Legally and Even Constitutionally Infirm.

A. The Immigration and Nationality Act mandates removal of unauthorized aliens.

Several provisions of the Immigration and Nationality Act mandate specific enforcement actions by immigration officials. Section 1225(a)(3), for example, specifies that "All aliens (including alien crewmen) who are applicants for admission [defined as any alien who has not been admitted] or otherwise seeking admission or readmission to or transit through the United States *shall be inspected by immigration officers*." 8 U.S.C. § 1225(a)(3) (emphasis added).[2] Absent a credible claim for asylum, stowaways are not eligible for admission at all, and "*shall be ordered removed* upon inspection by an immigration officer." § 1225(a)(2) (emphasis added). And apart from a few exceptions not at issue here, once an immigration officer "determines that an alien … is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer *shall order the alien removed* from the United States without further hearing or review…." § 1225(b)(1)(A)(i) (emphasis added). In other cases, "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained* for a [removal] proceeding under section 1229a …." § 1225(b)(2)(A) (emphasis added).

Once an alien has been detained under that statutory mandate, "[a]n immigration judge *shall conduct proceedings* for deciding the inadmissibility or deportability of an alien. § 1229a(a)(1) (emphasis added). An alien who fails to appear "*shall be ordered removed* in absentia" if the Immigration Service establishes that the alien was provided written notice of the hearing

[2] All code section references are to Title 8 of the U.S. Code unless otherwise noted.

and that the alien is removable. § 1229a(b)(5)(A) (emphasis added). Finally, applying the burdens of proof set out in the statute, "[a]t the conclusion of the proceeding the immigration judge *shall decide* whether an alien is removable from the United States." § 1229a(c)(1)(A) (emphasis added); §§ 1229a(c)(2), (3).

In other words, the statutory scheme uses the mandatory "shall" rather than a discretionary "may" throughout, indicating Congress's intent to treat these duties as ministerial mandates rather than discretionary enforcement options.

To be sure, this Court has recognized that a "well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes." *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 760 (2005) (citing 1 ABA Standards for Criminal Justice 1–4.5, commentary, pp. 1–124 to 1–125 (2d ed.1980). But removal proceedings are civil proceedings, not criminal ones, and as at least one prominent legal treatise has noted: "In contrast to criminal prosecution, the government has no free rein to refuse to enforce civil actions." R. Rotunda and J. Nowak, 1 Treatise on Const. Law § 7.6 (March 2016).

Moreover, Congress's statutory scheme here provides the "stronger indication" of a true mandate that this Court found lacking in *Gonzales*. 545 U.S. at 761-62. Beyond the repeated use of the mandatory language, Congress specified that removal proceedings "*shall be the sole and exclusive procedure* for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." § 1229a(a)(3) (emphasis added). The claim that a President has discretion *not*

to commence removal proceedings against unauthorized aliens and thereby afford to them a "lawful presence" in the United States cannot be squared with Congress's language that a determination of admissibility by an immigration judge in a removal proceeding is the "sole and exclusive" means for determining whether an alien may be admitted.

The U.S. District Court for the Northern District of Texas in *Crane v. Napolitano*, 3:12-CV-03247-O, 2013 WL 1744422 (N.D. Tex. Apr. 23, 2013), reached precisely that conclusion. Although that action by border patrol agents was ultimately dismissed for lack of subject matter jurisdiction because the Merit Systems Protection Board was the exclusive venue for their claims,[3] the District Court's analysis of the relevant statutory language was thorough and persuasive: "Congress's use of the word 'shall' in Section 1255(b)(2)(A) imposes a mandatory obligation on immigration officers to initiate removal proceedings against aliens they encounter who are not 'clearly and beyond a doubt entitled to be admitted.'" *Id.* at *17.

