Nos. 18-587, 18-588, 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.*

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 Writs of Certiorari to the United States Courts of Appeals for the Ninth, District of Columbia, and Second Circuits

BRIEF *AMICUS CURIAE* OF CITIZENS UNITED, CITIZENS UNITED FOUNDATION, AND THE PRESIDENTIAL COALITION, LLC IN SUPPORT OF PETITIONERS

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August 26, 2019

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Citizens United is a nonprofit social welfare organization exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation is a nonprofit educational and legal organization exempt from federal income tax under IRC section 501(c)(3). These organizations were established, *inter alia*, for purposes related to participation in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

The Presidential Coalition, LLC is an IRC section 527 political organization that was founded to educate the American public on the value of having principled conservative Republican leadership at all levels of government, and to support the election of conservative candidates to state and local government and the appointment of conservatives to leadership positions at the federal and state level in order to advance conservative public policy initiatives.

These *amici*, along with several others, filed three *amicus* briefs in two of these consolidated cases last year:

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

- U.S. Department of Homeland Security v. Regents of the University of California, Brief *Amicus Curiae* of Citizens United, *et al.*, U.S. Supreme Court, on petition for certiorari before judgment (Feb. 2, 2018);

- Vidal v. Nielsen, Brief *Amicus Curiae* of Citizens United, *et al.*, U.S. Court of Appeals for the Second Circuit (Mar. 14, 2018); and

- U.S. Department of Homeland Security v. Regents of the University of California, Brief *Amicus Curiae* of Citizens United, *et al.*, U.S. Supreme Court, on petition for certiorari (Dec. 6, 2018).

STATEMENT

The Brief for the Petitioners ("Pet. Br.") addresses the need for a rescission of the Deferred Action for Childhood Arrivals ("DACA") policy based on the findings made by Secretary Nielsen in her statement of July 22, 2018. Pet. Br. at 10, 40-41. These findings supplemented the reasons given by Acting Secretary Elaine C. Duke in her September 5, 2017 memorandum determining that DACA was unlawful and would be wound down. In addition to agreeing that DACA was contrary to law, Secretary Nielsen asserted that "'tens of thousands of minor aliens' ... have made the dangerous trek — with or without their families — to and across our southern border without legitimate claims to lawfully enter the country." *Id*. at 40. Secretary Nielsen determined it necessary "that DHS should send a strong message that children who

are sent or taken on this perilous and illegal journey will not be accorded preferential treatment." *Id*. at 41.

The lack of enforcement of our nation's immigration laws mandated by the courts below sends exactly the wrong signal — that the United States Government has lost the will to enforce its borders, and that anyone who enters the country illegally stands an excellent chance of being rewarded with permanent status as a lawful resident, and likely citizenship as well.

Multiple nationwide federal court injunctions that have been in place for nearly two years send the message that federal judges are in charge of our borders — not Congress or the President of the United States — and judges are welcoming of illegal immigrants. Indeed, the Ninth Circuit did not try to hide its policy preferences, praising DACA as a response to "the cruelty and wastefulness of deporting productive young people to countries with which they have no ties." Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Security, 908 F.3d 476, 486 (9th Cir. 2018) ("Regents").[2]

In their briefs urging that the injunctions be maintained, Respondents are unlikely to concede that

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[2] Pairing lax and deferred enforcement with the range of welfare-type benefits, the lower court injunctions have exacerbated the current crisis at the border. Almost two-thirds of illegal aliens reportedly are receiving welfare benefits. *See* S.A. Camarota and K. Zeigler, "63% of Non-Citizen Households Access Welfare Programs," *Center for Immigration Studies* (Nov. 20, 2018).

there is a crisis at the border as Secretary Nielsen contended — although the mainstream media, which has supported Respondents' litigation throughout, has changed its collective view on that point. On February 14, 2019, CNN Anchor Don Lemon opposed President Trump's attempt to declare a national emergency to secure border funding:

> Here is a really, really disgraceful thing. OK? You listening? All of this, this whole mess, is manufactured. It's a manufactured crisis. A noncrisis at the border that's really not fooling anybody. People go, 'Oh, it's a crisis, it's a crisis.' They know it's not a crisis. That's all for political expediency. [B. Adams, "Late to the party: CNN and MSNBC anchors discover there's a crisis at the border," *Washington Examiner* (June 26, 2019).]

