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

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
PETITIONERS,

V.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CATO INSTITUTE AND PROFESSOR JEREMY RABKIN AS *AMICI CURIAE* SUPPORTING DACA AS A MATTER OF POLICY BUT PETITIONERS AS A MATTER OF LAW

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Additional Captions Listed on Inside Cover

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

KEVIN K. MCALEENAN, ACTING SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

MARTIN JONATHAN BATALLA VIDAL, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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 Fifth Circuit ruling 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 (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.

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan think tank dedicated to individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Jeremy A. Rabkin is a law professor at George Mason University's Antonin Scalia Law School. Prof. Rabkin's fields of expertise include administrative law, constitutional history, and statutory interpretation.

The interest of *amici* here lies in preserving the separation of powers that maintains the rule of law at the heart of the Constitution's protections for individual liberty. *Amici* generally support DACA-type policies that would normalize the immigration status of individuals who were brought to this country as children and have no criminal records. But the president cannot unilaterally make fundamental changes to immigration law—in conflict with the laws passed by Congress and in ways that go beyond constitutionally-authorized executive power. Nor does the president acquire more powers when Congress refuses to act, no matter how unjustified the congressional inaction is. The separation of powers prevents the president from expanding his own authority. Those same dynamics ensure that a subsequent president can reverse his predecessor's unlawful executive actions.

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[1] Rule 37 statement: All parties issued blanket consents to the filing of *amicus* briefs. Nobody but *amici* and their counsel authored any of this brief or funded its preparation and submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Through the Deferred Action for Childhood Arrivals program (DACA), the previous administration took the position that the Immigration and Nationality Act (INA) authorized the secretary of homeland security to confer lawful presence on roughly 1.5 million aliens. The current administration reversed course. The attorney general concluded that this reading of federal law had "constitutional defects." He reached this decision in light of the Fifth Circuit's injunction of the similar Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA), which this Court affirmed by an equally divided vote.

Several lower courts blocked the president from winding down DACA, however, holding that the executive branch failed to justify the rescission. These rulings are wrong because DACA goes beyond executive power under the INA. But even if the Court declines to reach that holding, the attorney general offered reasonable constitutional objections such that if DACA somehow complies with the INA, then the INA itself violates the nondelegation doctrine as applied here.

First, DACA, which lacks "express statutory authorization," *Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 484 (1999), cannot be supported by any "implicit" congressional acquiescence. Two general provisions within the INA cannot bear the weight of this foundational transformation of immigration policy. Moreover, it should not matter if Congress has stood by idly when previous presidents exercised materially different deferred-action policies. The presi-

dent cannot acquire new powers simply because Congress acquiesced to similar accretions in the past. In any event, DACA is not consonant with past practice.

These arguments are sufficient to confirm the attorney general's conclusion that DACA is unlawful. But even if the Court disagrees—or declines to reach that issue—the executive branch has still provided adequate grounds to justify the rescission of DACA.

That is, *second*, the attorney general reasonably determined that DACA is inconsistent with the president's duty of faithful execution. Admittedly, the attorney general's letter justifying the rescission is not a model of clarity. But it need not be. This executive-branch communication provides, at a minimum, a reasonable constitutional objection to justify DACA rescission. Specifically, it invokes the "major questions" doctrine, which is used "in service of the constitutional rule" that Congress cannot delegate legislative power to the executive branch. *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting). In other words, if federal law in fact supported DACA, then important provisions of the INA would run afoul of the nondelegation doctrine. The attorney general, as well as the Fifth Circuit, rejected this reading of the INA. Here, the court should accept the executive's determination of how to avoid a nondelegation problem: by winding down a discretionary policy.

Amici support comprehensive immigration reform, of which a DACA-type policy is only one part. But the president can't make the requisite legal changes by himself. Such unlawful executive actions both set back prospects for long-term reform and, more importantly here, weaken the rule of law. *See*, *e.g.*, Ilya Shapiro, *I'm an Immigrant and a Reform Advocate. Obama's*

Executive Actions Are a Disaster for the Cause, Wash. Post, Feb. 24, 2015, https://wapo.st/30rnq5m. Reversing the courts below would restore the immigration debate to the political process—exactly where it belongs.

ARGUMENT

I. DACA, WHICH LACKS "EXPRESS STATUTORY AUTHORIZATION," CANNOT BE SUPPORTED BY "IMPLICIT" CONGRESSIONAL ACQUIESCENCE TO PREVIOUS USES OF DEFERRED ACTION

This Court has recognized that deferred action is a "regular practice" in the enforcement of immigration law. *Reno*, 525 U.S. at 484 (1999). However, it developed "without express statutory authorization." *Id.* (citations omitted). In 2016, the government argued that three statutes vested the secretary of homeland security with the "broad statutory authority" necessary for DAPA—and by extension, DACA. Brief for the Petitioners at 42, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674) ["Brief for DAPA Petitioners"].

