NO. 15-674

In the
Supreme Court of the United States

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

STATE OF TEXAS, *et al.*,
Respondents.

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

BRIEF FOR *AMICUS CURIAE* THE UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF RESPONDENTS

KERRY W. KIRCHER
General Counsel
WILLIAM PITTARD
Deputy General Counsel
TODD B. TATELMAN
Senior Assistant Counsel
ELENI M. ROUMEL
ISAAC ROSENBERG
KIMBERLY HAMM
Assistant Counsels
OFFICE OF
GENERAL COUNSEL
U.S. HOUSE OF
REPRESENTATIVES
219 Cannon House Office Bldg.
Washington, DC 20515

ERIN MURPHY
Counsel of Record
ANDREW N. FERGUSON
BANCROFT PLLC
500 New Jersey Ave., NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
emurphy@bancroftpllc.com

Counsel for Amicus Curiae

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STATEMENT OF INTEREST[1]

Amicus curiae the United States House of Representatives is one of the two Houses comprising the Congress in which "All legislative Powers" granted by the Constitution are vested. U.S. Const. art. I, §1. While individual members of Congress and groups of members file *amicus* briefs in this Court with some frequency, the filing of an *amicus* brief on behalf of the House itself is no ordinary matter. But this case involves no ordinary assertion of executive power. The Executive claims the power—unchecked by statutory criteria, administrative procedure, or even judicial review—to decree that millions of individuals may live, work, and receive benefits in this country even though federal statutes plainly prohibit them from doing so.

That is an extraordinary claim indeed. Under our Constitution, Congress possesses the "Power To … establish an uniform Rule of Naturalization." U.S. Const. art. I, §8, cl.4. The role of the Executive is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §3, cl.5. The Executive is certainly free to disagree with the immigration laws and to try to persuade Congress to revise them. And the Executive even has some discretion (albeit nowhere near the unlimited discretion it claims) to decide how

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

best to use its limited enforcement resources. But the Executive does not have the power to authorize—let alone facilitate—the prospective violation of the immigration laws on a massive class-wide scale. Because petitioners' contrary claim would undermine not only the immigration laws Congress has enacted, but also the separation of powers that underpins our very constitutional structure, the House submits this *amicus* brief in support of respondents.

STATEMENT OF THE CASE

A. Statutory Background

The Immigration and Nationality Act ("INA"), 8 U.S.C. §§1101 *et seq.*, is among the most detailed, complex, and comprehensive statutory schemes ever devised by Congress. The Act comprises hundreds of laws, spanning more than 500 pages of the U.S. Code, and identifies in painstaking detail who is authorized to live, work, and receive benefits in this country. In addition to making it illegal to enter or reenter the country under circumstances not authorized by Congress, *see* 8 U.S.C. §§1325-26, the immigration laws identify with specificity the limited circumstances in which the Executive may authorize individuals to stay even if their presence is not authorized by statute, *see, e.g.*, *id.* §§1229b, 1254a. While the Executive once claimed relatively broad discretion in that respect, over the past few decades, Congress has repeatedly curbed that discretion.

For instance, the Executive once claimed broad statutory power to grant "voluntary departure" to individuals who were present without authorization, a power the Executive frequently used to respond to unanticipated developments, such as an armed

conflict or a natural disaster, in the individual's home country. *See id.* §§1252(b), 1254(e) (1994); Petr.Br.5, 49-51. But Congress largely eliminated that practice in 1990 when it created a "temporary protected status" statute identifying when and how such extraordinary developments can be invoked as protection against removal. *See* Immigration Act of 1990 ("IMMACT"), Pub. L. No. 101-649, §302(a), 104 Stat. 4978, 5030 (codified as amended at 8 U.S.C. §1254a). And Congress subsequently eliminated the kind of "extended voluntary departure" that once operated as de facto permission to stay indefinitely by imposing a 120-day limit on all "voluntary departure." *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, §304(a)(3), 110 Stat. 3009-546, -596 (codified as amended at 8 U.S.C. §1229c).

Likewise, while the Executive once claimed broad statutory discretion to "parole" individuals into the United States on a temporary basis, *see* 8 U.S.C. §1182(d)(5)(A) (1994), Congress constrained that discretion after it became concerned that the Executive was end-running statutory restrictions by indefinitely paroling whole classes of inadmissible aliens "with the intent that they will remain permanently," H.R. Rep. No. 104-469, pt.1, at 140-41 (1996). *See* IIRIRA, §§301(a), 602(a). Thus, under current law, the Executive may "parole" otherwise inadmissible individuals "into the United States … only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. §1182(d)(5)(A).

Congress' actions with respect to the parents of citizens and lawful permanent residents are of a piece with this pattern. A statute has long been on the books identifying the circumstances in which parents may rely on their children's status to stay in this country even if they are not otherwise authorized to do so. Before 1996, the relevant statute authorized the Attorney General to suspend deportation and grant lawful permanent residence to an individual who established:

> (a) physical presence in the United States for at least seven years,
>
> (b) good moral character, and
>
> (c) that removal would result in extreme hardship to the alien or to his … child who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. §1254(a)(1) (1994). Congress subsequently curtailed that power through IIRIRA, which increased the continuous presence period and stiffened the hardship requirement. *See* IIRIRA, §304(a)(3).

Thus, under current law, the Executive may cancel the removal of an individual on grounds that he or she is the parent of a citizen or lawful permanent resident *only* if the individual:

> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> (B) has been a person of good moral character during such period;

> (C) has not been convicted of [certain offenses]; and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's … child who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. §1229b(b)(1). And Congress further limited the Executive to granting cancellation to only "4,000 aliens in any fiscal year." *Id.* §1229b(e)(1).