More recently, Lemon reversed ground, stating:

> "For anybody who doesn't think that immigration is a crisis, a deadly serious crisis, a humanitarian crisis...." [*Id.*]

CNN's Chris Cuomo and MSNBC's Brian Williams showed the same pattern and have agreed there is a crisis at the border. *See id.*

Some years ago, this Court recognized the scope of the problems that border states face as a result of illegal immigration. In Arizona v. United States, 567 U.S. 387 (2012), the Court noted that, in 2010, the federal government "apprehended almost half a

million" unlawful aliens. Arizona at 397. The Court added that "[s]tatistics alone do not capture the full extent of Arizona's concerns" about illegal immigration, adding that the record in that case demonstrates "an 'epidemic of crime, safety risks, serious property damage, and environmental problems' associated with the influx of illegal migration across private land near the Mexican border." *Id.* at 398. Since last addressed by this Court, conditions have only worsened, and the nation's border remains in crisis. Each year, from FY 2014 through FY 2018, Customs and Border Patrol has continued to apprehend an average of over half a million "inadmissibles."

Broad deferred enforcement programs such as DACA and Deferred Action for Parents of Americas ("DAPA") create an incentive for migrants to enter the United States illegally, not waiting for proper immigration processes. This year has seen an explosion of illegal border crossings and apprehensions, with over 144,000 apprehensions in May 2019 alone.[3] Through the first 10 months of FY 2019, there have been 862,785 apprehensions on the Southwest border, but this number does not include illegal crossings, making it impossible to know how many total illegal immigrants are entering the United States each month. The Constitution did not invest in the federal judiciary the authority to protect the nation's borders, and it should not continue to impede

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[3] *See* Customs and Border Protection, Southwest Border Migration FY 2019, https://www.cbp.gov/newsroom/stats/sw-border-migration.

the President of the United States in his effort to do just that.

It is in this context — the existence of a true crisis at the border — a border that the President of the United States has the duty to protect — that these cases come to this Court.

STATEMENT OF THE CASE

The original DACA policy, implemented by the Obama Administration in 2012, was a decision not to enforce existing law against a broad class of persons. The later and lawfully indistinguishable DAPA policy, which also expanded DACA, was determined to violate the notice-and-comment provision of the Administrative Procedure Act ("APA") (5 U.S.C. § 701, *et seq*.) by the U.S. District Court for the Southern District of Texas. Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015). That decision was affirmed by the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit took the position that DAPA (and its expansion of DACA) judgment likely violated both the APA and the Immigration and Nationality Act. Texas v. United States, 809 F.3d 134, 136, 170-196 (5th Cir. 2015). Lastly, the judgment of the Fifth Circuit was affirmed by this Court on an equally divided vote. United States v. Texas, 136 S.Ct. 2271, 2272 (2016) (*per curiam*).

Once the Trump Administration's Department of Homeland Security announced its decision to rescind the DACA policy on September 5, 2017, it was subjected to multiple challenges: (i) in the U.S.

District Court for the Northern District of California (by the Regents of the University of California, *et al.*); (ii) in the District of Columbia (by the National Association for the Advancement of Colored People, *et al.*); and (iii) in the Eastern District of New York (by Batalla Vidal). These three cases led to the issuance of three nationwide injunctions against DHS that remain in effect to this day, nearly two years later.

SUMMARY OF ARGUMENT

The Trump Administration's decision to end the DACA non-enforcement policy — which has applied to a broad class of persons illegally in the United States — merely returns to the Department of Homeland Security ("DHS") the ability to begin to enforce immigration law as it had been enforced prior to 2012. The decision to end DACA and begin enforcement itself did not constitute an adverse action against any person illegally in the country, and therefore, no one should have had standing even to challenge its rescission.

The decision to end DACA was not a non-enforcement decision and should not have been evaluated as such. Rather, it was the opposite — a decision to revoke a non-enforcement policy. That decision to begin enforcement was unreviewable by the judiciary because it could have been made by DHS for any policy reason whatsoever. This Court's decision in SEC v. Chenery presents no bar to rescission of the DACA non-enforcement decision. The decision to enforce the law was not just presumptively

unreviewable by federal courts, it was also completely unreviewable.

The courts below have made the legality and constitutionality of DACA an issue in this case. The justification for the injunctions against the rescission of DACA was that it was predicated, in part, on an opinion by the Attorney General and Secretary of DHS that DACA was unlawful. Because the judges involved disagreed, believing that DACA was lawful, the courts felt empowered to enjoin DACA's rescission on the theory that the government had made a mistake of law in viewing DACA to be unlawful, thereby rendering the rescission illegitimate.

Actually, the courts had no basis to enjoin DHS, irrespective of whether DACA was lawful or unlawful. First, the judges were wrong in concluding that the original DACA policy was lawful, and if the Court agrees, the injunctions must be dissolved. However, even if this Court were to believe that the original DACA policy was lawful, the injunctions should still be dissolved. This case does not present a situation where there is a dispute of law between an agency and the courts, and the court must have the final say. There is no doctrine of judicial supremacy which requires the Executive to consult with and then bow to the opinion of the courts before determining and carrying out its executive functions. Nor are the Petitioners asking the courts to stand down from any role in reviewing individual immigration decisions. Rather, the courts have no role **at this time** in mandating what the nation's immigration policies will be.