The court found compelling this Court's decisions in *Fed. Express Corp. v. Holowecki*, 552 U.S. 389 (2008), and *Lopez v. Davis*, 531 U.S. 230 (2001). *Holowecki* held that the EEOC's "duty to initiate informal dispute resolution processes upon receipt of a charge is mandatory in the ADEA context" because of statutory language in 29 U.S.C. § 626(d) providing that the EEOC "*shall* promptly seek to eliminate any

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[3] *Crane*, No. 3:12-cv-03247-O, Order (N.D. Tex., July 31, 2013), available at http://www.crs.gov/analysis/legalsidebar/Documents /Crane_DenialofMotionforReconsideration.pdf.

alleged unlawful practice by informal methods of conciliation, conference, and persuasion." 552 U.S. at 399 (emphasis added). Similarly, *Lopez* noted that Congress's "use of a mandatory 'shall' . . . impose[s] discretionless obligations." 531 U.S. at 241. The court also found this Court's decision in, *e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 835 (1985), and the Board of Immigration Appeals decision in *In re E-R-M & L-R-M*, 25 I. & N. Dec. 520, 520 (BIA 2011), to be distinguishable. The discretion recognized in the latter—an immigration case—was simply whether to refer an unauthorized alien to regular or expedited removal proceedings, the court noted, not "to refrain from initiating removal proceedings at all." *Crane*, 2013 WL 1744422, at *10. And the court found the statutory language in the Food, Drug, and Cosmetic Act at issue in *Chaney*, which this Court held committed "complete discretion to the Secretary to decide how and when they should be exercised," 470 U.S. at 835, to be in contrast with the Immigration and Nationalization Act, which "is not structured in such a way that DHS and ICE have complete discretion to decide when to initiate removal proceedings." *Crane*, 2013 WL 1744422, at *10.

B. DACA and DAPA are both categorical, and therefore unconstitutional, suspensions of the law.

Even if Congress's use of the mandatory term "shall" is deemed not to foreclose prosecutorial discretion in individual cases, the DACA and DAPA programs went much further than authorizing case by case discretion. Instead, they amounted to a categorical and therefore unconstitutional suspension of the law.

This Court's decision in *Chaney* is instructive. After concluding "that an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)" of the Administrative Procedures Act, this Court "emphasize[d] that the decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Chaney*, 470 U.S. at 832-33. This Court then cited, with apparent approval, the D.C. Circuit's en banc decision in *Adams v. Richardson*, 480 F.2d 1159 (1973) (en banc). The Court of Appeals in that case rejected the Government's claim of discretion over how or even whether to enforce Title VI of the Civil Rights Act of 1964. "Title VI not only require[d] the agency to enforce the Act, but also set[] forth specific enforcement procedures," *id.* at 1162, just as the Immigration and Naturalization Act does here. More significantly, the Court of Appeals recognized—in language cited by this Court—that prosecutorial discretion does not apply when an agency "has consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty." *Id.*; *see also Chaney*, 470 U.S. at 833 n.4.

Both DACA and DAPA fall on the "categorical suspension of the law" side of the *Chaney* line. In her June 15, 2012 memo establishing the DACA program, former Homeland Security Secretary Janet Napolitano set out specific, categorical criteria for DACA program eligibility. Memo from Janet Napolitano, Secretary of Homeland Security, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States*

as Children, p. 1 (June 15, 2012). Although the memo repeatedly asserts that eligibility decisions are to be made "on a case by case basis," it is actually a directive to immigration officials to grant deferred action to anyone meeting the criteria. "With respect to individuals who meet the above criteria" and are not yet in removal proceedings, the memo orders that "ICE and CBP *should* immediately exercise their discretion, on an individual basis, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States." *Id.* at 2 (emphasis added). And "[w]ith respect to individuals who are in removal proceedings but not yet subject to a final order of removal, and who meet the above criteria," "ICE *should* exercise prosecutorial discretion, on an individual basis, for individuals who meet the above criteria by deferring action for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States." *Id.* (emphasis added). USCIS and ICE are directed to "establish a clear and efficient process" for implementing the directive, and that process "*shall* also be available to individuals subject to a final order of removal regardless of their age." *Id.* (emphasis added).

Homeland Security Secretary Jeh Johnson's November 2014 memo establishing the DAPA program did the same thing. Although sprinkled with the phrase, "case-by-case basis," it also established eligibility criteria for the new program and directed immigration officials "to immediately begin identifying persons" who met the eligibility criteria, in order "to prevent the further expenditure of enforcement resources with regard to these individuals." Jeh Charles John-

son, Memorandum for Leon Rodriguez*, et al.*, *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*, p. 2 (Nov. 20, 2014). The memo even announced that the process for terminating removal of eligible aliens "*shall also be available* to individuals" already "subject to final orders of removal." *Id*. (emphasis added).

