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

MOTION FOR LEAVE TO FILE AND BRIEF OF GONZALEZ OLIVIERI LLC, QUAN LAW GROUP PLLC, AND REINA BATES LAW FIRM AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME OF AMICI CURIAE GONZALEZ OLIVIERI LLC, QUAN LAW GROUP PLLC, AND REINA BATES LAW FIRM IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3, Gonzalez Olivieri LLC respectfully moves for leave to file a brief Amicus curiae out of time, and to file the accompanying brief in support of the petitioners. This is one of the most important immigration cases to be heard by this Court in many years, and Gonzalez Olivieri LLC, has been involved extensively in immigration law and respectfully believes they have a perspective that might assist in the Supreme Court's consideration of the issue now pending before the Court. Amici initially expected that the Solicitor General and Amici would brief issues related to the Take Care Clause more thoroughly. We saw no need to file this brief until after March 8, 2016, when Amicus briefs became available, and we became aware that the prior treatment of the question the Honorable Court instructed the parties to address, namely whether executive action violates the Take Care Clause, left something to be desired. Available scholarship on the issue has not been addressed or has been addressed in only a token fashion. Petitioner's Brief devotes barely three pages to the Take Care Clause. Amici Professor Walter Dellinger; The Major Cities Chiefs Association; Educator's and Children's Advocates; National Queer Pacific Islander Alliance, Inc., and Others; California Business, Civic, Educational, and Religious

Figures and Institutions, Professional Economists and Scholars in Related Fields; United We Dream; and Mayors of New York, et al. have not addressed the issue at all. Amici Former Commissioners of the United States Immigration and Naturalization Service devote barely a page to the issue. And Amici 186 Members of the U.S. Houston of Representatives and 39 Members of the U.S. Senate, and Bipartisan Former Members of Congress devote barely three pages each to the issue. Petitioners and Respondents consent to the filing of this Amicus brief. Amici assert that the respondents will not be prejudiced by this filing, as they have consented in writing. Amici respectfully pray the Honorable Court grant this motion.

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici are Gonzalez Olivieri LLC, Quan Law Group PLLC, and Reina Bates Law Firm. Gonzalez Olivieri LLC, Quan Law Group PLLC, and Reina Bates Law Firm are Houston area immigration firms that serve the immigrant community through advocacy, pro bono work, and community education.

SUMMARY

The Guidance is a proper exercise of administrative discretion and lies well within the confines of congressionally proscribed authority. Because the agency derives broad authority under the statutory regime, the Guidance neither violates the Take Care Clause nor transgresses the province of the legislative branch. Furthermore, an agency's nonenforcement decisions are not subject to judicial review under the Administrative Procedure Act and the Guidance does not fall within the arguable exception to non-reviewability. Additionally, congressional alternatives to judicial review exist to limit agency nonenforcement discretion.

[1] No person or entity other than Amici and their counsel authored this brief or made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have consented to the filing of this brief, pursuant to Supreme Court Rule 37.

ARGUMENT

I. DAPA is a Proper Exercise of Administrative Discretion

A. Background

In an address to the nation in November of 2014, President Obama announced a second round of administrative policies.[2] A pillar of the announced policy involved a large-scale deferred action initiative, for the unauthorized parents of U.S. citizens and lawful permanent residents, in which eligible noncitizens who are not otherwise enforcement priorities for the government would be permitted to apply for the deferral of their removal, and work authorization for three years.[3] Together with the announcement of DAPA, DHS Secretary Johnson also issued a memorandum identifying department-wide guidelines intended to govern removal and detention policies and budget requests more generally.[4]

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[2] *See* Press Release, Office of the Press Sec'y, White House, Weekly Address: Immigration Accountability Executive Action (Nov. 22, 2014), available at http://www.whitehouse.gov/the-press-office/2014/11/22/weekly-address-immigration-accountability-executive-action.

[3] *Id.*

[4] *See* Jeh Charles Johnson, U.S. Dep't of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents 4 (2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

Far from being unprecedented,[5] deferred action has been a standard tool in the discretionary enforcement tool box for generations. Even class wide, arguably categorical, discretionary immigration actions have been utilized by some of the most conservative administrations in recent history.[6] Moreover, with an

[5] The Constitutionality of DAPA Part II: Faithfully Executing the Law, 19 Tex. Rev. Law & Pol. 213, Spring 2015.