First, the government cited 6 U.S.C. § 202(5), which authorizes the secretary of homeland security to "[e]stablish[] national immigration enforcement policies and priorities." Second, the government invoked 8 U.S.C § 1103(a), which charges the secretary "with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens." Third, the government relied on the interaction between 8 U.S.C. § 1324a(h)(3) and 8 C.F.R. 274a.12(c)(14). The former statute excludes from the definition of "unauthorized alien" an alien who is "authorized to be so employed by this chapter or by the Attorney General." The latter regulation states that an

alien who has been granted deferred action "must apply for work authorization" if she "establishes an economic necessity for employment." The solicitor general conceded that "Section 1324a(h)(3) did not create the Secretary's authority to authorize work; that authority already existed in Section 1103(a), the vesting clause that gives the Secretary sweeping authority to administer the INA and to exercise discretion in numerous respects." Brief for DAPA Petitioners, at 63.

In short, the case for DACA's statutory legality hangs on only two provisions of the U.S. Code: 6 U.S.C. § 202(5) and 8 U.S.C § 1103(a). Can the authority for DACA be found within the four corners of these statutes? No. Instead, the executive branch defended DACA on a broader understanding of delegation.

A. CONGRESS DID NOT—AND COULD NOT—IMPLICITLY AUTHORIZE DACA BY ACQUIESCING TO PAST EXERCISES OF DEFERRED ACTION

In 2014, the Office of Legal Counsel (OLC) opined that DAPA and DACA were lawful. Karl R. Thompson, OLC Memorandum Opinion, *DHS's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* at 29 (Nov. 19, 2014) [hereinafter OLC Opinion]. OLC contended that these policies were legal, in part, because Congress "implicitly approved" past "permissible uses of deferred action." *Id.* at 24.

The Court has, at times, endorsed this sort of "adverse possession" approach to the separation of powers. *NLRB v. Noel Canning*, 573 U.S. 513, 526 (2014) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); *id.*

at 613 (Scalia, J., concurring). That is, the president can accumulate *new* constitutional powers "by engaging in a consistent and unchallenged practice over a long period of time." *Id.* at 613–14. *But see Medellin v. Texas*, 552 U.S. 491, 532 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)) ("Past practice does not, by itself, create power."); Josh Blackman, *Defiance and Surrender*, 59 S. Tex. L. Rev. 157, 164 (2018) (noting that "courts favor purported defiance over voluntary surrender") (citing *McPherson v. Blacker*, 146 U.S. 1, 35–36 (1892)).

But the Court has never sanctioned the extension of a Frankfurterian gloss to the statutory context. The president cannot accrete new legislation-based powers because Congress has acquiesced to similar accretions in the past. The legality of DACA must stand or fall by virtue of the authority delegated by 6 U.S.C. § 202(5) and 8 U.S.C § 1103(a), *not* based on whether Congress has acquiesced to past invocations of those authorities.

B. DACA IS NOT CONSONANT WITH PAST EXECUTIVE PRACTICE

Even accepting OLC's framework, DACA is not "consonant with" past executive policy. *See* OLC Opinion at 24. OLC identified only "five occasions since the late 1990s" where the government "made discretionary relief available to certain classes of aliens through the use of deferred action": deferred action for (1) "[b]attered [a]liens [u]nder the Violence Against Women Act"; (2) "T and U Visa [a]pplicants"; (3) "[f]oreign [s]tudents [a]ffected by Hurricane Katrina"; (4) "[w]idows and [w]idowers of U.S. [c]itizens"; and, as relevant here, (5) the 2012 "Deferred Action for Childhood Arrivals" (DACA) policy. *Id.* at 15–20.

The scope of Congress's acquiescence for the first four policies was far more constrained than OLC suggested. Each instance of deferred action was sanctioned by Congress, and one of two qualifications existed: (1) the alien already had an existing lawful presence in the U.S., or (2) the alien had the immediate prospect of lawful residence or presence in the U.S. In either case, "deferred action acted as a *temporary bridge* from one status to another, where benefits were construed as arising immediately post-deferred action." Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 3 Geo. L.J. Online 96, 112 (2015) (emphasis in original). *See also Texas v. United States*, 809 F.3d 134, 184 (5th Cir. 2015) ("[M]any of the previous programs were *bridges* from one legal status to another, whereas DAPA awards lawful presence to persons who have never had a legal status and may never receive one.") (emphasis added).

The solicitor general makes this same point now: these past practices "used deferred action to provide certain aliens temporary relief while the aliens sought or awaited permanent status afforded by Congress." Brief for the Petitioners at 47, Dep't of Homeland Security v. Regents of the Univ. of California (2019) (Nos. 18-587, 18-588, and 18-589) [SG Brief]. Unlike previous recipients of deferred action, DACA beneficiaries have no prospect of a formal status adjustment unless they become eligible for some other statutory relief.