Section 1229b(b)(1) unquestionably does not provide a path to relief for all parents of citizens or lawful permanent residents who are living here without authorization. But that was no accident on Congress' part. The reality that there are far more than 4,000 such individuals was no more lost on Congress in 1996 than it is today. Even then, roughly five million people were estimated to have been living in this country illegally for at least a year, and in many instances much longer. *See, e.g.*, U.S. Citizenship & Naturalization Serv., The Triennial Comprehensive Report on Immigration ES-2 (1997), http://1.usa.gov/1Y4Y3OS; H.R. Rep. No. 104-469, pt. 1, at 110. Nonetheless, taking into consideration the competing interests that inhere in a national problem of the magnitude and complexity of immigration, Congress made a conscious decision to *narrow* the Executive's discretion to treat that familial relationship as a ground for granting relief to individuals living here illegally.

Of course, there are also means through which such individuals may enter the United States legally, and with authorization to remain permanently.

But Congress has placed limits on the extent to which a parent-child relationship may be considered in that context as well. *See* 8 U.S.C. §1151(a)(1), (b)(2)(A)(i). An "immediate-relative" visa authorizing permanent residence on that basis is available only to the parent of a citizen who is at least 21 years old. *Id.* §1151(b)(2)(A)(i). While there is no limit on how many such visas may issued, *id.*, they are available only to individuals not subject to a ten-year reentry bar as a result of having "been unlawfully present … for one year or more," *id.* §1182(a)(9)(B)(i)(II). Accordingly, most individuals who are presently living in this country illegally would need to leave for at least ten years to become eligible to return on an immediate-family visa.

Congress has made changes to the immigration laws since 1996, including some that extend a path to lawful presence to a new category of individuals, or remove barriers to a path that already existed.[2] But Congress has repeatedly declined to enact legislation that would establish an additional path to lawful presence for the parents of citizens or lawful permanent residents. *See, e.g.*, H.R. 4437, 109th Cong. (2005); S. 2611, 109th Cong. (2006); S. 1348,

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[2] *See, e.g.*, Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §803, 127 Stat. 54, 111 (children of victims of domestic violence); Violence Against Women and Department of Justice Reauthorization Act of 2005 ("2005 VAWA"), Pub. L. No. 109-162, §§805, 814, 816, 119 Stat. 2960, 3056-60 (victims of domestic violence); Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, §568(c), 123 Stat. 2142, 2186-87 (2009) (surviving spouses of citizens); USA PATRIOT Act of 2001, Pub. L. No. 107-56, §423(a), 115 Stat. 272, 360-61 (family members of citizens killed by terrorism).

110th Cong. (2007); S. 1639, 110th Cong. (2007); S. 744, 113th Cong (2013).

B. Factual Background

The President has fervently supported revising the immigration laws to provide a path through which many individuals living in this country unlawfully may obtain authorization to stay. He has urged Congress repeatedly (but unsuccessfully) to enact various versions of the "DREAM Act," which would authorize the Executive to extend legal status to most individuals who entered illegally before age 16. *See, e.g.*, S. 3992, 111th Cong. (2010); S. 952, 112th Cong. (2011); Address Before a Joint Session of the Congress on the State of the Union, 5 Pub. Papers 48, 52 (Jan. 25, 2011). The President also has urged Congress (again unsuccessfully) to enact legislation that would extend legal status to most of the more than 4 million of individuals with citizen or lawful permanent resident children. *See* Remarks in El Paso, Texas, 5 Pub. Papers 504, 508 (May 10, 2011); S. 1258, 112th Cong. (2011).

At the same time, the President acknowledged that he lacks statutory or constitutional authority to alter the immigration status of these individuals on his own. "I'm President, I'm not king," he explained.

> If Congress has laws on the books that says [sic] that people who are here who are not documented have to be deported, then I can exercise some flexibility in terms of where we deploy our resources, to focus on people who are really causing problems as a opposed to families who are just trying to work and support themselves. But there's a limit to the

> discretion that I can show because I am obliged to execute the law. That's what the Executive Branch means. I can't just make the laws up by myself.

Transcript of President Barack Obama with Univision, L.A. Times (Oct. 25, 2010), http://lat.ms/1tkAH6R; *see also, e.g.*, JA14-16.

Notwithstanding these candid and constitutionally correct acknowledgements, on June 15, 2012, the Secretary of Homeland Security ("the Secretary") announced the creation of a program designed to achieve the same result as the proposed but unenacted DREAM Act. Through this "Deferred Action for Childhood Arrivals" (DACA) program, the Secretary invited individuals under age 31 who satisfy criteria nearly identical to that set forth in most versions of the proposed DREAM Act—*i.e.*, they entered before age 16, have lived here continuously for at least five years, have not been convicted of certain crimes, and are students of good moral character who pose no threat to national security—to come forward and obtain a written "deferred action" designation that authorizes them to continue living here for two years. *See* JA102-06. Enforcement officials have proceeded to reflexively approve nearly every "deferred action" application received through DACA. Pet.App.256a.

At the time, the President modified his position to insist that DACA represented the outermost limit of his statutory and constitutional authority. Four months after DACA's creation, he explained: "I've done everything I can on my own." JA23. He later reiterated that the Executive had already "stretched

our administrative flexibility as much as we can," JA24, and that any further "broadening" of deferred action "would be ignoring the law in a way that I think would be very difficult to defend legally." JA388. But two years later, the President changed his position once again. When the House declined to take up his preferred immigration reform bill, the President instructed his subordinates "to identify additional actions my administration can take on our own." Remarks on Immigration Reform, 2014 Daily Comp. Pres. Doc. 504, at 2 (June 30, 2014).

On November 20, 2014, the Secretary responded by issuing two memoranda, both purportedly exercises of his "prosecutorial discretion" under the immigration laws. The first bears some hallmarks of an exercise—albeit a very aggressive exercise—of prosecutorial discretion. In an effort to "develop smart enforcement priorities, and ensure that use of … limited resources is devoted to the pursuit of those priorities," it instructs all immigration enforcement agents to prioritize the removal, first, of unauthorized aliens who are "threats to national security, border security, and public safety"; second, of "misdemeanants and new immigration violators"; and third, of aliens who have committed "other immigration violations" and have been issued a removal order "on or after January 1, 2014." Pet.App.421, 423-26. While the memorandum authorizes enforcement agents to pursue removal of other individuals only if an Immigration and Customs Enforcement field office director concludes that doing so "would serve an important federal interest," the memorandum expressly disclaims any intent "to prohibit or discourage the apprehension, detention, or

removal of aliens unlawfully in the United States who are not identified as priorities herein." Pet.App.426.