[6] In 1956, President Dwight D. Eisenhower used executive authority to "parole" 923 foreign-born orphans into the custody of U.S. military families seeking to adopt them. *See* Executive Grants of Temporary Immigration Relief, 1956-Present, American Immigration Counsel, Oct. 02, 2014. Presidents Eisenhower, John F. Kennedy, Lyndon B. Johnson and Richard Nixon used executive powers to parol into the U.S. a majority of 621,403 Cuban asylum seekers fleeing the Cuban revolution. *Id.* In 1976, President Gerald Ford granted extended voluntary departure to protect Lebanese immigrants from deportation and also provided work authorization. *Id.* In 1980, President Jimmy Carter paroled 123,000 Cubans and Haitians into the U.S. during the Mariel boatlift. *Id.* In 1987, President Ronald Reagan deferred deportation for children in more than 100,000 families if the parents of the families were gaining legal status under the 1986 Immigration Reform and Control Act, IRCA, which granted legalization to about three million immigrants. *Id.* In 1990, President George H. Bush used executive powers to defer deportations of up to 1.5 million spouses and children of people legalized under IRCA. *Id.* In 1992, Presidents Bush and Clinton granted stays of deportation to about 190,000 Salvadorans whose temporary protected status that allowed them to live and work in the U.S. had expired. *Id.* In 2002, President George W. Bush expedited naturalization for green card holders who enlisted in the military, eliminating their three year wait. *Id.*

estimated 12 million undocumented immigrants,[7] and just over 20,000 ICE employees,[8] it is simply impossible to enforce the INA to the letter. It is then within the province of the executive to employ policy measures to best obtain an executive means to the legislative end.[9]

Furthermore, an agency to which Congress has delegated policymaking responsibilities may "rely upon the incumbent administration's views of wise policy to inform its judgments." *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 865-66, 104 S. Ct. 2778, 2793 (1984). In *Chevron*, this Court reasoned that "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices." *Id.* The President's guidance thus is entirely appropriate.

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[7] Estimate from 2013, http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states/, last accessed 2/17/16 (citing to U.S. Census information).

[8] https://www.ice.gov/about, last accessed 2/17/16.

[9] Letter from Thomas Jefferson to William H. Cabell, 11 August 1807, available at http://founders.archives.gov/documents/Jefferson/99-01-02-6144, last accessed 2/17/16. ("if means specified by an act are impracticable, the constitutional [executive] power remains, and supplies them. . . . This aptitude of means to the end of a law is essentially necessary for those who are executive; otherwise the objection that our government is an impracticable one, would really be verified.").

B. DAPA does not Violate the Separation of Powers Doctrine under *Youngstown*'s Framework

In a well-known law review article, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, Professor Blackman argues that DAPA is a "perfect storm of executive lawmaking, descending to the lowest depths of *Youngstown*, beyond the 'zone of twilight,' and even below the 'lowest ebb.'" 19 Tex. Rev. Law & Pol. 213, Spring 2015, at 267. The subject matter at issue in *Youngstown* is legally and factually distinct from the instant case. *Youngstown* did not involve enforcement discretion or policy. Instead it was centered on President Truman's unlawful seizure of a steel mill to prevent a labor dispute from occurring during an armed conflict. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). In *Youngstown*, there was an absence of statutory authority for President Truman's actions, which were purportedly justified as an inherent consequence of his position as head of the armed forces. *Id.* In contrast, DAPA is a consequence of congressionally derived authority to make enforcement decisions. As such, it more aptly falls within the highest state of existence within Justice Jackson's tripartite taxonomy of executive power analysis, whereby the President "acts pursuant to an express or implied authorization of Congress"; and whereby his authority is at its apogee and embodies the federal government as an undivided whole, as opposed to the third rung or "lowest ebb," which is marked by not only a lack of

statutory authority but by actions that are contrary to express statutory language. *See id.* at 635-36 (Jackson, J., concurring).

II. DAPA Does Not Violate the Take Care Clause

It has been further alleged that the Administration's discretionary nonenforcement policy violates the President's enforcement obligation under the Take Care Clause of the Constitution, which provides that the President "shall take Care that the Laws be faithfully executed." *See* U.S. Constitution, Article II, § 3. This is simply untrue.

This Court's decisional law has long professed an understanding that the Take Care Clause imposes a "duty" or "obligation" upon the President to ensure that executive branch officials enforce the law,[10] which includes legislative acts. *See Marbury v. Madison*, 5 U.S. 137 (1803).