Nor does President George H.W. Bush's 1990 "Family Fairness" policy, which OLC also cited, support DACA's legality. First, the Family Fairness policy served as a *bridge* to adjustment of status because it was "interstitial to a statutory legalization scheme."

Texas v. United States, 809 F.3d at 185; *see also* Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 Am. U. L. Rev. 1183, 1217 (2015) ("Family Fairness was ancillary to Congress's grant of legal status to millions of undocumented persons in IRCA."). Second, the actual size of the program is significantly smaller than DACA. *See* SG Brief at 49; *see also* Glenn Kessler, *Obama's Claim that George H.W. Bush Gave Relief to '40 Percent' of Undocumented Immigrants*, Wash. Post (Nov. 24, 2014), https://perma.cc/J92E-C6M9. Third, the Family Fairness policy was premised on a different statutory authority, known as extended voluntary departure, 8 U.S.C. § 1254(e), which was severely curtailed in 1996. 8 U.S.C. § 1229c(a)(2)(A). The solicitor general now seems to endorse this argument. *See* SG Brief at 49 n. 10.[2] As a result, all exercises of deferred action prior to 1996 are of limited relevance.

Finally, OLC admitted that DACA stands on a more tenuous footing than did DAPA. A cryptic footnote explained that OLC "orally advised" that DACA was still "permissible," even though it "was predicated

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[2] One of the courts below suggested that DACA rescission was "arbitrary and capricious" because the attorney general "fail[ed] to even consider OLC's thorough analysis." *NAACP v. Trump*, 298 F. Supp. 3d 209, 240 n.23 (D.D.C. 2018). But one president cannot "choose to bind his successors by diminishing their powers." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 497 (2010). Nor can one administration's OLC bind a subsequent OLC. The attorney general's decision to reverse course should be seen as an implicit repudiation of the 2014 OLC opinion. Moreover, declining to explain internal agency deliberations was in no sense "arbitrary and capricious." In any case, the solicitor general maintains that the OLC memo on DAPA "does not undermine the Secretary's conclusion that DACA is unlawful." SG Brief at 47.

on humanitarian concerns that appeared less particularized and acute than those underlying certain prior class-wide deferred action programs." OLC Opinion at 18 n.8. In other words, DACA was less "consonant" with past executive practice than was DAPA. Even if this legal framework were correct, OLC once again erred with respect to the facts. "[T]he concerns animating DACA were" *not* "consistent with the types of concerns that have customarily guided the exercise of immigration enforcement discretion." *See id.* Generally, the "humanitarian concern" behind past deferred action policies concerned family reunification. DAPA, at least, had this attribute: beneficiaries were required to have a close kinship with a citizen or lawful permanent resident child. In contrast, DACA beneficiaries need not have *any* familial relationship with *any* citizen or lawful resident. See Blackman, *The Constitutionality of DAPA Part I*, *supra* at 116–19. *Amici* agree with OLC that the legal basis for DAPA was stronger than the legal basis for DACA. Neither policy, however, can be squared with federal immigration law.

In sum, DACA lacks "express statutory authorization," and is not supported by "implicit" congressional acquiescence. This conclusion provides adequate grounds to reverse the judgments below. The Administrative Procedure Act (APA) cannot be read to force the executive branch to continue implementing a policy that is contrary to law, regardless of how it chooses to rescind the policy. SG Brief at 51 ("[I]f DACA is unlawful, even an inadequate explanation could not provide a basis to overturn the agency's decision to rescind the unlawful policy."). But even if the Court disagrees on that point, or declines to resolve that question, the executive branch has still provided adequate grounds to justify the rescission of DACA.

II. IF FEDERAL LAW AUTHORIZES DACA, IMPORTANT PROVISIONS OF THE INA IMPERMISSIBLY DELEGATE LEGISLATIVE POWER TO THE EXECUTIVE

The executive doesn't need the judiciary's permission to stop enforcing a law it sees as unconstitutional. *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. Off. Legal Counsel 199 (Nov. 2, 1994). For example, in 2002, President George W. Bush construed an obviously "mandatory" statute as "advisory," so as not to "impermissibly interfere with [his] constitutional authority" concerning diplomatic recognition. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2082 (2015). This decision was compelled by his duty to take care that the laws be faithfully executed. Const., art. II, § 3. Ultimately, the Court endorsed this exercise of departmentalism. *See Zivotofsky*, 135 S. Ct. at 2096.

Likewise, the executive branch does not need the judiciary's permission to cease enforcing a regulation it determines to be unconstitutional. Indeed, the APA would be unconstitutional, as applied, whenever its regulatory manacles required the executive to continue enforcing an unconstitutional policy.

Here, the attorney general determined that DACA had "constitutional defects," in light of the Fifth Circuit's decision in *Texas v. U.S*, and the major questions doctrine. The Court should defer to this reasonable interpretation of the president's duty to faithfully execute the law because it avoids nondelegation problems. In other words, courts should allow reversals of novel execution actions that expand presidential power.