The second memorandum does something else entirely. It begins by expanding DACA, relaxing its eligibility criteria and extending its "deferred action" designation from two years to three. Pet.App.415a-16a. The memorandum then establishes a new "similar" program through which "parents of U.S. citizens or lawful permanent residents" can come forward and apply for comparable "deferred action" status. Pet.App.414a-17a. To be eligible for "deferred action" under this new program (known as DAPA), an individual must (1) have a child who is a citizen or lawful permanent resident, (2) have continuously resided in the United States since January 1, 2010, (3) be present both on the date of the memorandum and when the "deferred action" application is filed; (4) have no lawful status as of the date of the memorandum, (5) not be an enforcement priority under the separate enforcement memorandum, and (6) "present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate." Pet.App.417a.

DAPA is not, as petitioners contend, merely a means of "notifying an alien that [the Department of Homeland Security ("DHS")] has decided to forbear from removing him for a designated period." Petr.Br.36. An individual whose "deferred action" application under DAPA is granted is designated "lawfully present in the United States" for the next three years. Pet.App.413a. That designation is not a just a matter of semantics. Among other things, the Secretary treats it as sufficient to designate an

individual "lawfully present" for purposes of 8 U.S.C. §1611(b), which dictates who may receive benefits under Social Security, Medicare, and railroad-worker programs. *See* Petr.Br.8. The Secretary also treats it as sufficient to toll the accrual of time during which an alien is "unlawfully present" for purposes of 8 U.S.C. §1182(a)(9)(B), which imposes time-bars on lawful reentry after an extended period of unlawful presence. *See* Petr.Br.9 n.3. And the Secretary treats it as sufficient to entitle an individual to apply for work authorization. Pet.App.417a-18a.

While this second memorandum purports, like the first, to be an exercise of "prosecutorial discretion," the Secretary's explanation for DAPA has little, if anything, to do with enforcement priorities, allocation of agency resources, or any other "factors which are peculiarly within [the Secretary's] expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Indeed, individuals are eligible for DAPA only if they are not "enforcement priorit[ies]" under the first memorandum—*i.e.*, only if the Secretary has already instructed enforcement agents not to pursue their removal. Pet.App.417a. The Secretary's explanation for DAPA instead rested on a different kind of policy judgment altogether: In his view, "most individuals" eligible for DAPA "are hard-working people who have become integrated members of American society" and who should be "encourage[d] … to come out of the shadows, submit to background checks, pay fees, apply for work authorization …, and be counted." Pet.App.415a. DAPA creates a mechanism through which they can do just that—even though Congress has declared their presence unlawful, mandated their removal, and prohibited their employment. As the

President candidly acknowledged shortly afterward, DAPA is "an action" not to enforce, but "to change the law." Pet.App.384a.

SUMMARY OF ARGUMENT

Petitioners come before this Court with the most aggressive of executive power claims. According to petitioners, not only has Congress bestowed upon the Executive the power to decide whether millions of individuals who are living in this country illegally may stay, work, and receive benefits; that power is so absolute that it is unconstrained by statutory criteria, administrative procedure, or even judicial review. Thus, in petitioners' view, the Executive may decide for itself whether to bestow prospective authorization to violate the immigration laws on a case-by-case basis, a categorical basis, or even across the board, and there is nothing under the immigration laws or even the Administrative Procedure Act that anyone can do about it. More remarkable still, petitioners insist that the Executive has unqualified discretion to bestow "lawful presence," work authorization, and other benefits on the very same class of individuals on which Congress repeatedly has refused to bestow those very same benefits. In other words, petitioners claim to have discovered lurking in the immigration laws "sweeping authority," Petr.Br.63, to achieve through unilateral and unreviewable executive action precisely what Congress has consistently declined to amend those laws to achieve.

That extraordinary contention strains credulity. It is the rare statute that grants the Executive absolute and unreviewable discretion to do *anything*. A statute that grants the Executive blanket discretion

to resolve a question of the magnitude and scope of the question at issue here is unheard of—and understandably so, as it would raise constitutional concerns of the first order. At a bare minimum, if the Executive is to make such an improbable claim, it must have the most compelling of evidence that Congress intended to achieve that untenable result. Yet petitioners rest their claim principally on the notion that the power to authorize the prospective violation of the immigration laws on a massive class-wide scale is *implicit* in the Executive's purportedly unreviewable "enforcement discretion." That starting conception of enforcement discretion is a stretch even for the Executive. While the Executive's obligation to "take Care that the Laws be faithfully executed," U.S. Const. art. II, §3, cl.5, is not so absolute as to admit of no discretion as to which enforcement actions to pursue, it manifestly does not admit of discretion—let alone statutorily, procedurally, and judicially unchecked discretion—to affirmatively authorize, and even facilitate, massive prospective violation of the very laws the Executive is charged with executing.

Such an improbable grant of power, if even constitutionally permissible, would have to come directly and explicitly from the immigration laws themselves, not from vague allusions to "enforcement discretion." But petitioners fare no better there, as the statutes on which they rely do not even *mention* the powers they claim, let alone convey them in sweeping and absolute terms. Petitioners are thus left attempting to demonstrate that Congress has somehow implicitly "ratified" the Executive's claimed authority to confer "lawful presence," work authorization, and other benefits on anyone it pleases,

no matter what the immigration statutes say. But petitioners' revisionist history of past exercises of executive discretion in this area largely ignores the reality that the recent history of the immigration laws has been one of *constraining*, not ratifying or encouraging, the Executive's ability to exercise the kind of discretion it claims here. Moreover, petitioners fail to grapple with the fact that the programs to which they analogize are simply nothing like DAPA, as those programs facilitated Congress' efforts to *grant* relief to particular classes of individuals. DAPA, by contrast, is a naked effort to circumvent Congress' *refusal* to grant relief to the very class to which it applies.