The notion that either memo allowed for a true individualized determination rather than providing a categorical suspension of the law is simply not credible. There is nothing in either memo to suggest that immigration officials could do anything other than grant deferred action to those meeting the defined eligibility criteria. Indeed, the overpowering tone of the memos is one of woe to line immigration officers who did not act as the memo told them they "should," a point that was admitted by Department of Homeland Security officials in testimony before the House of Representatives. *See* Transcript, Hearing on *President Obama's Executive Overreach on Immigration*, House of Representatives Judiciary Committee (Dec. 2, 2014) (Represenative Goodblatt noting: "DHS has admitted to the Judiciary Committee that, if an alien applies and meets the DACA eligibility criteria, they will receive deferred action. In reality, immigration officials do not have discretion to deny DACA applications if applicants fulfill the criteria.").

Nevertheless, by repeatedly regurgitating the phrase, "on a case by case basis," Secretaries Napolitano and Johnson seemed to have recognized that prosecutorial discretion cannot be exercised categorically without crossing the line drawn in *Chaney* into

unconstitutional suspension of the law—without, that is, violating the President's constitutional obligation to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3; *Chaney*, 470 U.S. at 833 n.4. But the memos' directives to the immigration services *not to enforce* the immigration laws against anyone meeting the eligibility criteria set out in the memos, "in order to prevent low priority individuals from being removed from the United States," clearly falls on the unconstitutional side of the *Chaney* line. As this Court recognized nearly 180 years ago, "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Kendall, v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838).

The Office of Legal Counsel at the Department of Justice has likewise recognized the need for individualized determinations for exercises of prosecutorial discretion to be constitutional. "[T]he Executive Branch ordinarily cannot … consciously and expressly adopt[] a general policy that is so extreme as to amount to an abdication of its statutory responsibilities," it noted in the memo purporting to validate the DAPA program. Karl R. Thompson, Office of Legal Counsel, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Un-lawfully Present in the United States and to Defer Removal of Others*, p. 7 (Nov. 19, 2014) (quoting *Chaney*, 470 U.S. at 833 n.4, internal quotation marks omitted). "[A] general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses 'special risks' that the agency has exceeded the bounds of its enforcement discretion." *Id.* (quoting *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671,

677 (D.C. Cir. 1994)). Yet that is exactly what DACA and DAPA did. As the district court for the Eastern District of Pennsylvania correctly recognized, the executive actions at issue in those programs, establishing threshold eligibility criteria for aliens unlawfully present in the United States to obtain "deferred action," constituted "legislation" rather than prosecutorial discretion, "and effectively change[d] the United States' immigration policy." *U.S. v. Juarez-Escobar*, 25 F. Supp. 3d 774, 786 (W.D. Pa. 2014).

Neither were the executive actions implemented in the DACA and DAPA programs simply an exercise of the kind of prosecutorial discretion that had been exercised by previous administrations. Much was made at the time of the Family Fairness Program implemented by President George H.W. Bush's administration in February 1990. But that program, which dealt with delayed voluntary departure rather than DACA and DAPA's deferred action, was specifically authorized by statute. Section 242(b) of the Immigration and National Act at the time provided, in pertinent part:

> *In the discretion of the Attorney General* and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 1251 of this title if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraphs (4) to (7), (11),

(12), (14) to (17), (18), or (19) of section 1251(a) of this title.

8 U.S.C. § 1252(b), *cited in Perales v. Casillas*, 903 F.2d 1043, 1048 (5th Cir. 1990) (emphasis added).

That specific statutory authority was largely superseded by the Temporary Protected Status program established by the Immigration Act of 1990, which is available to nationals of designated foreign states affected by armed conflicts, environmental disasters, and other extraordinary conditions, 8 U.S.C. § 1254a, and subsequently limited to 120 days by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRI"), *see* 8 U.S.C. § 1229c. In contrast, as even the OLC opinion defending DAPA acknowledged, "deferred action," which is the asserted basis for the DACA and DAPA executive actions, "developed without statutory authorization." OLC Memo, at 13; *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (noting that deferred action "developed without express statutory authorization," apparently in the exercise of discretionary response to international humanitarian crises that trigger the President's separate foreign affairs authority of the sort now covered by the Temporary Protected Status Program).