A. COURTS DO NOT DEFER TO EXECUTIVE ACTIONS THAT IMPLICATE "MAJOR QUESTIONS" OF "DEEP 'ECONOMIC AND POLITICAL SIGNIFICANCE'"

Under the familiar rule established in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, courts will defer to an agency's interpretation of an ambiguous statute so long as the interpretation is reasonable. 467 U.S. 837, 845 (1984). In four cases from the past quarter-century, however, the Court carved out an important exception to *Chevron*: when a regulation implicates a "major question," the agency is owed no deference. *See* Josh Blackman, *Gridlock*, 130 Harv. L.Rev. 241, 260-265 (discussing doctrinal development).

First, *FDA v. Brown & Williamson Tobacco Corp.*, held that the FDA could not expand its jurisdiction to regulate tobacco as a "drug." 529 U.S. 120, 131–33 (2000). This case introduced the concept of the "major questions" doctrine. The phrase came from a 1986 article authored by then-Judge Stephen Breyer: "'Congress is more likely to have focused upon, and answered, *major questions*,'" he wrote, "'while leaving interstitial matters to answer themselves in the course of the statute's daily administration.'" *Id.* at 159 (emphasis added) (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L.Rev. 363, 370 (1986)). Regulations that resolve such "major questions" in "extraordinary cases," give courts "reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id.* As a result, the Court was "obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA" the authority to

regulate tobacco as a drug. *Id.* at 160. The Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.*

Second, *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001) elaborated on the *Brown & Williamson* framework. The Court recognized that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Id.* at 468. Justice Scalia explained in a memorable line that Congress "does not, one might say, hide elephants in mouseholes." *Id.* (citations omitted).

Third, in *Util. Air Reg. Group v. EPA* (*UARG*), the Court added a skeptical gloss to *Brown & Williamson*: "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism." 573 U.S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U.S. at 159). Congress will "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.* ((quoting *Brown & Williamson*, 529 U.S. at 159).

Fourth, the Court revisited the major questions doctrine in *King v. Burwell*. 135 S. Ct. 2480 (2015). This case considered whether the Affordable Care Act (ACA) permitted the payment of subsidies on exchanges established by the federal government. *Id.* at 2488. The Court declined to defer to the government's reading of the ACA: "In extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id.* at 2488–89 (quoting *Brown & Williamson*, 529 U.S. at

159). Instead, it recognized that the payment of billions of dollars of credits on the federal exchanges was a major question of "*deep* 'economic and political significance' that is central to this statutory scheme." *Id.* at 2489 (quoting *UARG*, 573 U.S. at 324)) (emphasis added, to signal that the modifier "deep" was grafted onto the *Brown & Williamson* test). If Congress had intended for the IRS to have this authority to grant tax credits, "it surely would have done so expressly." *Id.*

A recent opinion from this Court sheds further light on the major questions doctrine and its constitutional foundation, the nondelegation doctrine.

B. "THE HYDRAULIC PRESSURE OF OUR CONSTITUTIONAL SYSTEM . . . SHIFT[ED] THE RESPONSIBILITY" FOR REVIEWING LEGISLATIVE DELEGATIONS FROM THE NONDELEGATION DOCTRINE TO THE MAJOR QUESTIONS DOCTRINE

Gundy v. United States considered the constitutionality of a provision of the Sex Offender Registration and Notification Act (SORNA). 139 S. Ct. 2116 (2019). SORNA § 20913(d) gave the attorney general "the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offender." A plurality of the short-handed Court held that Section 20913(d) did not violate the "nondelegation doctrine[, which] bars Congress from transferring its legislative power to another branch of Government." *Id.* at 2121.

At least three justices disagree. The SORNA provision, Justice Gorsuch wrote, "purports to endow the

nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens." *Id.* at 2131 (Gorsuch, J., dissenting). Through this statute, he observed, Congress "gave the Attorney General free rein to write the rules for virtually the entire existing sex offender population in this country." *Id.* at 2132. Justice Gorsuch acknowledged that the Court "last held that a statute improperly delegated the legislative power to another branch" more than eight decades ago. *Id.* at 2141. Yet "the Court has hardly abandoned the business of policing improper legislative delegations." *Id.* The judiciary has continued to perform that function with a different label, notably "the 'major questions' doctrine." *Id.*

Generally, "an agency can fill in statutory gaps where 'statutory circumstances' indicate that Congress meant to grant it such powers." *Id.* The major questions doctrine is as an exception to that rule. *Chevron* deference does not apply "[w]hen the 'statutory gap' concerns 'a question of deep economic and political significance' that is central to the statutory scheme.'" *Id.* (quoting *Burwell*, 135 S. Ct. at 2488–89). What are examples of such "major questions?" Justice Gorsuch cited each case in the modern nondelegation trilogy: (1) *Brown & Williamson* (regulations "to ban cigarettes"); (2) *UARG* (regulations to "assume control over millions of small greenhouse gas sources"); and (3) *King v. Burwell* (regulations "to rewrite rules for billions of dollars in healthcare tax credits"). *Id.* at 2141–42. In each case, deference was not warranted because Congress "did not hide elephants in mouseholes." *Whitman*, 531 U.S. at 468.