At bottom, DAPA finds no support in any recognizable concept of "enforcement discretion," any express grant of statutory authority, or any "longstanding" executive practice. Instead, DAPA is an unprecedented effort, as the President acknowledged, to "change" the immigration laws by executive fiat. Whether couched as a statutory power, a constitutional power, or an implicit component of "enforcement discretion," that is not a power the Executive possesses. The Constitution gives *Congress* the power to make the law; the Executive's obligation is to enforce it. Petitioners identify nothing that comes close to justifying abandonment of that bedrock constitutional principle.

ARGUMENT

I. The Executive's "Discretion" To Enforce The Law Does Not Include Blanket Power To Authorize Its Prospective Violation.

The extraordinary conception of executive power that petitioners press exceeds the outermost limits of

law, logic, and the Constitution. Statutes should not lightly be construed to empower the Executive to resolve "a question of deep 'economic and political significance' that is central to [the] statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). Nor should they lightly be construed to enable the Executive "to accomplish the agency hat trick—avoid defense of its policy at any stage." *U.S. Tel. Ass'n v. FCC*, 28 F.3d 1232, 1235 (D.C. Cir. 1994). Yet here, the Executive claims not just discretion, but unreviewable discretion, to resolve one of the Nation's most hotly debated social, economic, and political issues. Moreover, petitioners' argument goes beyond even an implausible claim of discretion to "'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Chaney*, 470 U.S. at 833 n.4. For according to petitioners, Congress has given the Executive absolute discretion not just to decline to *enforce* the immigration laws against more than 4 million people, but to affirmatively *authorize* those people to keep right on violating those laws.

It would be a bizarre statute indeed that empowered the Executive to authorize and even encourage people to do the very things the statute prohibits—and then insulates the Executive from any substantive, procedural, or judicial constraints on that power. At the very least, if Congress truly intended to accomplish such an improbable result (which it manifestly did not), then "it surely would have done so expressly." *King*, 135 S. Ct. at 2489. Yet petitioners do not rest their sweeping theory on any *express* grant of absolute discretion to the Executive—something Congress knows full well how to accomplish.

See Resp.Br.42 n.32 (collecting immigration statutes granting Executive "sole and unreviewable discretion"). Instead, petitioners' principal claim is that the power to affirmatively authorize prospective violation of the immigration laws on a massive scale is implicit in the Executive's purportedly unreviewable "enforcement discretion."

Even setting aside the dubious proposition that the Executive's power to decline to enforce a law knows no bounds, *but see, e.g.*, *Chaney*, 470 U.S. at 833 n.4; U.S. Const. art. II, §3, cl.5, that lesser-includes-the-greater theory of "enforcement discretion" defies common sense. *Cf. NFIB v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) (Roberts, C.J.) (Necessary and Proper Clause "does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated" (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819))). Indeed, the Executive action at issue here cannot even meaningfully be "defend[ed] … as an exercise of … enforcement discretion." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014). There is an obvious difference between declining to devote resources to enforcing a law in some circumstances and "purport[ing] to *alter* [the law] and to establish with the force of law that otherwise-prohibited conduct will not violate" it. *Id.* It is one thing, for instance, for the Executive to prioritize enforcement actions against the worst violators of pollution statutes. It is another thing entirely for the Executive to identify a substantial class of violators as to which it believes those statutes should not apply and then invite those violators to apply for a government-issued card that every enforcement agent in the country is instructed

to treat as authorizing them to continue violating those statutes unless and until the Executive changes its mind.

That commonsense distinction was not lost on the Secretary when he created DAPA. After all, the Secretary issued not one memorandum on November 20, 2014, but two. The enforcement memorandum (not at issue here) is confined to establishing which unlawfully present aliens are prioritized for removal, to ensure that the "limited resources" available for enforcement are put to most effective use. Pet.App.421. The second memorandum, by contrast, allows millions of unlawfully present aliens to apply for authorization to stay, work, and receive benefits, on grounds that those particular individuals should be "encourage[d] … to come out of the shadows, submit to background checks, pay fees, apply for work authorization …, and be counted." Pet.App.415a. Whatever the Secretary may have chosen to label those two distinct actions, only the first bears any resemblance to any recognizable concept of "enforcement discretion."

Indeed, petitioners identify no other context in which "enforcement discretion" includes the power not just to overlook past violations of the law, but to license *future* violations as well.[3] When the Executive

[3] To the extent petitioners claim *Wayte v. United States*, 470 U.S. 598 (1985), fits that bill, Petr.Br.38-39, they are mistaken. The "passive enforcement" policy at issue there simply identified the circumstance in which the government would investigate individuals who failed to register for the draft. It did not invite individuals to come forward and obtain permission to refuse to register going forward.

enters into a deferred prosecution agreement, it does not empower the defendant to continue violating the law so long as he first confesses his past wrongdoings. It conditions deferred prosecution on remedying past violations and refraining from committing future ones. *See, e.g.*, Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 Am. Crim. L. Rev. 159, 161 (2008); U.S. Dep't of Justice, U.S. Attorneys' Manual §9-22.010 (1997) (explaining that prevention of future crimes and remediation of past ones are chief functions of pre-trial diversion). The IRS's voluntary disclosure program for offshore account offenses did not authorize participants to continue declining to pay taxes on their accounts so long as they provided notice of their intention to do so. It required them to come forward, pay back taxes and penalties, and disclose the account for future taxation. *See* IRS, Offshore Voluntary Disclosure Program: Frequently Asked Questions & Answers 2014, http://1.usa.gov/1V123So. *That* is how the Executive exercises "enforcement discretion"—not by affirmatively authorizing people to continue violating the law, and making it easier for them to do so.