[10] "Law" is defined as "The aggregate of legislation, judicial precedents, and accepted legal principals; the body of authoritative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them." *Law definition* Black's Law Dictionary 10th Ed. (2009). This would presumably include constitutional provisions, statutes, decisional law, rules and regulations.

A. The Take Care Clause as a Source of Enforcement Discretion

Although the Take Care Clause is interpreted so as to impose a duty on the President to enforce the law, it has also been interpreted as the source of non-enforcement discretion. *See e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("The decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"); *United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 1486 (1996) ("They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'"); *Smith v. Meese*, 821 F.2d 1484, 1491 (11th Cir. 1987) ("The prosecutorial function, and the discretion that accompanies it, is thus committed by the Constitution to the executive, and the judicial branch's deference to the executive on prosecutorial decisionmaking is grounded in the constitutional separation of powers.").

B. Categorical Nonenforcement in the Context of Prosecutorial Discretion

Professor Blackman, citing Professor Price, suggests that the "categorical and prospective nonenforcement of statutes is impermissible without statutory authorization." 19 Tex. Rev. Law & Pol. 213

at 254. However, prosecutors routinely employ categorical and prospective nonenforcement policies in criminal prosecution. For example, many prosecutors decline to enforce offenses that are classified as low priority, such as jaywalking or minor traffic infractions due to limited resources and a desire to deter crimes which pose greater danger to society. Additionally, prosecutors may, as a matter of public policy, decline to prosecute crimes which are antiquated and no longer viewed as offensive to society, such as sexual deviance laws[11] or laws prohibiting unmarried women from parachuting on Sundays. Amici would venture to guess that state prosecutors are not statutorily authorized to engage in such categorical nonenforcement of the law.

C. The INA Itself Proscribes Broad Powers of Enforcement Discretion

Apart from the inherent power of nonenforcement derived from Article II, the INA itself provides a source of authority for implementing administrative policy such as enforcement priorities and selective enforcement. *See* 8 U.S.C. § 1103(a)(3) ("He [Secretary of Homeland Security] shall establish regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and ***perform***

[11] *See e.g.*, Fla. Stat. § 798.02 (1868) (making it a crime for "any man and woman, not being married to each other, [to] lewdly and lasciviously associate and cohabit together. . . .").

such other acts as he deems necessary for carrying out his authority under the provisions of this Act.") (emphasis added). The Johnson Memo provides the rationale for administrative guidance on exercising prosecutorial discretion. The Secretary reasons that such guidance is necessary because "[d]ue to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States."[12] It is clear that the Secretary of Homeland Security has deemed necessary the guidance he has set forth in his memorandum as a means to better enable him to best meet the legislative ends of the INA with the limited resources at his disposal. Basically, Secretary Johnson has been granted the authority by Congress, through 8 U.S.C. § 1103(a)(3), to "perform other such acts as he deems necessary," and he is acting within that authority by providing guidance to his agents regarding exercising their prosecutorial discretion. It is difficult to conceive how the Secretary's guidance could be violating the Take Care Clause when he is acting through a statutorily proscribed duty.

D. Role of Enforcement Discretion

This Court has recognized the vital role that discretion plays in the execution of immigration laws and the potential for utilizing such discretion as a tool to shape other areas within the province of

[12] *See* Johnson *supra* at note 4.

executive functions. *See Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) ("Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. . . . The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities."). As such, immigration enforcement is uniquely intertwined with other executive objectives and may at times be calculated to serve dual functions. This is yet another factor in favor of administrative discretion within the immigration context.

E. The President's Actions fall Squarely within the Confines of the Take Care Clause

Essentially, within the purview of the Take Care Clause, the President "has back of him not only each

general law-enforcement power conferred by the various acts of Congress but the aggregate of all such laws plus that wide discretion as to method vested in him by the Constitution for the purpose of executing the laws." *Youngstown*, 343 U.S. 579, 692 (Minton, J., dissenting). As such, the President's actions fall squarely within the confines of the Take Care Clause.