The major questions doctrine is not a mere "canon of statutory construction." *See Gundy*, 139 S. Ct. at

2142 (Gorsuch, J., dissenting). Instead, courts "apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency," *id.*[3] "When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines." *Id.* (citing *McDonald v. Chicago*, 561 U.S. 742, 758 (2010)). In this way, the major questions doctrine is a corollary to the nondelegation doctrine.

C. THE FIFTH CIRCUIT USED THE MAJOR QUESTIONS DOCTRINE "IN SERVICE OF THE CONSTITUTIONAL RULE" THAT CONGRESS CANNOT DELEGATE ITS LEGISLATIVE POWER

In *Texas v. United States*, the Fifth Circuit purported to decide the legality of DAPA "without resolving the constitutional claim." 809 F.3d. at 154. Specifically, the panel expressly declined to "decide the challenge based on the Take Care Clause." *Id.* at 146 n. 3.[4] The panel observed that "[w]e merely apply the ordinary tools of statutory construction to conclude that

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[3] Although the *Gundy* plurality rejected Justice Gorsuch's application of the nondelegation doctrine in that case, no justice disputes that the major questions doctrine reflects long-established constitutional concerns.

[4] *Amici* previously explained how DAPA runs afoul of the Take Care Clause. *See* Brief for the Cato Institute et al. as Amici Curiae Supporting Respondents at 20-30, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674) ["Cato DAPA Brief"]. These arguments apply with equal force to DACA. *See also* Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing The Law*, 19 Tex. Rev. L. & Pol. 215 (2015).

Congress directly addressed, yet did not authorize, DAPA." *Id.* at 183 n 191. Although the major questions doctrine, again, is not a mere "canon of statutory construction," *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting), part VII of *Texas* faithfully considered the modern nondelegation trilogy:

> DAPA would make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits, and "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." DAPA undoubtedly implicates "question[s] of deep 'economic and political significance' that [are] central to this statutory scheme; had Congress wished to assign that decision to an agency, it surely would have done so expressly."

Texas, 809 F.3d at 181 (citing *Brown & Williamson*, 529 U.S. 120, *UARG*, 573 U.S. 302, and *King v. Burwell*, 135 S. Ct. 2480).

Next, the Fifth Circuit considered the three statutes that OLC claimed supported DAPA, as well as DACA: "the broad grants of authority" in 6 U.S.C. § 202(5) and 8 U.S.C. § 1103(a)(3) "cannot reasonably be construed as assigning 'decisions of vast 'economic and political significance,' such as DAPA, to an agency." *Id.* at 183 (quoting *UARG*, 573 U.S. at 324). What about 8 U.S.C. § 1324a(h)(3), which purportedly empowers the secretary to provide DACA recipients with work authorization? The court observed that the statute "does not mention lawful presence or deferred action" and "is

listed as a '[m]iscellaneous' definitional provision expressly limited to § 1324a." *Id.* This section, which "concern[s] the 'Unlawful employment of aliens'" was "an exceedingly unlikely place to find authorization for DAPA." *Id.* (citing *Whitman*, 531 U.S. at 468 ("Congress, we have held, 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 mouseholes."). At bottom, the Fifth Circuit's decision is best understood to reflect an application of the major questions doctrine, a corollary to the nondelegation doctrine.

D. THE ATTORNEY GENERAL'S LETTER MADE A REASONABLE CONSTITUTIONAL OBJECTION TO DACA

In September 2017, the attorney general wrote a one-page letter to the acting secretary of homeland security. A careful parsing of this executive-branch communication, read in conjunction with *Texas* and Justice Gorsuch's *Gundy* dissent, establishes a reasonable constitutional objection to DACA premised on the nondelegation doctrine. Indeed, this reading was apparent even before *Gundy*.[5]

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[5] *NAACP v. Trump*, 298 F. Supp. 3d 209, 240 n.21 (D.D.C. 2018) ("At least one commentator has identified a second possible constitutional argument in the Sessions Letter: 'The Obama administration's open-ended reading of certain definitional provisions of the Immigration and Nationality Act (INA) would run afoul of the nondelegation doctrine.' *See* Josh Blackman, *Understanding Sessions's Justification to Rescind DACA*, Lawfare (Jan. 16, 2018), https://perma.cc/B28T-2DRJ; *see also Texas*, 809 F.3d at 150 (noting that the plaintiffs there had asserted "constitutional claims under the Take Care Clause" and the "separation of powers doctrine")).