Petitioners' novel theory that the power to enforce the law includes the power to authorize its prospective violation not only defies law and logic; it also raises constitutional concerns of the first order. Under our Constitution, "the legislature makes, the executive executes, and the judiciary construes the law." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825). To be sure, that division of labor may be inconvenient at times, particularly when issues of immense national importance are at stake. But "[t]he doctrine

of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). In this respect as in so many others, "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992).

To preserve that separation of powers, this Court has "not hesitated to strike down provisions of law" or reject assertions of power "that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch." *Mistretta v. United States*, 488 U.S. 361, 382 (1989); *see also, e.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Clinton v. City of New York*, 524 U.S. 417 (1998); *INS v. Chadha*, 462 U.S. 919 (1983); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). Nor has the Court hesitated to apply constitutional avoidance principles to reject statutory interpretations that create separation of powers concerns. *See, e.g.*, *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. ("The Benzene Case")*, 448 U.S. 607, 646 (1980); *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 342-43 (1974); John F. Manning,

The Nondelegation Doctrine as a Canon of Avoidance, 2000 Sup. Ct. Rev. 223.

Petitioners invite—indeed, urge—the Court to interpret the immigration laws to create precisely the sort of unconstitutional delegation the Court has repeatedly construed statutes to avoid. After all, petitioners do not contend that DAPA is permissible because it is consistent with some "intelligible principle," *Mistretta*, 488 U.S. at 372, that Congress has established to guide or constrain the Secretary's professed power to decide who may violate those laws. To the contrary, petitioners take great pains to argue that *nothing* constrains the Secretary's purported power to confer—or revoke, *see* Petr.Br.5, 38—"deferred action" status and the work authorization and benefits that come with it. Indeed, petitioners are so adamant that there is "no meaningful standard" by which the Secretary's actions may be judged that they insist even this Court lacks any power to review them. Petr.Br.36.

Yet, by the Secretary's own telling, DAPA is not grounded in any of the typical factors that have been understood to be "peculiarly within [the Executive's] expertise," such as "whether a violation has occurred," or "whether agency resources are best spent on this violation or another." *Chaney*, 470 U.S. at 831. Indeed, individuals are eligible for DAPA only if the Secretary has already concluded that they are *not* an "enforcement priority." *See* Pet.App.417a. The Secretary grounded DAPA in something else entirely—his views about what the immigration laws should permit. And in his view, rather than prohibiting the class of individuals covered by DAPA

from staying, working, and receiving benefits, those laws should "encourage these people to come out of the shadows, submit to background checks, pay fees, apply for work authorization …, and be counted." Pet.App.415a.

That is certainly a policy question on which reasonable minds can differ. But it is by no stretch of the imagination a question "peculiarly within [the Executive's] expertise." *Chaney*, 470 U.S. at 831. To the contrary, it is a question peculiarly within—indeed, constitutionally committed to—*Congress'* expertise. *See* U.S. Const. art. I, §8, cl.4. And Congress has concluded that the class of individuals covered by DAPA is *not* "lawfully present," is *not* authorized to work, and is *not* entitled to receive benefits. Unless and until Congress decides to change those laws, the Executive's obligation is to "take Care that [they] be faithfully executed." U.S. Const. art. II, §3, cl.5. Whatever else may be said about the scope of the Executive's "enforcement discretion" in fulfilling that charge, that discretion plainly does not include the power—let alone the statutorily, procedurally, and judicially unchecked power—to authorize prospective violation of those laws on a massive class-wide scale.

II. The Immigration Laws Do Not Grant The Executive Power To Authorize—Let Alone Facilitate—Their Prospective Violation.

Assuming the Constitution could even tolerate a grant of unbridled executive power to confer "lawful presence," work authorization, and other benefits on individuals who are living in this country illegally, any claim to such power must rest on something far more compelling than vague notions of "enforcement

discretion." Indeed, nothing short of an explicit statutory grant could suffice to prove that Congress actually intended to grant such a constitutionally suspect power. Yet petitioners do not rest their sweeping theory of executive power on any such express grant of "sole and unreviewable discretion." Nor do they even rest their theory on an express grant of power to confer "deferred action," "lawful presence," work authorization, or anything else on individuals living in this country illegally.

Instead, petitioners seek to infer this unfettered executive power from a most unlikely trio of sources: the provision of the INA that "charge[s]" the Secretary with the "administration and enforcement" of the immigration laws, 8 U.S.C. §1103(a); the provision of the Department of Homeland Security's organic act that assigns one of the new agency's under-secretaries responsibility for "[e]stablishing national immigration enforcement policies and priorities," 6 U.S.C. §202(5); and a provision of the statutory prohibition on employing unauthorized aliens that defines "unauthorized alien" to exclude an individual "authorized … by the Attorney General" to work, 8 U.S.C. §1324a(h)(3). That is it. After combing hundreds of immigration statutes spanning more than 500 pages of the U.S. Code, the best statutory authority petitioners can identify for the proposition that the Executive possesses absolute discretion to authorize more than 4 million individuals to violate those laws on a prospective basis is a vesting clause, an assignment of responsibility to a new under-secretary, and a definitional provision that does not assign any power at all.

The principle that Congress "does not … hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), suffices to doom any suggestion that these statutes actually *grant* the power the Executive claims. So, too, does their text. To start with section 1103(a), that statute says not a word about "deferred action," "work authorization," or the power to confer benefits on unlawfully present individuals. Instead, the principal language on which petitioners rely reads:

> The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers[.]

8 U.S.C. §1103(a)(1). As is plain on its face, the purpose of that provision is simply to establish that the Secretary, not some other Executive official, is "charged with the administration and enforcement of" the immigration laws, except insofar as those laws say otherwise.