III. DAPA is not subject to review under the APA

Section 10 of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), makes judicial review inapplicable "to the extent that . . . agency action is committed to agency discretion by law." In *Heckler v. Chaney*, this Court construed § 701(a)(2) to create a presumption against reviewability for an agency's nonenforcement action. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

In *Heckler*, the Court, albeit in dicta, arguably suggests that judicial review of agency nonenforcement may be available where the agency "consciously and expressly adopted a general policy" that is "so extreme as to amount to an abdication of its statutory responsibilities." *See Heckler*, 470 U.S. at 833, n.4.[13]

[13] The note cites to *Adams v. Richardson*, a D.C. Circuit decision concerning the failure of the Secretary of Health, Education, and Welfare to enforce Title IV of the Civil Rights Act of 1964, which directed the agency to ensure that federal

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The infamous footnote provided that although the Court "express[ed] no opinion on whether such decisions [abdicating statutory responsibilities] would be reviewable under 701(a)(2)," the relevant statute "might indicate that such decisions were not 'committed to agency discretion.'" *Id.* As discussed further *infra*, this arguable exception to the APA's nonreviewability provision is inapplicable in the instant case because Congress has granted the agency broad discretion in its execution of the INA and neither mandates removal nor restricts nonenforcement discretion or the issuance of work authorization.

A. DAPA Does Not Constitute an Abdication of Statutory Responsibilities

Professor Blackman argues that while the decision to defer some deportations is not enough to amount to an abdication of the Executive's statutory responsibilities, "the size and scope of those exempted from the laws greatly exceeds any previous classwide deferrals by several orders of magnitude." 19 Tex. Rev. Law & Pol. 213, Spring 2015, at 236. The article also posits that the President's deferred action programs "amount[ ] to a categorical, prospective suspension of both statutes requiring removal of unlawful immigrants and statutory penalties for employers who hire immigrants without proper work

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funding was not provided to segregated schools. *See Adams v. Richardson*, 351 F. Supp. 636, 641 (D.D.C. 1972).

authorization." *Id*. Finally, it states that "By waiving myriad legal requirements, the action thus is presumptively beyond the scope of executive." *Id.* (internal quotations removed).

As such, Professor Blackman's logical premise is as follows: 1) although the President has broad prosecutorial discretion, he violates the law when he abdicates his responsibilities; 2) ignoring strict statutory mandates is an abdication of responsibility; and 3) abdicating responsibility on an unprecedented scale requires unprecedented judicial intervention into the executive's sphere.

While there may be hypothetical abdications of responsibility where the conclusion above may follow, this is not that case. In fact, the argument falls apart at step 2 and step 3 because DAPA establishes a deferral of complying with statutory imperatives on a much smaller scale than the author imagines. The reason is that there is, in fact, no broad statutory duty of the executive branch "requiring removal of unlawful immigrants."

B. The INA does not impose a duty to remove unlawful immigrants

The relevant sections of the Immigration and Nationality Act include Section 212(a), (8 U.S.C. § 1182), Section 237(a) (8 U.S.C. § 1227), and Section 240 (8 U.S.C. § 1229a). Section 212(a) sets forth the grounds of inadmissibility to the U.S. Section 237(a) sets forth separate grounds of deportability. And

Section 240 grants power to immigration judges. Section 212(a) does not order the executive to remove anyone from the United States or create any affirmative duty; rather, it establishes "classes of aliens ineligible for visas or admissions." As such, it creates at most a passive duty for the Executive to refuse admission to aliens actively seeking it (or seeking certain relief from removal that requires a finding of "admissibility," *see* 8 U.S.C. § 1255(a)).

Section 240 also does not mandate that any alien be removed. It merely sets out the rules of the administrative removal process and states "At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing." 8 U.S.C. § 1229a(c)(1)(A).

In contrast, Section 237(a) establishes "classes of deportable aliens" and states, with regard to these: "Any alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens[.]" Note that the preceding sentence, while stating that certain aliens "shall . . . be removed" is qualified by the phrase "upon the order of the Attorney General." In other words, an alien shall not "be removed" merely because he is an "unlawful immigrant." He becomes removable only once he has been duly ordered removed by the Attorney General.

C. The President Cannot Abdicate a Non-existent Duty

Professor Blackman therefore mischaracterizes the INA's mandates. DAPA is not "greatly exceeding any previous class-wide deferrals by several orders of magnitude," because the large majority of the 4 million DACA eligible aliens, the President is under no mandate to remove because most of those individuals do not have an outstanding removal order. Moreover, there is no statutory duty for the executive to place most of them in removal proceedings where they may be issued a removal order. Indeed, the issuance of a Notice to Appear (under the purview of Immigration and Customs Enforcement) is tantamount to "the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). *See also* INA § 239(a), 8 U.S.C. § 1229) (not establishing a statutory duty to issue a notice to appear to any group of aliens but merely stating "In removal proceedings under section 240 of this Act [8 U.S.C. § 1229a], written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following[ ]".