ARGUMENT

I. DHS' DECISION TO END DACA AND ENFORCE IMMIGRATION LAW IS NOT JUDICIALLY REVIEWABLE.

Former Attorney General Sessions and the Secretary of the Department of Homeland Security determined that DACA should be phased out, *inter alia*, because "the Department lacked statutory authority to have created DACA in the first place," having been "'an unconstitutional exercise of authority'" with "the same legal and constitutional defects that the courts recognized as to DAPA."[4] Regents at 491-92.[5] The Ninth Circuit did not dispute — and indeed no one appears to have disputed — that the Trump Administration has the absolute discretion to end the DACA program based on a change in policy.[6] *See* Pet. Br. at 19-20; *see also* Regents at 510. And no one in this case has alleged that the executive branch has improperly enforced any immigration law that Congress enacted. *See* Pet. Br. at 19. Indeed,

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[4] The legality of the DACA program is discussed in Section III, *infra.*

[5] The government argues that it also had provided additional reasons for reversing the DACA program, and that those reasons independently support its decision. Pet. Br. at 37.

[6] Presumably, President Trump could simply declare "I have chosen to end DACA because I believe it necessary to protect the border," and that would moot this case, as APA does not apply to the President, absent express statement by Congress. *See* Franklin v. Massachusetts, 505 U.S. 768, 801 (1992).

revocation of DACA only signals an **intent to enforce** federal immigration law as it was enforced prior to 2012. The only sticking point for the courts has been the reasons given for the decision to end DACA and to begin to enforce immigration law. In other words, DHS made a permissible decision for an impermissible reason.[7] Due to this perceived error in reasoning (but not in judgment), the Ninth Circuit panel below claimed that the decision to end DACA is judicially reviewable.

A. Revising Reviewability Precedents: From "No Opinion" to "May Be" to "Is."

On its way to determining that the DHS decision to revoke DACA was judicially reviewable, the panel below first cited Heckler v. Chaney, 470 U.S. 821, 832 (1985), where this Court held that nonenforcement

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[7] This is not the first time that the lower courts have invalidated this President's policy agenda based on allegations of improper reasons for otherwise legitimate decisions. *See, e.g.,* IRAP v. Trump, 857 F.3d 554, 572 (4th Cir. 2017) (claiming President Trump's order "drips with religious intolerance, animus, and discrimination"). The lower courts have repeated these *ad hominem* attacks *ad nauseam*, claiming that hidden, secret motivations override the legality of otherwise perfectly acceptable policy choices with which federal judges personally disagree. In this case, the judges of the Ninth Circuit have made no secret of how they wanted the case to turn out. Claiming that President Obama's policies "[r]ecogniz[ed] the cruelty and wastefulness of deporting productive young people," the allegedly neutral and detached magistrates below decried the current administration's decision to end this so-called "'commendable exercise'" and to disappoint DACA recipients who were "trusting the government to honor its promises." Regents at 486-87.

decisions by the executive branch are presumed to be nonreviewable by the judiciary. Regents at 495. However, as the Ninth Circuit noted, this Court had "express[ed] no opinion" as to whether an agency's nonenforcement decision is judicially reviewable if based upon the belief that the agency lacked jurisdiction to institute proceedings. Chaney at 833 n.4.[8]

Undeterred, the Ninth Circuit filled in the alleged gap in Chaney with its own prior opinion in Montana Air Chapter No. 29 v. Federal Labor Relations Authority, 898 F.2d 753, 754 (9th Cir. 1990), finding that "the Supreme Court had nevertheless 'suggested that'" such decisions "'may be reviewable.'" Regents at 496. Thus, the Ninth Circuit understood Montana Air as having established that the "presumption of nonreviewability '**may be** overcome if the refusal is based solely on the erroneous belief that the agency lacks jurisdiction.'" *Id.* (emphasis added).

A page later, however, the Ninth Circuit took yet another leap, converting Montana Air's "may be overcome" language into a hard-and-fast rule that "a nonenforcement decision **is reviewable** ... if the decision was based solely on the agency's belief that it lacked jurisdiction to act." Regents at 497 (emphasis

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[8] This Court also discussed a situation where "the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion'" (*id.*), but that situation is not present here.

added).[9] Of course, by the Ninth Circuit's own admission, this Court has never reached that conclusion and neither had the Ninth Circuit — until its decision in this case.

Then, as the icing on its cake, the Ninth Circuit relied on City of Arlington v. FCC, 569 U.S. 290 (2013), for the proposition that "there is no difference between an agency that lacks jurisdiction to take a certain action, and one that is barred by the substantive law from doing the same...." *Id.* at 497. But the facts in this case have nothing to do with the City of Arlington distinction between an agency "**exceeding** the scope of its authority ... and its **exceeding** authorized application of authority that it unquestionably has,"[10] or between agencies which "'act **improperly**'" versus ones that act "'**beyond** their jurisdiction.'" Regents at 496 (emphasis added). Rather, in this case, DHS clearly has **not** acted in **excess** of or **beyond** its jurisdiction — but rather, it is the Ninth Circuit's opinion that, in implementing DACA, the agency has acted well **within** any limit on its authority. Here, the Ninth Circuit takes the position that DHS has far more authority than the agency itself believes it has. City of Arlington has no application here.