The letter recognized that under DACA, "certain individuals who are without lawful status in the United States [can] request . . . benefits such as work authorization." Letter from Attorney General Jeff Sessions to Acting Secretary Duke (Sept. 5, 2017). The attorney general explained that the work-authorization grants were "effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result." *Id.* He added that "[s]uch an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch." *Id.*

Why was the provision of work benefits "effectuated . . . without proper statutory authority"? Why was it "an unconstitutional exercise of authority by the Executive Branch"? Why was it "an open-ended circumvention of immigration laws"? Admittedly, the attorney general's letter is not a model of constitutional clarity. But it need not be. It provides, at a minimum, a reasonable constitutional objection to justify the rescission of DACA.

First, consider the regulation that authorizes the secretary to grant DACA recipients with work authorization, with which we can presume the attorney general was familiar.[6] 8 C.F.R. 274a.12(c)(14) provides a crystalline illustration of the elephant-in-mousehole framework. In 1987, the Immigration and Naturalization Service denied a petition for rulemaking to restrict the issuance of work authorization to certain aliens. See Dep't of Justice, Immig. & Naturalization,

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[6] *See infra* n.8.

Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46,092 (Dec. 4, 1987). The government justified the denial, in part, because the number of such work authorizations would be "quite small"—so small, that the number was "not worth recording statistically." *Id.* at 46,092-93. Moreover, such authorizations would "normally [be] of very limited duration," and would be very rare. *Id.* at 46,092.

DACA operates in a very different fashion. The policy could provide roughly 1.5 million aliens with work authorization, and those authorizations could be renewed for years to come.[7] This elephantine-sized grant of work authorizations—limited in neither size and "with no established end-date"—cannot conceivably be jammed into a not-statistically-significant mousehole. In every sense, this provision of benefits relies on a reading of federal immigration law that amounts to "an unconstitutional exercise of authority by the Executive Branch"—that is, the exercise of legislative powers. The attorney general's conclusion is consistent with the Court's admonition in *Brown &* Williamson: "Congress could not have intended to delegate a decision of such economic and political significance"—the ability to provide work authorization to 1.5 million aliens—"in so cryptic a fashion."[8]

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[7] *Texas v. United States*, 328 F. Supp. 3d 662, 676 (S.D. Tex. 2018) ("An estimated population of 1.5 million people—greater than the populations of at least ten states—potentially qualify for these benefits."). As a matter of first principle, people should not need government permission to work. But federal (and state) law often imposes onerous and even irrational requirements on the right to earn an honest living, which the president is powerless to alter.

[8] In 2016, a group of 43 senators explained that "it strains credulity that Congress would grant the Executive such unfettered discretion" to grant so many work authorizations. *See* Brief of Senate

Second, the attorney general's analysis echoed another important attribute of modern nondelegation doctrine: the provision of work authorization to 1.5 million aliens was a major question of "deep 'economic and political significance' that is central to this statutory scheme." *King v. Burwell*, 135 S. Ct. at 2489 (quoting *UARG*, 573 U.S. at 324)). Indeed, the attorney general stressed that DACA sidestepped Congress "after Congress' repeated rejection of proposed legislation that would have accomplished a similar result."

Secretary of Homeland Security Kristjen Nielsen echoed this reading of *Texas*. Her June 2018 memorandum noted that the Fifth Circuit's decision "turned on the incompatibility of such a *major* nonenforcement policy with the INA's comprehensive scheme." (emphasis added). That is, DACA resolved a "major question." The status of the Dreamers has divided our polity for more than a decade. This question is of far deeper "economic and political significance" than the payment of healthcare subsidies on the federal exchange.

Third, the letter cited part VII of the Fifth Circuit's panel decision. The attorney general reasoned that "[b]ecause the DACA policy has the same legal and *constitutional defects* that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA." Letter from Attorney General Sessions, *supra* (emphasis added). Admittedly, the Fifth Circuit purported to

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Majority Leader Mitch McConnell and 42 Other Members of the U.S. Senate as Amici Curiae Supporting Respondents at 22–23, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674). That brief should provide some insight into the current administration's thinking: it was authored by the current head of OLC and joined by the attorney general who authorized DACA rescission.

decide the case "without resolving the constitutional claim." *Texas*, 809 F.3d. at 154. But that framing was inapt. Justice Gorsuch's *Gundy* dissent clarifies that the application of the major question doctrine *was* a constitutional decision. The attorney general's reference to DAPA's "constitutional defects" is most naturally understood as a rejection of the prior administration's unbounded reading of federal law.

E. THE SOLICITOR GENERAL'S BRIEF REAFFIRMS THE ATTORNEY GENERAL'S REASONABLE CONSTITUTIONAL OBJECTION

To be sure, the solicitor general stopped short of referring to the major questions doctrine, as well as the nondelegation doctrine. He did not expressly reference what the "constitutional defects" in DACA were. With good reason. Generally, the federal government is hesitant to support doctrines that could result in the invalidation of federal law. But it is difficult to read the government's brief—especially after *Gundy*—without seeing its constitutional overtones.