There are now specific statutes that authorize deferred action. *See*, *e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (providing that certain individuals are "eligible for deferred action"); USA PATRIOT ACT of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361 (proving that certain immediate family members of Lawful Permanent Residents who were killed on 9/11 should be made "eligible for deferred action."); National Defense Authorization Act for Fiscal Year 2004, Pub. L.

No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694, and other statutes that delegate to the Attorney General discretion to waive other provisions of the INA in specific circumstances, *e.g.*, 8 U.S.C. § 1182(a)(6)(E)(iii), (d)(11) (authorizing discretionary waiver of smuggler ineligibility for admission rule for smugglers who only assisted their own spouses, parents, or children); 8 U.S.C. § 1182(d)(13), (14) (authorizing, in certain specified circumstances, discretionary waiver of inadmissibility rules for recipients of "T" and "U" visas); *cf.* 8 U.S.C. § 1229b (authorizing the Attorney General to "cancel removal" and "adjust status" for up to four thousand aliens annually who are admitted for lawful permanent residence and who meet certain specific statutory criteria). But none of these statutes authorize the broad use of deferred action for domestic purposes asserted by the June 2012 DACA program or the expanded November 2014 DAPA program. Indeed, the fact that Congress deemed it necessary to include such statutory authorization for these specific domestic uses of deferred action is compelling evidence that the Executive does *not* have unfettered discretion to give out deferred action whenever it chooses, and certainly not to deem such individuals as "lawfully present in the country for a period of time," as Secretary Johnson claimed in his November 20, 2014 memo. Johnson Memo, *supra*, at 2.

C. The provision of benefits and a "lawful" status are beyond the scope of prosecutorial discretion.

Even if DACA's categorical suspension of deportation requirements could be viewed as a valid exercise of prosecutorial discretion, the granting of affirmative

benefits such as work authorization and "lawful presence" cannot be.

"The doctrine of prosecutorial discretion applies to enforcement decisions, not benefit decisions," noted Bo Cooper, General Counsel for the Immigration and Naturalization Service at the end of the Clinton Administration. Bo Cooper, General Counsel, INS, *INS Exercise of Prosecutorial Discretion*, at 4 (July 11, 2000).[4] Although Cooper was of the opinion that the INS had "prosecutorial discretion to place a removable alien in proceedings, or not to do so," he acknowledged that it did "not have prosecutorial discretion to admit an alien into the United States who is inadmissible under the immigration laws, or to provide any immigration benefit to any alien ineligible to receive it." *Id.* at 1. "[T]he grant of an immigration benefit, such as naturalization or adjustment of status, is a benefit decision that is not a subject for prosecutorial discretion." *Id.* at 4.

Yet in implementing DACA, the Immigration services contended that an unauthorized alien "who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period of deferred action is in effect." U.S. Citizenship and Immigration Services, *Frequently Asked Questions*

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[4] Available at http://niwaplibrary.wcl.american.edu/reference/dditional-materials/immigration/enforcement-detention-and-criminaljustice/government-documents/Bo-Cooper-memo%20pros%20discretion7.11.2000.pdf

(June 15, 2015).[5] And Secretaries Napolitano and Johnson both directed the immigration services to extend work authorization to individuals they placed in deferred action who were otherwise ineligible to work in the United States. Secretary Napolitano's memo establishing the DACA program cited no provision of law authorizing her to grant work authorization, but Secretary Johnson purported to find such authority in five words of the work authorization definitional statute. "Each person who applies for deferred action pursuant to the criteria above shall also be eligible to apply for work authorization for the period of deferred action, pursuant to my authority to grant such authorization reflected in section 274A(h)(3) of the Immigration and Nationality Act," he wrote. Johnson Memo, at 4-5 (citing 8 U.S.C. § 1324a(h)(3)).