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[9] In Montana Air, the Ninth Circuit separately concluded that an agency's nonenforcement decision might be reviewable if based "upon adoption of a general policy so extreme as to amount to an abdication of the agency's statutory responsibilities." *Id.* at 754. Unsurprisingly, the Ninth Circuit never mentioned this rule when it opined that the original DACA program — adopting a general policy not to enforce the law — was lawful.

[10] City of Arlington at 299 (emphasis added).

B. The Decision to End DACA Is Not a "Nonenforcement Decision."

As discussed above, neither this Court's decisions nor the Ninth Circuit's own precedents support its conclusion that the decision to end DACA is judicially reviewable. But there is an even more fundamental weakness in the Ninth Circuit's decision. The decision to revoke DACA is not a "nonenforcement decision." Regents at 497. Rather, it is the opposite — **an enforcement decision** — a "decision to rescind a nonenforcement policy...." Pet. Br. at 21. Therefore, this is not a case like Chaney where an agency decides not to enforce because it does not have the jurisdiction **to bring** enforcement proceedings. Rather, here an agency is deciding to enforce the statute as it is written, based on the court below's theory that it does not have the authority **to abdicate** its responsibility to enforce the law.

This means that none of the factors weighing in favor of judicial reviewability of nonenforcement decisions is applicable here. *See* Pet. Br. at 31-32. Certainly when, as here, an agency states its intent to enforce the law, there is no "danger that [the] agenc[y] may not carry out [its] delegated powers with sufficient vigor...." Chaney at 834. Indeed, unlike actual nonenforcement decisions, an enforcement decision presents no conflict between the legislature and the Executive. Rather, with the DHS decision to revoke DACA and enforce immigration law, Congress and the executive branch are once again in lockstep. Congress has determined that certain persons are unlawfully present in the United States, and the

Trump Administration has announced its intent to enforce that law. It is only the lower federal courts — part of the allegedly "weakest of the three departments of power"[11] — which have stood in the way, forcing both other branches of government to bend to the judiciary's will through the liberal application of nationwide injunctions.[12]

Both Respondents and the courts below try to give the impression that the revocation of DACA will end all exercises of prosecutorial discretion, and that all DACA recipients immediately will be deported. On the contrary, there is no indication that the executive branch now will move generally to deport persons who are part of the DACA program. With DACA repealed, enforcement will simply revert to the way it was before — with real prosecutorial discretion being applied based on the facts and circumstances of actual individual cases. True prosecutorial discretion will replace the policy discretion, on a categorical basis, engaged in by the prior administration.

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[11] A. Hamilton, Federalist No. 78, reprinted in G. Carey & J. McClellan, The Federalist at 402 (Liberty Fund: 2001).

[12] This Court has held that when the Executive and Congress act arm-in-arm on a matter, the President's authority is at its maximum. Thus, a decision to enforce federal law, when "executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).

Respondents here are attempting to convince this Court to do on a wholesale level what instead should be done at the retail level. But as Petitioners note, "an alien subjected to removal proceedings may challenge the substantive validity of an adverse final order, but he may not raise a procedural claim that the government was arbitrary and capricious for commencing enforcement." Pet. Br. at 23.

In upholding the district court's issuance of a nationwide injunction, the Ninth Circuit has declared that a duly enacted statute may not be enforced by the Executive.[13] In other words, the judiciary has created a requirement that the federal government must continue to permit our immigration laws to be broken by hundreds of thousands of persons for a period now going on two years — unless permitted to do otherwise by the judicial branch. *See* Pet. Br. at 16. The injunction below was not issued because the decision to revoke DACA is unconstitutional, or because it conflicts with a statute or an international agreement

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[13] The Ninth Circuit credits itself with "empowering the Executive" in this case by informing DHS that it has greater authority than it believes. Regents at 490. Of course, this is just whitewash, as the Ninth Circuit's opinion upheld the district court's injunction preventing the administration from implementing its policy agenda and forcing the DACA program on the American people for nearly an additional two years. Later, the Ninth Circuit outrageously claims that its opinion in this case "prevents [an] anti-democratic and untoward outcome," allegedly because an accurate description of the law permits voters to properly allocate blame. Regents at 499. Of course, there is nothing democratic about four unelected and unaccountable judges below, all appointed by Democratic presidents, unilaterally impeding the political agenda of an elected Republican president.

or treaty. Rather, it was issued solely because an executive branch agency has taken the position that a law Congress enacted should be enforced, and that the prior administration's political abdication of its responsibility to enforce the law was wrong.