To be sure, that charge is not so absolute as to admit of no discretion to determine which enforcement actions to prioritize—subject, of course, to such constraints as Congress and the Constitution may impose. *See, e.g.*, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. F, tit. I, 129 Stat. 2242, 2493 (2015); Consolidated Security, Disaster

Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, div. D., tit. II, 122 Stat. 3574, 3654-67 (2008); U.S. Const. art. II, §3, cl.5; *Chaney*, 470 U.S. at 833 n.4. But nothing about section 1103(a)(1) explicitly or implicitly evinces any intent to empower the Secretary to go beyond exercising "enforcement discretion" in the ordinary sense and actually authorize violations of the very laws he is charged with enforcing. If anything, section 1103(a)(1) undermines petitioners' argument. Just as "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952), the Secretary's charge to "administer[] and enforce[]" the immigration laws refutes the idea that Congress has assigned him the power to authorize—and even facilitate—their prospective violation.

Petitioners vaguely allude to other, unspecified provisions of section 1103(a) that authorize the Secretary "to exercise discretion in numerous respects." Petr.Br.63. But they tellingly decline to identify which of those provisions has anything to do with the power claimed here—and for good reason, as not a single one says anything about making "deferred action," "work authorization," or any other benefits available to individuals who are living in this country illegally. Petitioners make passing reference (at 2, 70) to subsections (a)(2) and (a)(3), but surely the Secretary's power to "control, direct[ ], and supervis[e] … all employees," 8 U.S.C. §1103(a)(2), does not empower him to direct them to do anything he pleases, without regard to what the hundreds of immigration laws that follow say. Nor does the power to "establish

such regulations; … issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter," *id.* §1103(a)(3), say anything about the scope of the Secretary's "authority under" those "provisions."

Petitioners' reliance on 6 U.S.C. §202(5) fails for much the same reasons. At the outset, section 202 is not even part of the title of the U.S. Code that houses the immigration laws. It is a provision of DHS's organic act that assigns responsibilities to the Under Secretary for Border and Transportation Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §402, 116 Stat. 2135, 2177-78. Moreover, the responsibility section 202(5) assigns is responsibility for "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. §202(5). That is not, as petitioners seem to think, the power to make all manner of immigration policy, unconstrained by statutory criteria, administrative procedure, or even judicial review. It is simply the power to develop policies and priorities for *enforcing* the immigration laws—which, as already discussed, plainly do not include policies designed to facilitate their violation.

That leaves the definitional provision of 8 U.S.C. §1324a, the statutory prohibition on employing an "unauthorized alien." Here, too, petitioners identify no statutory text that by its terms gives the Executive power—let alone unfettered power—to grant "lawful presence," work authorization, or any other benefit to people living here illegally. Instead, petitioners seek to infer that power from the bare fact that section 1324a defines "unauthorized alien" to mean "that the alien is not at that time either (A) an alien lawfully

admitted for permanent residence, or (B) authorized to be so employed by this chapter *or by the Attorney General*." *Id.* §1324a(h)(3) (emphasis added). In their view, because Congress accepted the premise that the Attorney General has the power to grant work authorization in *some* circumstances, Congress must have accepted the premise that the Attorney General has blanket discretion to do so in *any* circumstances of his choosing.

In fact, the explanation for that language is much more prosaic: Other provisions of the immigration laws expressly authorize, or even obligate, the Attorney General (or now the Secretary) to grant work authorization in certain circumstances. *See, e.g.*, *id.* §§1160(a)(4), (d)(1)(B), (d)(2)(B), 1255a(b)(3)(B), (e)(1)(B), (e)(2)(B). These provisions are not recent innovations; many were added to the code along with section 1324a. *Compare* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §101(a)(1), 100 Stat. 3359, 3368 (enacting section 8 U.S.C. §1324a(h)(3)), *with*, *e.g.*, *id.* §201 (enacting 8 U.S.C. §1255a(b)(3)(B), (e)(1), (2)), *and id.* §302(a)(1) (enacting 8 U.S.C. §1160(a)(4), (d)(1)(B)), (d)(2)(B)); *see also* Refugee Act of 1980, Pub. L. No. 96-212, §401(b), 94 Stat. 102, 118 (codified as amended at 8 U.S.C. §1255 note (1982)). Section 1324a(h)(3) thus reflects nothing more than the unremarkable reality that work authorization sometimes comes directly from a statute and other times must come from the Attorney General, pursuant to statute.[4]

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[4] Petitioners' reliance on 8 U.S.C. §1611(b) suffers from the same flaw: Congress' recognition that whether an individual "is lawfully present" is to be "determined by the Attorney General"

To the extent there were any doubts on that score, subsequent statutory enactments eliminate them. As petitioners themselves explain in detail, *see* Petr.Br.56-59, since section 1324a was enacted, Congress has passed a host of laws authorizing or instructing the Attorney General to grant work authorization in certain circumstances.[5] Petitioners cannot explain why Congress has continued to enumerate the narrow circumstances in which the Executive may grant work authorization to individuals who entered or remained in the country illegally if the combination of the INA's "vesting clause" and section 1324a's definitional provision already give the Executive the power to do so any time it chooses.

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does not mean the Attorney General gets to decide what constitutes "lawful presence." It simply means the Attorney General is responsible for determining whether an individual "is lawfully present" *under the statutes Congress has enacted*.

[5] *See, e.g.*, William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, §201(c), 122 Stat. 5044, 5053; *id.* §203(c)(2); 2005 VAWA, §814(b)-(c); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §1703(c)(1)(A), (d)(1)(A), 117 Stat. 1392, 1694-95 (2003); USA PATRIOT Act of 2001, §423(b)(1), (2); Immigration and Nationality Act-Amendment, Pub. L. No. 107-124, 115 Stat. 2402, 2402 (2002); Work Authorization for Spouses of Intracompany Transferees Act, Pub. L. No. 107-125, §1, 115 Stat. 2403, 2403 (2002); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §1503(d)(2)(IV), 114 Stat. 1464, 1522; LIFE Act, Pub. L. No. 106-553, §1102(b), 114 Stat. 2762A-142, 2762A-143-44 (2000); Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, §902(c)(3), 112 Stat. 2681-538, -539; Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, §202(c)(3), 111 Stat. 2193, 2195 (1997); IIRIRA, §604(a); IMMACT, §§221, 301(a)(2), 302(a).