First, the solicitor general touches all the bases of the Court's modern nondelegation doctrine jurisprudence. He observes that "DHS retains authority to address 'interstitial matters' of immigration enforcement." SG Brief at 44 (citing *Brown & Williamson*, 529 U.S. at 159). However, DACA "is hardly interstitial." *Id.* Next, he explains that "longstanding regulations" concerning "work authorization" are inconsistent with DACA, which "is not a gap-filling measure in any meaningful sense." *Id.* Instead, DACA is "an agency decision[] of vast 'economic and political significance' " without any warrant from Congress." *Id.* at 44–45 (quoting *UARG*, 573 U.S. at 324). "When an agency

claims to discover in a long-extant statute an unheralded power over important national affairs, this Court typically greets its announcement with a measure of skepticism." *Id.* at 45 (cleaned up).

Second, the solicitor general explains that the prior administration's broad reading of federal immigration laws cannot be reconciled with Congress's "finely reticulated regulatory scheme" over immigration. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2406–07 (2018) (citations omitted). The government argues that "neither the INA's general grants of authority in 6 U.S.C. 202(5) and 8 U.S.C. 1103(a)(3), nor the other scattered references to deferred action throughout the U.S. Code, can be *fairly interpreted* as authorizing DHS to maintain a categorical deferred-action policy affirmatively sanctioning the ongoing violation of federal law by up to 1.7 million aliens to whom Congress has repeatedly declined to extend immigration relief." SG Brief at 43–44 (emphasis added). The brief adds that 6 U.S.C. § 202(5) and 8 U.S.C. § 1103(a)(3) "simply do not provide the *clarity* that is required to authorize a nonenforcement policy of the nature and scope of DACA." SG Brief at 45-46 (emphasis added). Finally, the brief observes that the lower courts did not "identify any *specific delegation* on which DHS could rely" to enact a policy of DACA's magnitude. SG Brief at 46 (emphasis added). The emphasized language—*fairly interpreted*, *clarity*, and *specific delegation*—is about as close as any solicitor general will ever get to conceding that his predecessor espoused a reading of federal law that would violate the nondelegation doctrine.

Third, and most important, the solicitor general frames the attorney general's decision in expressly departmentalist terms: he was not merely interpreting a

statute, but was advising on the executive's duty of faithful execution. His brief explains that "as a coordinate Branch, the Executive has an independent duty to determine whether it lacks authority to act." SG Brief at 50. What is an example of such a determination? The quintessential exercise of executive power: "the Attorney General may direct United States Attorneys not to bring prosecutions that, in his view, would be unconstitutional." *Id.* at 51. Does the government need to persuade the courts about the validity of that action? Absolutely not. "[I]n the unique context of its decision whether or not to enforce the law, the Executive is entitled to act on its view of the bounds of its enforcement discretion *even if the courts might disagree*." *Id.* at 50–51 (emphasis added). The solicitor general explains that "[t]here is nothing arbitrary and capricious about making such an enforcement decision based on the Executive's own view of what the law permits. So too here, DHS was entitled to stand on its view that DACA is an invalid exercise of prosecutorial discretion even if the courts would uphold it." *Id.* It is difficult to read this conclusion, which follows a lengthy discussion of the major questions doctrine, as anything but an endorsement of the constitutional theory underlying the nondelegation doctrine.

Here, the executive branch is on the same page: the previous administration's reading of federal law that supports DACA would render parts of the INA unconstitutional. For that reason, the attorney general recommended, and the secretary decided, to rescind DACA. The Court should hesitate before reaching an alternate holding, in which the attorney general and the secretary of homeland security, as well as the solicitor general, were simply mistaken about the executive's faithful execution. The better understanding is

that the reference to DACA's "constitutional defects" was framed in terms of the major questions and nondelegation doctrines, as Justice Gorsuch recognized in *Gundy*.[9] But if there is any doubt about this important question, the government should be asked to represent its position about DACA's "*constitutional* defects."

F. TO ELIMINATE NONDELEGATION CONCERNS, COURTS SHOULD DEFER TO REVERSALS OF NOVEL EXECUTIVE ACTIONS THAT EXPANDED EXECUTIVE POWER

Admittedly, *amici*'s reading of the attorney general's letter is charitable. Indeed, one of the court below took exception to this approach: "Some academic commentators have offered interesting arguments as to why courts should review deferentially Defendants' decision to end the DACA program." *Vidal v. Nielsen*, 279 F. Supp. 3d 401, 421 (E.D.N.Y. 2018) (citing Josh Blackman on *Lawfare Blog* and Zachary Price on *Take Care Blog*). The court observed that the government has not sought such deference, "arguing instead that, if their decision is indeed subject to judicial review, it should be reviewed under the *ordinary* arbitrary-and-capricious standard of APA § 706(2)(A)." 279 F. Supp. at 421, n. 9 (emphasis added). If the government still maintains this position, *amici* respectfully posit that a different standard should be applied.