II. DHS' DECISION TO END DACA WAS LAWFUL UNDER SEC V. CHENERY.

Having determined that neither the APA nor the Immigration and Nationality Act imposes any bar to judicial review of the rescission of DACA, the Ninth Circuit examined the merits of the decision to end DACA, based on the "likelihood of success on the merits" prong of the preliminary injunction standard. Regents at 505, *et seq*.

The court below relied on this Court's decision in SEC v. Chenery Corp., 318 U.S. 80 (1943). There, the Court determined that it could not uphold an "order" by the Securities and Exchange Commission based on the record before the Court. The Court likened review of agency action to appellate review of lower court decisions: if a lower court reaches the right result but for the wrong reason, the appellate court nevertheless can sustain the decision if there is an alternative ground on which the lower court could have relied. However, in cases where a required showing, or factual or jury determination, was not made, the appellate court must remand the case to make that determination. Chenery at 88.

In rejecting the Commission's order in Chenery, the Court likened that case to the latter scenario — a

situation where "[t]he record is utterly barren of any such showing," and where "findings might have been made and considerations disclosed which would justify its order," but were not. *Id.* at 93-94. Specifically, the Court noted that the Commission had applied the wrong standard to the case but that, since "the Commission is not bound by settled judicial precedents," it was impossible for the Court to weigh in on the issue, and thus remanded the case for further findings. *Id.* at 89, 95.

This case involves precisely the opposite situation, and implicates the first scenario from Chenery — where a decision "must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.'" *Id.* at 88. Here, the decision to end DACA was said to have been made because the program was believed to have been unlawful and unconstitutional at its inception. And even if the Ninth Circuit is correct that such a justification was incorrect, the court admits that the decision to end DACA may have been justified for any number of other reasons, presumably including one as simple as "because we can." Unlike in Chenery, there is no need to send the decision back to DHS for additional fact finding or required showings, since the agency was not required to find any facts or make any showing before ending an entirely discretionary program.

In Chenery, the Commission's decision could have been justified **only** by a determination that was not made. Here, however, the decision to end DACA presumably could have been justified by just about

any reason, allegedly except the one that was given. Thus, like the other cases relied on by the panel below, Chenery provides no support for the Ninth Circuit's decision, but actually demonstrates that the DHS decision to end DACA should have been upheld.

III. DACA HAS BEEN UNLAWFUL SINCE ITS INCEPTION, BUT EVEN IF FOUND LAWFUL, WAS LAWFULLY RESCINDED.

A. The Ninth Circuit Clearly Erred by Failing to Consider the Constitutionality of DACA.

Although the questions presented to this Court do not directly raise the legality or constitutionality of DACA, that question is subsumed in the second question presented — whether the Trump Administration's decision to wind down the Obama Administration's DACA policy is lawful. Indeed, these *amici* argued at the petition stage that, in order to evaluate properly the rescission of DACA, it would be essential to evaluate the legality and constitutionality of the original policy. *See* Brief *Amicus Curiae* of Citizens United, *et al.* (Dec. 6, 2018) at 14.[14]

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[14] The government's brief on the merits extensively addresses the legality of the original DACA policy. *See* Pet. Br. at 43-52. So too did the Ninth Circuit's opinion below, as the legality of DACA was necessary for the courts below to conclude as to the illegality of the decision to end DACA. Regents at 506-510. *See also* Vidal v. Nielsen, 279 F. Supp. 3d 401, 420-27 (E.D. NY 2018). Thus, the lawfulness of the original DACA policy is before the Court, should the Court first find the rescission of DACA to be judicially reviewable. If this Court finds that DACA was unlawful to begin

Interestingly enough, the Ninth Circuit acknowledged that the Attorney General's (and DHS's) decision to end DACA was based in part on its perceived unconstitutionality. Regents at 492, 506. Yet, even though it purportedly rejected that argument, the Ninth Circuit actually did not address it. Rather, the court washed its hands of any constitutional strictures on the theory that "no court has ever held that DAPA is unconstitutional" and "the government makes no attempt in this appeal to defend the Attorney General's assertion that the DACA program is unconstitutional." *Id.* at 506.

That is quite an interesting conclusion. Certainly, it is axiomatic that, in a typical case, a criminal defendant can waive many constitutional challenges.[15] And an individual plaintiff certainly can waive constitutional claims, such as in Section 1983 litigation. But this is anything but a typical case. Here, with the Sessions[16] and Duke memoranda, it was **the government** arguing that **its own** ongoing action is unconstitutional.

In the typical cases discussed above, a waiver of constitutional claims or arguments means only that a court must **overlook past** possible constitutional

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with, then the nationwide injunctions against the Trump Administration's rescission of the program are even more clearly unlawful.