Indeed, if the "vesting clause" truly gave the Secretary the "sweeping authority" petitioners claim, Petr.Br.63, then Congress would have had no need to enact *anything* beyond section 1103(a), as its work apparently was done the moment it identified which Executive official was "charged" with "administration and enforcement" of the immigration laws, 8 U.S.C. §1103(a). Unsurprisingly, such arguments have not met with success in the past. *See, e.g.*, *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 805-06 (D.C. Cir. 2002); *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995). Under our Constitution, Congress makes the law and the Executive enforces it. The bare fact that Congress has identified which member of the Executive is charged with enforcing the laws it enacted does not—and cannot—upend that basic constitutional order.

III. The Immigration Laws Do Not Implicitly "Ratify" Any Power Anything Like What The Executive Claims Here.

Ultimately, petitioners' real argument is not that these (or any other statutes) *grant* the Executive blanket discretion to confer "lawful presence," work authorization, and other benefits on anyone it pleases. It is that the combination of these statutes, snippets of various others, and certain actions or inactions over the years evince Congress' intent to "ratif[y]" the Executive's purportedly "longstanding" practice of *claiming* that blanket discretion. Petr.Br.16-17. Of course, "'[p]ast practice does not, by itself, create power.'" *Medellin v. Texas*, 552 U.S. 491, 532 (2008). Nor could past practice even begin to do so here, as the Executive simply does not have any past practice—let

alone any "longstanding" past practice—of doing anything like DAPA.

At the outset, petitioners' narrative of executive action over the past several decades contains a healthy dose of revisionist history. While petitioners detail at length various instances in which the Executive has claimed discretion to make relief from deportation or removal available "on the basis of aliens' membership in defined categories," Petr.Br.43, they conveniently relegate to footnotes any mention of the many instances in which Congress has curtailed—or even eliminated—the very forms of discretion on which they rely. For example, some of those programs were exercises of a statutory "parole" power that, as a result of a subsequent congressional enactment, the Executive now may invoke "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. §1182(d)(5)(A). Several more were undertaken pursuant to "voluntary departure" practices that the Executive ceased exercising after Congress enacted the "temporary protected status" statute and imposed a 120-day statutory limit that put a permanent end to the "extended voluntary departure" of old. *See id.* §§1229c(a)(2), 1254a.[6]

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[6] While the President has occasionally invoked his "foreign affairs" power to grant country-specific relief in circumstances beyond those set forth in 8 U.S.C. §1254a, that practice has no bearing here, as DAPA plainly is not animated by "sensitive foreign policy imperatives," Petr.Br.31. Individuals are eligible for DAPA without regard to their country of origin, let alone whether return to that country presents foreign policy or safety concerns.

Petitioners also largely ignore the fact that most of the programs they identify were *country*-specific programs, designed to deal with extenuating circumstances, such as armed conflict or a natural disaster, that gave rise to "concern that the forced repatriation … could endanger th[e] lives or safety" of individuals. H.R. Rep. No. 100-627, at 6 (1988). And the rare programs petitioners identify that were *not* country-specific cannot plausibly support their implicit "ratification" theory, as they were exercises of statutory authority that the Executive can no longer claim. For instance, the "Family Fairness" program on which petitioners place so much emphasis was undertaken pursuant to the "extended voluntary departure" practice that Congress subsequently eliminated.[7] Congress also placed additional constraints on the Executive's discretion to grant relief from removal based on familial relationships six years later when it increased the continuous presence period and stiffened the hardship showing for parents of citizens and lawful permanent residents, and capped cancellation of removal at 4,000 individuals per year. 8 U.S.C. §1229b(e)(1).

Petitioners likewise neglect to mention that most of the work authorization and benefits practices they identify pre-date statutes that fundamentally altered those landscapes. For instance, whether the Executive's "ordinary practice" in "the early 1970s"

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[7] Moreover, like the categorical "deferred action" programs of the 1990s and 2000s, the "Family Fairness" program applied only to individuals who were on track to receive a visa. DAPA, by contrast, applies without regard to whether an individual has any statutory path to lawful status. *See infra* pp.32-33.

was to "authorize 'illegal aliens' to work when it decided not to pursue deportation," Petr.Br.51, is largely beside the point, as Congress did not prohibit the employment of unauthorized aliens until 1986. Likewise, whatever benefits the Executive may or may not have extended to such individuals before 1996 is irrelevant, as Congress put an end to those practices with IIRIRA, which requires an individual to be "lawfully present" to obtain Social Security, Medicare, and other benefits. 8 U.S.C. §1611(b)(2)-(4). The whole point of that restriction was to *eliminate* the past practice of affording benefits whenever the Executive chose to forebear removal. *See, e.g.*, H.R. Rep. No. 104-725, at 383 (1996).

In light of that history, the only discretionary practice of any relevance that even arguably has any continued vitality under current law is "deferred action." And the only "deferred action" practices that even arguably have any relevance here are those that granted "deferred action" not on a case-by-case basis, but "on the basis of aliens' membership in defined categories." Petr.Br.43. Yet as compared to the handful of past programs of that nature, DAPA plainly "accomplishes a shift in kind, not merely degree." *NFIB*, 132 S. Ct. at 2605.[8]

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[8] The only possible exception is DACA, a program that Congress has decidedly *not* ratified. Indeed, Congress' decade-long refusal to enact the DREAM Act has far greater relevance to legality of DACA than Congress' decision not to block all DHS funding unless DACA is rescinded. *See* Petr.Br.59-60. While Congress' consistent refusal to *grant* the Executive a particular power certainly has bearing on whether such power exists, *see, e.g.*, *Youngstown*, 343 U.S. at 597-602 (Frankfurter, J., concurring), Congress' failure to take immediate action to refute

First, none of those programs extended "deferred action" to a class of individuals who neither entered this country legally nor have any prospect of obtaining statutory authority to remain. Instead, past programs have been confined to classes of individuals who either were on track to obtain lawful status or were lawfully present but lost (or were likely to imminently lose) that status due to extraordinary circumstances beyond their control. For instance, after Congress enacted special visa provisions for victims of domestic abuse, human trafficking, and other crimes, the Executive established deferred action policies that allowed beneficiaries of those statutes to stay while awaiting visas. JA216-28, 229-38. In the wake of Hurricane Katrina, the Executive adopted a deferred action policy that allowed affected student-visa holders to stay for a few months while awaiting the opportunity to reenroll. R.675-83. And in 2009, the Executive "provid[ed] deferred action to certain surviving spouses of deceased U.S. citizens and their children while Congress considered legislation to allow these individuals to qualify for permanent residence status." Pet.App.414a n.3. Each of those programs provided a bridge to a statutory form of lawful status. DAPA, by contrast, is a bridge to nowhere.