Section 1324a establishes the general rule that employing an unauthorized alien is illegal. Subsection (a)(1) specifically makes it unlawful to hire "an unauthorized alien (as defined in subsection (h)(3) of this section)." Subsection (h)(3) in turn defines "unauthorized alien" as any alien who is not "lawfully admitted for permanent residence" (that is, someone who qualifies under one of the carefully wrought exemptions to inadmissibility contained in Section 1101(a)(15) of the Immigration Code, such as the "T" visa) or an alien "authorized to be so employed by this chapter *or by the Attorney General*." 8 U.S.C. § 1324a(h)(3) (emphasis added).

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[5] Available at https://web.archive.org/web/20150626103508/https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.

That last phrase, "or by the Attorney General" (and by extension the Secretary of Homeland Security), was the statutory hook that Secretary Johnson claimed to have provided him unfettered discretion to grant work authorization to any unauthorized alien he wished. It was, to say the least, a pretty slim reed.

For one thing, such a broad interpretation of that brief statutory reference would render superfluous several other statutory provisions that give specific authority to the Attorney General to confer both lawful status and work authorization and other benefits on certain unauthorized aliens in carefully circumscribed circumstances. Section 1101(a)(15)(V), for example, allows the Attorney General to confer temporary lawful status on the close family members of lawful permanent residents who have petitioned the Attorney General for a nonimmigrant visa while an application for an immigrant visa is pending. Section 1158(c)(1)(B) authorizes the Secretary to grant work authorization to aliens who have been granted asylum). Section 1226(a)(3) allows the Secretary to grant work authorization to otherwise work-eligible aliens pending a removal decision, and Section 1231(a)(7) permits the Secretary to grant work authorization under certain narrow circumstances to aliens who have received final orders of removal. Much more likely, therefore, that the phrase, "or by the Attorney General," simply refers to the specific grants of authority given to the Attorney General in other pro-visions of the Immigration Code.

For another, nothing in the legislative history suggests that Congress intended to give the Attorney General the kind of unfettered discretion that Secretary Johnson claimed. The section of the immigration

law that includes the brief phrase on which this entire edifice of authority was erected was added in 1986 as part of the Immigration Reform and Control Act. The legislative record leading to the adoption of that monumental piece of legislation is extensive, but there does not appear to be any discussion whatsoever of the clause, much less any claim that by including that clause, Congress was conferring unfettered discretion on the Attorney General to issue "lawful presence" and work authorization to anyone illegally present in the United States he chose. Indeed, such a position makes a mockery out of the finely wrought (and hotly contested) provisions elsewhere in the Immigration code providing for such lawful status only upon meeting very strict criteria.

The more limited view of Section 1324a(h)(3), namely, that it simply refers to other provisions of federal law conferring such authority on the Attorney General in specific circumstances, was implicitly espoused by a plurality of this Court when, in *Chamber of Commerce of U.S. v. Whiting*, it summarized Section 1324a(h)(3) as defining an "unauthorized alien" to be "an alien not 'lawfully admitted for permanent residence' or *not otherwise authorized by federal law to be employed*." 131 S. Ct. 1968, 1981 (2011) (emphasis added); *see also Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147 (2002) (federal immigration law denies "employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States," citing Section 1324a(h)(3)); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 518-19 (M.D. Pa. 2007), *aff'd in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010), *judgment vacated sub nom. City of Hazleton, Pa. v.*

Lozano, 131 S. Ct. 2958 (2011), and *aff'd in part, rev'd in part*, 724 F.3d 297 (3d Cir. 2013).

Moreover, if the clause did provide the Attorney General (now Homeland Security Secretary) with such unfettered discretion, Congress had been wasting its time trying to put just such an authority into law. For more than a decade illegal immigration advocates had been pushing for Congress to enact the DREAM Act, the acronym for the Development, Relief, and Education for Alien Minors Act first introduced by Senators Dick Durbin and Orin Hatch as Senate Bill 1291 back in 2001. The bill would give lawful permanent residence status and work authorization to anyone who arrived in this country illegally as a minor, had been in the country illegally for at least five years, was in school or had graduated from high school or served in the military, and was not yet 35 years old (although that age requirement could be waived). The bill or some version of it has been reintroduced in each Congress since, but has usually faced such stiff opposition by those who view its principal provisions as an "amnesty" for illegal immigrants that even its high-level bipartisan support has proved insufficient to get the bill adopted. It is hard to imagine the expenditure of so much political capital to provide an authority to the Secretary that he claimed had been in the existing statutes all along. As Judge Smith noted in the Fifth Circuit's decision enjoining DAPA, such an interpretation is "exceedingly unlikely." *Texas v. United States*, 809 F.3d 134, 183 (5th Cir. 2015), *as revised* (Nov. 25, 2015). "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse-