[15] *See* Criminal Resource Manual 626: Plea Agreements and Sentencing Appeal Waivers — Discussion of the Law.

[16] *See* Joint Appendix 877-878.

violations. Here, however, multiple federal courts, including the Ninth Circuit, **mandated future** government action, yet the Ninth Circuit expressly refused to analyze whether that action is constitutional or not. It was error for the court below to fail to consider DACA's constitutionality before ordering that the program continue unabated.

In fact, once the district courts issued their injunctions, DACA which originated as an executive action, became DACA perpetuated by judicial action. And it seems evident that courts have an obligation to *sua sponte* consider the constitutionality of their own orders. Indeed, had the Ninth Circuit examined the issue, it would have found that the DACA policy violated several constitutional provisions.

B. DACA Is an Unconstitutional Exercise of Legislative Power.

The Immigration and Nationality Act did not delegate to the Executive the power to invalidate immigration laws, either permanently or temporarily. Although the DACA policy advised beneficiaries that their status (or lack thereof) could be revoked at any time, DACA nevertheless granted a renewable two-year deferred action status, and the benefits that go with that status, to more than 700,000 aliens who are present in the United States in defiance of the immigration laws enacted by Congress.[17] DACA thus changed the nation's immigration law in a

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[17] *See* U.S. Citizenship and Immigration Services, Approximate Active DACA Recipients: Country of Birth (July 31, 2018).

fundamental way — a change that began in 2012 and continues to this day.

Any notion that the Obama Administration implemented DACA pursuant to congressional authority is not plausible. President Obama repeatedly failed to persuade Congress to enact the Development, Relief, and Education for Alien Minors Act ("DREAM") Act, which would have gone a long way towards eviscerating many of the nation's immigration laws. Thrice, Congress has made known its position with respect to the provisions of DACA. First, Congress explicitly legislated with regard to the legality of aliens' presence and the grounds for their removal. *See* Arizona v. United States, 567 U.S. 387, 396-97 (2012). As the U.S. Department of Justice Office of Legal Counsel's own Memorandum ("OLC Memo") notes, "[i]n the INA, Congress established a comprehensive scheme governing immigration and naturalization." *Id.* at 3.[18] Second, Congress implicitly rejected President Obama's DACA scheme, in refusing to take any steps toward enacting the DREAM Act and thus ratifying the program. Third, the President has only narrow, statutorily defined circumstances whereby he may grant deferred-action status for certain specified illegal aliens.

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[18] *See* K.R. Thompson, "The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others," U.S. Department of Justice, Office of Legal Counsel (Nov. 19, 2014).

Even the Ninth Circuit admits that "[u]nlike most other forms of relief from deportation, deferred action is not expressly grounded in statute." Regents at 487. In fact, President Obama publicly announced that he did not believe he had the power to implement a DACA-type policy.[19] Nevertheless, he implemented DACA anyway. President Obama's assumption of a broad general power (a power he acknowledged he did not have) to waive the nation's immigration laws for large numbers of persons is simply incompatible with the narrow and detailed statutory scheme. With DACA, President Obama not only established new national immigration policy outside of the legislative process, but also he acted contrary to Congress' clear desires, where his power is clearly "at its lowest ebb"[20] and, indeed, its exercise is unconstitutional.

C. DACA Violates Separation of Powers Principles.

The Ninth Circuit, as well as the parties before it, acknowledged that "DACA's *adoption* was a general statement of policy." Regents at 513. But such a policy is not the equivalent of legislation adopted pursuant to the bicameral approval and presentment process in Article I, Section 7 that govern the exercise of legislative power. *See* Dept. of Transportation v.

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

[20] Youngstown Sheet & Tube Co. at 637 (Jackson, J., concurring). *See* discussion in Section II.B, *infra*.

Ass'n. of American R.R., 135 S. Ct. 1225, 1237 (2015) ("DOT") (Thomas, J., concurring).

Legislative power is vested by Article I, Section 1 of the Constitution in Congress alone, and Congress "cannot delegate its 'exclusively legislative' authority at all." *Id.* The question, then, is whether DACA is an exercise of legislative power to create immigration policy or, as the Ninth Circuit alleges, stems from "the Executive's inherent authority to allocate resources and prioritize cases." Regents at 487.[21]

Although DACA is a rule governing the Secretary and DHS agents in the administration and enforcement of INA, it is also a rule governing private conduct. First, DACA requires an alien to apply for lawful presence status. Second, DACA requires the alien to affirmatively demonstrate that he is entitled to the deferred action status including, but not limited to, "not fall[ing] within the Secretary's enforcement priorities."[22] And third, presumably if an applicant

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[21] The Ninth Circuit initially claims that DACA involves a system whereby "each application is ... evaluated for approval by DHS personnel on a case-by-case basis." Regents at 490. Later, however, the court lets the truth slip, acknowledging that this alleged "case-by-case" review involves no "prosecutorial discretion," but rather that "DACA obviously allows (and indeed requires) DHS officials to exercise discretion in making deferred action decisions as to individual cases...." *Id.* at 507. In other words, DACA allows/requires voluntary/mandatory "decisions" by DHS rubber stampers. The Ninth Circuit's statements are doublespeak.