Second, none of those programs was adopted in the face of a statute that expressly *constrained* the Executive's authority to grant relief based on membership in the very same class. Yet DAPA not only establishes a "deferred action" program for the

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a novel assertion of executive power hardly suffices to prove "ratification."

same class covered by 8 U.S.C. §1229b(b)(1); it renders members of that class eligible for relief on terms far more generous than those established by Congress. Whereas section 1229b(b)(1) requires physical presence for ten years, DAPA requires it only since January 1, 2010. Pet.App.417a. Whereas section 1229b(b)(1) requires proof "that removal would result in exceptional and extremely unusual hardship to the alien's … child," DAPA asks only whether there are any "factors that, in the exercise of discretion, makes the grant of deferred action inappropriate." Pet.App.417a. DAPA thus reverses the presumption section 1229b(b)(1) creates; instead of demanding "exceptional and extreme[]" circumstances that make "lawful presence" *appropriate*, DAPA asks only whether any factors make "lawful presence" *in*appropriate. That unprecedented use of a categorical "deferred action" program to override express statutory constraints on the Executive's discretion to grant relief to the very same class plainly oversteps the Executive's statutory and constitutional bounds.

Third, none of those other programs was adopted in response to Congress' *refusal* to create a statutory path to lawful presence based on membership in that same category. Instead, most past "deferred action" programs were interstitial, designed to fill a statutory gap in a way that facilitated Congress' evident intent to *protect* the category at issue. For instance, the programs adopted for U and T visa beneficiaries ensured that the Executive's own delay in adopting implementing regulations and processing applications would not force temporary removal of individuals eligible for the new path to lawful status that

Congress created. *See* JA229-38. The surviving spouses program was a temporary measure adopted in response to Congress' ongoing consideration of uncontroversial legislation that shortly thereafter became law. *See* Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, §568(c), 123 Stat. 2142, 2186-87 (2009). DAPA, by contrast, is an unabashed effort to extend relief to a class of individuals living in this country illegally in direct response to Congress' *refusal* to do the same.

Finally, while the principal problem is that DAPA "accomplishes a shift in kind, not merely degree," *NFIB*, 132 S. Ct. at 2605, DAPA also dwarfs past class-based "deferred action" programs by orders of numerical magnitude. U and T visas were capped by Congress at 15,000, 8 U.S.C. §1184(o)(2), (p)(2)(A), and relief for student-visa holders affected by Hurricane Katrina was limited to "several thousand foreign students," JA68. DAPA, by contrast, makes "deferred action" available to more than *4 million* individuals—more than a third of the entire estimated population of individuals living in this country illegally. An attempt to alter the legal consequences of continued presence in this country for more than a third of the illegal population plainly falls on the legislative, not the executive, side of the line.[9]

In the end, then, it is petitioners' conception of the Executive's discretion under the immigration laws

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[9] It also plainly constitutes the kind of executive action that, even if authorized by statute—which it manifestly is not—could be undertaken only in accordance with the Administrative Procedure Act' notice-and-comment safeguards. *See* Resp.Br.60-70.

that "cannot be reconciled with this history," Petr.Br.48, for the recent history of those laws has been one of *constraining*, not expanding or ratifying, the kind of discretion the Executive claims here. Moreover, even the forms of class-based discretion the Executive has continued to exercise (albeit without express statutory authority) bear no resemblance to DAPA. Petitioners' contention that Congress has "ratified" the extraordinary power they claim thus fails for the most basic of reasons: Congress cannot have ratified a power that has never before been asserted.

Nor is there any reason to believe Congress ever *would* ratify a power as radical as the one the Executive claims here. After all, Congress does not ordinarily surrender to the Executive its power to resolve "a question of deep 'economic and political significance' that is central to [the] statutory scheme." *King*, 135 S. Ct. at 2489. And there are few questions of greater economic and political significance to this country than whether individuals who entered illegally should be authorized to stay, work, and receive benefits. That is certainly a question on which reasonable minds can disagree. But this case is not about how to answer that question; it is about who has the power to answer that question. Under our Constitution, Congress is entrusted with "All legislative Powers," including the "Power To … establish an uniform Rule of Naturalization." U.S. Const. art. I, §§1, 8, cl.4. The Executive may disagree with the laws Congress enacts and may try to persuade Congress to change them. But neither any immigration law now on the books nor the Constitution empowers the Executive to authorize—

let alone facilitate—the prospective violation of those laws on a massive class-wide scale. Because that is precisely what DAPA does, it is both unlawful and unconstitutional.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

KERRY W. KIRCHER
General Counsel
WILLIAM PITTARD
Deputy General Counsel
TODD B. TATELMAN
Senior Assistant Counsel
ELENI M. ROUMEL
ISAAC ROSENBERG
KIMBERLY HAMM
Assistant Counsels
OFFICE OF
GENERAL COUNSEL
U.S. HOUSE OF
REPRESENTATIVES
219 Cannon House
Office Bldg.
Washington, DC 20515

ERIN MURPHY
Counsel of Record
ANDREW N. FERGUSON
BANCROFT PLLC
500 New Jersey Ave., NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
emurphy@bancroftpllc.com

Counsel for Amicus Curiae
the United States House of Representatives

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