holes." *Id.*, n. 186 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

Indeed, even if this Court were to accept that the general phrase, "or by the Attorney General," could be interpreted to support Secretary Johnson's claimed authority to extend work authorization without reliance on other specific grants of authority, such an interpretation would render the clause unconstitutional, a violation of a core aspect of separation of powers.

Article I, Section I of the Constitution requires that "[a]ll legislative Powers" granted by the Constitution must be exercised by Congress and cannot be delegated away. U.S. Const. art. I, § 1. This Court has held that Congress can delegate a large amount of rule-making authority to executive branch agencies, but only if it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to con-form." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *Mistretta v. U.S.*, 488 U.S. 361, 372 (1989).

To be sure, this Court has, over the decades, been rather generous in determining what qualifies as an "intelligible principle." *See, e.g.*, *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420 (1930) ("just and reasonable"); *New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932) ("public interest"); *Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933) ("public convenience, interest, or necessity"); and *FTC v. Gratz*, 253 U.S. 421 (1920) ("unfair methods of competition"). But even though the treatment of such amorphous language as an "intelligible" principle might rightly cause one to wonder whether the word "intelligible" is really

intelligible at all, this Court has always insisted that there at least be *something* in the statute adopted by Congress to constrain the agency's discretion.

If Secretary Johnson's interpretation of Section 1324a(h)(3) were to be accepted, there is absolutely nothing. The phrase, "or by the Attorney General," is not constrained by any requirement that the Attorney General's decision be in the "public interest," or for the "public convenience, interest, or necessity," or be "just and reasonable," or even be in the public interest *as the Attorney General determines it to be*. Rather, it stands entirely on its own, unadorned and unencumbered by any lawmaking judgment by Congress.

Because such an interpretation as that offered by Secretary Johnson would be manifestly unconstitutional, a violation of the non-delegation doctrine even in its current, largely moribund state, it should only be adopted, under the doctrine of constitutional avoidance, if no other reasonable interpretation exists that would render the statute constitutional. *See, e.g.*, *Blodgett v. Holden,* 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). Because the constitutionally valid alternative interpretation set out above is not only reasonable, but much more consistent with the Immigration code in its entirety, Secretary Johnson's interpretation simply cannot stand.

This should be particularly true in the immigration law context, over which Congress's power has repeatedly been described by this Court as "plenary." *See, e.g.*, *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 201 (1993); *INS v. Chadha*, 462 U.S. 919, 940-41 (1983); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). Indeed, this Court declared over a century ago that "over no conceivable subject is the legislative

power *of Congress* more complete" than immigration. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (emphasis added); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). "[T]hat the formulation of [immigration] policies is entrusted *exclusively to Congress* has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvin v. Press*, 347 U.S. 522, 531 (1954) (emphasis added).

There is yet another constitutional problem with the interpretation that had been offered by Secretary Johnson. The granting of "lawful presence" and work authorization by the Executive branch alone made DACA and DAPA recipients eligible for other financial benefits without specific authorization from Congress. That violates Article I, Section 9 of the Constitution, which provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Only Congress, in compliance with the bicameralism and presentment requirements of the Constitution, U.S. Const. art. I, § 7, could authorize such appropriations; a President (much less a Secretary of Homeland Security) cannot do it unilaterally. *See Clinton v. New York*, 524 U.S. 417, 438 (1998).