[22] "Frequently Asked Questions: Rescission of Memorandum Providing for Deferred Action for Parents of Americans and

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

D. DACA Violates the Take Care Clause.

After a bill becomes law, other constitutional provisions govern. The Take Care Clause of Article II, Section 3 requires the President to "take Care that the Laws be faithfully executed," and the President's Oath of Office requires him to "preserve, protect and defend the Constitution of the United States." So long as a law was duly enacted, and so long as it comports with the Constitution, the President has a duty to implement or enforce the law.[23] The reason that all persons illegally in the United States are not deported immediately is regularly described as being due to inadequate enforcement resources — not due to a decision by the President that the law was unworthy of being enforced. *See* Pet. Br. at 4.

Lawful Permanent Residents ("DAPA")," Department of Homeland Security (June 15, 2017).

[23] On the other hand, if a law was not duly enacted, or if it is "repugnant" to the Constitution, then the President could argue that he is duty-bound by his oath **not** to implement and enforce it. *See* Article II, Section 1, Clause 8. However, the Obama Administration never made such claims about the INA.

This Court has noted that, "[a]lthough the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes." Clinton v. New York, 524 U.S. 417, 439 (1998). However, the Court did not view this silence as authorizing executive action, but rather viewed it as "equivalent to an express prohibition" on the post-enactment executive meddling with enacted statutes. *Id.* Whenever a President acts to "effect the repeal of laws ... without observing the procedures set out in Article I, § 7 ... he is rejecting the policy judgment made by Congress and relying on his own policy judgment." *Id.* at 444-45.

Indeed, in the debates on the Constitution, Hamilton and other advocates of a strong executive proposed that "[t]he Executive ought to have an absolute negative" over laws passed by Congress. Records of the Federal Convention, June 4, 1787, reprinted in P. Kurland & R. Lerner, The Founders' Constitution ("Founders") (Univ. of Chicago Press: 1987), vol. 2, p. 389. However, other delegates thought that "[t]his was a mischievous sort of check," that "[t]o give such a prerogative would certainly be obnoxious to the temper of this country," and the proposal was unanimously rejected by a vote of the state delegations. *Id.* at 390. Since the framers specifically rejected the idea that the President should have an absolute veto, it certainly could not be argued that they would have favored absolute executive power to dispense with a law for policy reasons after it has been enacted. This "threat of nonenforcement gives the

President improper leverage over Congress by providing a second, postenactment veto." R. Delahunty & J. Yoo, "Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause," 91 TEX. L. REV. 781, 795 (2013).

Because DACA is a "'law' in the Blackstonian sense of [a] generally applicable rule[] of private conduct" (*see* Dep't of Transportation v. Ass'n of American R.R., 135 S.Ct. 1225, 1245 (2015), it is outside the authority of the DHS, because Article I, Section 1 vests legislative power exclusively in Congress. *Id*.

> The [Constitution] itself and the writings surrounding it reflect a conviction that the power to make the law and the power to enforce it must be kept separate, particularly with respect to the regulation of private conduct. [*Id.* at 1244.]

Thus, contrary to the lower courts' conclusions that DACA was a lawful exercise of authority under the INA, for the reasons set forth above, and for the reasons set forth by Petitioners, DACA was an unlawful and unconstitutional action, and it was appropriate for the Secretary to rescind it.

E. Even if DACA Was Lawful, It Can Be Lawfully Rescinded.

Although these *amici* contend that DACA was unlawful when implemented, the case does not turn on

that issue. If DACA was lawful when implemented, as the courts below have contended, it nevertheless was certainly possible for the Secretary of DHS and the Attorney General to have a different view, and take action based on that view, without first seeking judicial approval. Indeed, judges have no constitutional authority to decide constitutional issues not properly before them. Any belief that no President may have a view of the Constitution at odds with a judge is an extreme and unsupportable view of judicial supremacy.

Legal scholars may differ as to whether Congress and the President have a role to play in interpreting the law and the Constitution, or whether the Supreme Court's decisions become part of the supreme law of the land. That is an extreme view — advanced only on one known occasion by this Court in Cooper v. Aaron, 358 U.S. 1, 18 (1958), but at odds with a great deal of history. Famously, William Blackstone wrote that a judge's "opinion" represents merely "evidence" of what the law is. W. Blackstone, I Commentaries on the Laws of England (Univ. Chi. Facsimile ed.: 1765) at ¶ 71. In Marbury v. Madison, this Court likewise held that it is the role of judges "to say what the law is." 5 U.S. 137, 177 (1803). And just as "a legislative act contrary to the constitution is not law," (*id.*), a judicial opinion that "is manifestly absurd or unjust" is not simply "bad law" but rather "not law" at all. Blackstone at ¶ 70; *see also* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 107 (1993) (Scalia, J., concurring). It does not matter which branch of government is responsible for the act, action, or

opinion — if it violates the law or the Constitution, all are equally "not law."