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[9] One of the courts below contended that because the government did "not raise" arguments premised on the nondelegation doctrine, it would "not consider them." *NAACP*, 298 F. Supp. 3d at 240 n. 21 (D.D.C. 2018). *Amici* contend that these constitutional defenses were not—and indeed cannot be—waived.

The attorney general's letter is not akin to mundane guidance documents in which an agency interprets its own regulations. *See Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). This case isn't about the "regulatory definition of active moiety," whatever that is. *Id.* at 2410 n.1. Rather, the letter explains that continuing to enforce DACA would be unconstitutional. And it concludes: "As Attorney General of the United States, I have a duty to defend the Constitution and to faithfully execute the laws passed by Congress." This invocation of the constitutional standard takes this letter out of the realm of normal administrative law. *See* SG Brief at 50 ("DHS was interpreting the scope of its own authority to maintain a discretionary policy of nonenforcement that no one claims was required by law.").

For example, the Court has recognized that the major questions doctrine takes a regulation out of *Chevron*'s domain. Such a "presidential discovery" of new power should not be entitled to deference. *See* Josh Blackman, *Presidential Maladministration*, 2018 Ill. L. Rev. 397, 423 (2018) ("[W]hen the President's instigation leads to an agency asserting some new power, Article III spider senses should start tingling. This caution should be even more pronounced when the discovery of the new power occurs *after* Congress refused to vest a similar power through bicameralism."). This cramped approach restores the "major question" back to the democratic process.

A similar dynamic should apply for the major questions doctrine, but in reverse: deference should be afforded to the rescission. Stated differently, the "presidential discovery" of a novel power should be viewed with skepticism, while the "presidential reversal" of that action should be viewed with deference. *See id.* at

405, 483-84. The "*ordinary* arbitrary-and-capricious standard of APA § 706(2)(A)," *Vidal*, 279 F. Supp. at 421 (emphasis added), is not applicable in this context.

Both approaches lead to the same destination: "while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts," Congress cannot "endow the nation's chief prosecutor with the power to write his own [immigration] code governing the lives of [one-and-a-]half-million" aliens. *See Gundy*, 139 S. Ct at 2131, 2148 (Gorsuch, J., dissenting).

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If the previous administration's boundless reading of immigration law was correct, Congress would have unconstitutionally delegated legislative authority to the executive branch. Indeed, leading immigration scholars—whom the government cited—endorse such an expansive conception of statutory delegation. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 511 (2009) (noting that the president now enjoys a "*de facto* delegation of power that serves as the functional equivalent to standard-setting authority."); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 Yale L.J. 104, 155 (2015) (concluding that "the structure of modern immigration law simply leaves us with no discernable congressional enforcement priorities."); Josh Blackman, *Immigration Inside the Law*, 55 Washburn L.J. 31 (2016) (recalling that according to some immigration scholars, "Congress and the INA impose absolutely no constraints on the prosecutorial discretion of the President, so long as the President does not entirely stop deportations").

But a *de facto* delegation of statutory authority with no discernable congressional enforcement priorities would "constitute an invalid delegation of legislative power to the executive." *See* Cato DAPA Brief at 24–25. In a conflict between a novel executive action based on a theory that would render vast swaths of immigration law unconstitutional, and a more constrained reading of those laws that allows Congress to resolve "major questions," the latter must prevail.

The Court need not treat this case as a vehicle "to revisit" the nondelegation doctrine, writ large. *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting). Instead, it can be resolved on the narrower "hydraulic" principle afforded by the major questions doctrine. Indeed, this modified approach is especially appropriate here because the executive seeks to reverse a discretionary policy endorsed by his predecessor. Here, we have the rare situation where the federal government seeks to contract, rather than expand, its own powers. SG Brief at 39 ("Nothing in our system of separated powers prohibits executive officials from seeking legislative approval for particularly significant executive actions."). Courts enforcing constitutional checks and balances should encourage these kinds of decisions.

CONCLUSION

Presidents with different priorities come and go. But under our constitutional separation of powers, Congress's "painstaking[ly] detail[ed]" and "finely reticulated regulatory scheme" over immigration must prevail. *See Trump v. Hawaii*, 138 S. Ct. at 2444 (Sotomayor, J., dissenting). Congress, not the president, is empowered to resolve the status of the Dreamers, a major question that has divided our polity for more

than a decade. Three years ago, *amici* explained that rejecting this novel discovery of executive power "would return the ball of change to the court where it belongs: Congress." Cato DAPA Brief at 34. The same principle controls here.

Respectfully submitted,

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