D. The Scope of DAPA has been Grossly Exaggerated by its Critics

Professor Blackman presumes that because about four million individuals may be eligible for DAPA, the program represents an abdication of responsibility on the scale of four million people. But as shown above, this is not so. Since the President is only required to remove those with outstanding removal orders, and only a portion of the illegal alien population has outstanding removal orders, only a portion of the individuals protected by DAPA are individuals the President is required to remove. Indeed, The Center for Immigration Studies, a conservative anti-immigration think tank, reports that as of July 2013, there were 872,000 aliens with unexecuted removal orders in the United States. However, the number of individuals the Executive is required to remove who would be protected by DAPA is smaller still because eligibility for DAPA requires that the applicant not be "an enforcement priority for removal from the United States, under the November 20, 2014, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum."

Critically, one of the enforcement priorities is aliens who have been issued an order of removal on or after January 1, 2014. So at least some of those aliens with outstanding removal orders are not among those who qualify for DAPA. Moreover, Priority 1 includes "aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States." That is a potentially very large number of

people. And Priority 2 includes aliens convicted of significant misdemeanors and "aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who cannot establish to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously since January 1, 2014." So out of the pool of aliens with outstanding removal orders, a potentially large percentage will not qualify for DAPA anyway, further lowering the number of aliens who both fall within DAPA's protections and who also fall into the group of those who "shall, upon the order of the Attorney General, be removed." INA § 237(a).

Moreover, Professor Blackman, quoting Professor Zachary Price, argues that DAPA's precursor, DACA, "amounts to a categorical, prospective suspension of both the statutes requiring removal of unlawful immigrants and the statutory penalties for employers who hire immigrants without proper work authorization." 19 Tex. Rev. Law & Pol. 213 at 236. This argument is fallacious. He is equating legalization of an action with violation of the law. The Attorney General has been explicitly delegated unfettered authority by Congress to authorize employment.[14] If the AG then

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[14] *See* 8 U.S.C. § 1324(a)

("(1) In general it is unlawful for a person or other entity –

(A)

to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an

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authorizes employment, he is not flouting the penalties for unauthorized employment.[15] This would be tantamount to Congress granting the President authority to increase the speed limit from 65 to 75 and then the states suing the President for dereliction of his duty to enforce the 65 mph limit.

E. DAPA does not Constitute a Nonenforcement Policy

The fact that DAPA does not even amount to an actual nonenforcement policy, but rather a deferred enforcement policy, is further evidence that the policy does not amount to an abdication of statutory responsibilities. An agency decision to hold enforcement in abeyance has been held to fall within the "paradigm" of enforcement discretion, and is thus not subject to judicial review. *See Schering Corp. v. Heckler*, 779 F.2d 683, 685 (D.C. Cir. 1985). With DAPA,

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> unauthorized alien (as defined in subsection (h)(3)) with respect to such employment. . . ."). Subsection (h)(3) goes on to define the term "unauthorized alien" as "with respect to the employment of an alien at a particular time, 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***."

[15] *See* 8 U.S.C. § 1324(a)(h)(3), *supra.* Congress allows anyone to be employed if they are authorized "by this chapter" *or* "by the Attorney General." Not, mind you, by the Attorney General *in accordance with this chapter*. This is full and outright, presumably unreviewable, discretion. Thus, the agency can grant employment authorization to anyone it so chooses.

the President is merely deferring enforcement within a statutory framework that is not only void of an express mandate to enforce, but grants the agency nearly unfettered discretion in making enforcement decisions.

IV. Congressional Alternatives Exist to Judicial Review of Administrative Nonenforcement Policies

Perhaps the guiding principle behind the presumption against reviewability of agency enforcement discretion lies in the fact that the legislative branch is best suited for limiting such discretion. This Court has articulated that "[a]ll constitutional questions aside, it is for Congress to determine how the right which it creates shall be enforced." *Switcherman's Union of North America v. National Medication Bd.*, 320 U.S. 297, 301 (1943). Essentially, by drafting a statute so as to restrict discretion in enforcement and nonenforcement, Congress can alter the default rule (in favor of agency discretion) without upsetting the delicate balance of power among the branches. Amici respectfully assert that this is the proper channel for those who are upset by the President's actions.

CONCLUSION

For the reasons stated above, Amici respectfully urge this Court to reverse the judgment below.

Respectfully submitted,

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