Indeed, although Marbury established judicial review, it did not adopt judicial supremacy, "the idea that the Supreme Court should be viewed as the authoritative interpreter of the Constitution and that we should deem its decisions as binding on the other branches and levels of government...." E. Chemerinsky, In Defense of Judicial Supremacy, 58 WM. & MARY L. REV. 1459 (2017). The natural corollary to this view is that **any** opinion from **any** judge in **any** court in the country issued on **any** topic is the supreme law of the land, at least until overruled by a higher court.

Although judicial supremacy is viewed by some as "desirable because we want to have an authoritative interpreter of the Constitution,"[24] it has no basis in the structure of the Constitution, which divides federal power — including the power to opine on the law — among the branches. Chemerinsky at 1459. And, as *amici* argued in their brief at the petition stage, officers of the executive and judicial branches are "each independently bound by oath to support the Constitution in the exercise of [their] respective

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[24] This school of thought would require that, if this Court in District of Columbia v. Heller, 554 U.S. 570 (2008) had determined that "the right of the people" only referred to a right of the states to maintain the National Guard, overriding the Second Amendment's clear text, the Court's edict must be followed nationwide. History, however, teaches us that even this Court is not infallible.

powers." Brief *Amicus Curiae* of Citizens United, *et al.* in Support of Petitioners (Dec. 6, 2018) at 8. These oaths are to follow the Constitution and the law as the oath taker understands it to be, not as the Ninth Circuit would advise it should be. This understanding stands in contrast to the Ninth Circuit's view of "the judiciary [being] the branch ultimately responsible for interpreting the law...." Regents at 499.

President Andrew Jackson, in vetoing the national bank bill enacted by Congress, wrote that "[t]he Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution.... The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both." Veto Message of the Bill on the Bank of the United States, reprinted in 50 Core American Documents at 166-67 (C. Burkett, ed.: Ashbrook Press: 2016). Likewise, in Federalist 49, Madison wrote that "[t]he several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers...."[25] Finally, Thomas Jefferson wrote that "to consider the judges as the ultimate arbiters of all constitutional questions" is "a very dangerous doctrine indeed and one which would place us under the despotism of an

[25] J. Madison, Federalist No. 49, reprinted in The Federalist.

Oligarchy."[26] Petitioners agree, arguing that "as a coordinate Branch, the Executive has an independent duty to determine whether it lacks authority to act." Pet. Br. at 50.

Thankfully, this Court need not resolve any such thorny and enduring constitutional disputes in this case. This case does not involve a disagreement between the branches as to what the law or Constitution **requires** the President to do (or not to do), but what the law **permits** him to do. As the Ninth Circuit has admitted, this case is not a situation where the agency has actually done anything unlawful or unconstitutional. Rather, this case involves a matter of executive discretion.

In forming the nation's immigration policy, former Attorney General Sessions and DHS officials have relied upon their own opinions as to what the law and Constitution requires of them. They may be right, or they may be wrong, but it is not within the purview of the courts to weigh in every time another branch of government takes a position on a law or the Constitution, and then acts on that position.

The Ninth Circuit disagreed, claiming that "[t]he government may not simultaneously both assert that its actions are legally compelled, based on its interpretation of the law, and avoid review of that assertion by the judicial branch...." Regents at 486. But courts are not roving tribunals open to anyone

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[26] Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820).

who might dispute the legality of government action or inaction. *See Exodus* 18:16. As Petitioners note, "the Executive is entitled to act on its view of the bounds of its enforcement discretion even if the courts might disagree." Pet. Br. at 50-51.

Ironically, the Ninth Circuit does not accuse DHS officials of taking too expansive a view of the scope of executive authority, but rather too narrow a view. The Ninth Circuit may disagree with the assessment that DACA was wrongly implemented, but that does not consequently give rise to a power to have its say on the matter to set the record straight. In a case such as this, it is perfectly acceptable for President Trump and the Ninth Circuit to have different interpretations of the law. And, unlike many other times in our history, no constitutional crisis is created by DHS's decision to end DACA contrary to the wishes of the Ninth Circuit.

CONCLUSION

For the foregoing reasons, the decisions issued by the U.S. Court of Appeals for the Ninth Circuit and the U.S. District Court for the District of Columbia, and the order issued by the U.S. District Court for the Eastern District of New York granting an injunction, should be reversed.

Respectfully submitted,

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August 26, 2019