In sum, by frequent use of the word "shall," the Immigration and Nationality Act itself mandates removal in a number of circumstances, thus overriding whatever prosecutorial discretion might normally exist. Even if otherwise, the DACA and DAPA programs were categorical suspensions of the law rather than the exercise of true case-by-case discretion, and therefore ran afoul of the President's constitutional duty to take care that the laws be faithfully executed. And

even if the line between permissible discretion and impermissible suspension is deemed to be too difficult a line to be judicially enforceable, the provision of a "lawful presence" status and other benefits such as work authorization is simply beyond the scope of what can be accomplished through the use of prosecutorial discretion. Former President Obama was therefore correct when, on more than a dozen occasions, he announced he had no constitutional authority to "just suspend deportation through executive order." *See, e.g.,* Remarks by the President at Univision Town Hall (March 28, 2011).[6] "There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as President." *Id.*

The notion, accepted by the lower courts, that the current administration cannot rescind a discretionary policy of a prior administration that was itself of such dubious legality simply cannot be countenanced.

II. A Discretionary Decision Not To Enforce The Law Cannot Give Rise To A Reliance Interest In Continued (And Certainly Not In Perpetual) Non-Enforcement.

A second argument advanced by plaintiffs and accepted by the courts below, namely, that DACA cannot be rescinded because DACA recipients have reliance and Due Process interests in retaining their deferred

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[6] Available at https://obamawhitehouse.archives.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall.

action "lawful presence" status, is equally without merit, for several reasons.

First, if the DACA program was a valid exercise of prosecutorial discretion *not to enforce* the law, it is necessarily the case that a successor administration (or even the same administration, should it decide to exercise its discretion in a different direction) could choose once again to exercise that same prosecutorial discretion in favor of *enforcing* the law. Indeed, the exercise of discretion to *enforce* is necessarily more valid than the exercise of discretion *not to enforce*, because the former carries with it no risk of crossing the line into an unconstitutional suspension of the law.

Second, the DACA program on its own terms explicitly disclaimed any reliance interest. The policy, as articulated by Secretary Napolitano, "confer[ed] no substantive right, immigration status or pathway to citizenship." Regents Pet. App. 101a. "Only the Congress, acting through its legislative authority, can confer these rights," she added. *Id.* And applicants for the DACA program were separately notified, on the application form itself, that "Deferred action does not confer lawful status upon an individual." USCIS Form I-821D (06/25/13).[7]

Such caveats are not surprising. Law enforcement officers exercise prosecutorial discretion every day, most often without such express caveats. When a highway patrol officer chooses not to stop someone driving a few miles over the speed limit, that is an ex-

[7] Available at https://web.archive.org/web/20140107074823/http://www.uscis.gov/sites/default/files/files/form/i-821d.pdf.

ercise of prosecutorial discretion. When the Drug Enforcement Agency decides not to arrest someone for small amounts of marijuana possession, that, too, is an exercise of prosecutorial discretion. But in none of those routine cases does an entitlement to future exercises of prosecutorial discretion arise, should one choose to continue to violate the law. And this is true even if the law enforcement officer does not spell out in writing or explicitly state that his decision not to make an arrest *this time* is not an immunity from arrest *next time*. The notion that there can possibly be a reliance interest in continued, even perpetual, prosecutorial discretion *not to have the law enforced* would turn the "discretion" into an entitlement, a "grant of an immigration benefit, such as naturalization or adjustment of status, … that is not a subject for prosecutorial discretion," as former Clinton administration INS General Counsel Bo Cooper acknowledged more than two decades ago. Bo Cooper, *INS Exercise of Prosecutorial Discretion*, at 4, *supra* at 14.

Finally, had the DACA program actually created an entitlement in which there could be a reliance interest, it would even more clearly have amounted to an unconstitutional suspension of the law. *See supra*, I.B.

The claim of "reliance interest" in a prosecutor's "discretion" is therefore an oxymoron that should be rejected by this Court.

CONCLUSION

Because the DACA program adopted in 2012 is itself constitutionally infirm, the decision by the current administration to rescind it is well within the bounds of its own executive authority. But even were

it perfectly valid as a legitimate exercise of prosecutorial discretion, the discretion exercised by one presidential administration cannot possible bind a future presidential administration that chooses to exercise its prosecutorial discretion in a different manner. That would convert a discretionary decision not to prosecute into an entitlement to be exempt from the operation of the law entire, which is a legislative rather than executive function, assigned under our Constitution to the Congress, not to the President. The decisions of the courts below to the contrary should therefore be reversed.

Respectfully submitted,

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