No. 15-674

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
PETITIONERS
v.
STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, WEST VIRGINIA, WISCONSIN; PAUL R. LEPAGE, GOVERNOR, STATE OF MAINE; PATRICK L. MCCRORY, GOVERNOR, STATE OF NORTH CAROLINA; C.L. "BUTCH" OTTER, GOVERNOR, STATE OF IDAHO; PHIL BRYANT, GOVERNOR, STATE OF MISSISSIPPI; BILL SCHUETTE, ATTORNEY GENERAL, STATE OF MICHIGAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL SHERIFFS' ASSOCIATION, THE REMEMBRANCE PROJECT, AND AMERICAN UNITY LEGAL DEFENSE FUND SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The Executive Branch unilaterally created a program that would deem four million unlawfully present aliens to be "lawfully present" and eligible for a host of benefits, including work authorization. Pet. App. 413a. This program, called DAPA, goes far beyond forbearing from removal or enforcement discretion.

The questions presented are:

1.a. Whether at least one plaintiff State has a personal stake in this controversy sufficient for standing, when record evidence confirms that DAPA will cause States to incur millions of dollars in injuries.

1.b. Whether DAPA—which affirmatively grants lawful presence and work-authorization eligibility—is reviewable agency action under the Administrative Procedures Act (APA).

2. Whether DAPA violates immigration and related benefits statutes, when Congress has created detailed criteria under which aliens may be lawfully present, work, and receive benefits in this country.

3. Whether DAPA—one of the largest changes in immigration policy in our Nation's history—is subject to the APA's notice-and-comment requirement.

4. Whether the Guidance violates the Take Care Clause of the Constitution, art. II, section 3.

This brief focuses on Question 2, with special attention to whether DAPA violates the Immigration and Nationality Act as amended by the Illegal Immigration Reform and Immigrant Responsibility Act.

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

This case has enormous importance for all Americans who are concerned about the rule of law. But its resolution is especially important to groups like *amici* National Sheriffs' Association, The Remembrance Project and American Unity Legal Defense Fund, who are described at greater length in the Appendix, and who have a particular interest in the enforcement of the Nation's immigration laws. *Amici* are concerned that, if allowed to go into effect, the Executive order at issue here—Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)—will exacerbate the problem of violent crime by unauthorized immigrants. DAPA will thereby lead to more deaths like those of Joshua Wilkerson, Jonathan Alvarado, and Kathryn Steinle (whose tragic stories are recounted below) and thousands of others.

Concerns about public safety were at the root of opposition to a law proposed in 2013, the Border Security, Economic Opportunity, and Immigration Modernization Act, which was supported by the Administration and would have granted legal status to most of the Nation's estimated 11 million unauthorized immigrants. Despite repeatedly stating the President did not have authority to grant legal status administratively, after a grassroots effort blocked the 2013 legislation, the Administration issued DAPA, which would unilaterally grant legal status—including the right to

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[1] None of the parties or their counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. Besides funding from *amici* themselves, the brief was funded in part by a grant to The Remembrance Project from US Inc. All parties have consented to the filing of this brief in communications on file with the Clerk.

work and other benefits—to some 4 million unauthorized immigrants.

While DAPA violates federal law and the U.S. Constitution in all of the ways identified by respondents, this brief focuses on the issue of public safety. It describes how DAPA not only evades Congress's decision not to pass the 2013 proposal, but also violates express Congressional limits on Executive discretion that were designed to protect American residents from harm by unauthorized immigrants. It also shows how DAPA would exacerbate the very safety problems Congress hoped to prevent. Combined with the policies of numerous "sanctuary cities" on the detention of criminal aliens, DAPA's implementation would greatly increase the risk of unauthorized immigrants committing serious crimes against American citizens and other lawful residents.

The effects of this Court's decision will also extend to similar actions by this or a future Administration. Indeed, the Administration now asserts that there is "no justiciable limit" to the number of aliens to which it can grant the kind of legal status that DAPA contemplates—thereby portending additional encroachments on Congress's authority over immigration.

If this Court reversed the Fifth Circuit, that decision would seriously erode Congress' constitutional authority to protect Americans from the crime and other consequences of uncontrolled immigration, even as it would cede to the Presidency the power to set up an alternative immigration system without any of those protections. Such a decision would thereby undermine both the rule of law and public safety.

STATEMENT

DAPA, adopted in November 2014, represented a substantial expansion of an earlier program known as Deferred Action for Childhood Arrivals or DACA. J.A. 96.

1. Adopted in the "DACA Directive"[2] of June 2012, DACA halted deportations of people who are under the age of 30, entered the United States before the age of 16, and have continuously resided in the U.S. for 5 years. J.A. 102-03. The Department of Homeland Security characterized DACA as an "exercise of prosecutorial discretion" not conferring any "substantive right, immigration status or pathway to citizenship." But in fact the DACA Memo instructed U.S. Citizenship and Immigration Services (USCIS) to quickly determine whether individuals qualified for one highly important "immigration status"—that is, whether they "qualify for work authorization." J.A. 103, 106.

The DACA Memo also instructed executive officials to determine each DACA application on a case-by-case basis after a background check. J.A. 104. But the record shows that executive officials *automatically* approve DACA applications that meet the other eligibility requirements without necessarily conducting the background check. Pet. App. 56a n.130; J.A. 656-657.

At the time DACA was issued, moreover, President Obama explicitly noted that he did not have legal authority to expand that order to larger classes of aliens: "if we start broadening that, then essentially I would be ignoring the law in a way that I think would be very

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[2] Formally, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children." J.A. 102-06.

difficult to defend legally." R.2142. Moreover, this limited view of presidential authority was at the heart of the Administration's support for the proposed Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, which would have granted legal status to most of the Nation's estimated 11 million unauthorized immigrants.

2. Nevertheless, in November 2014, the Department adopted a new program, DAPA, sweeping millions of additional individuals within DACA's reach and expanding the period for which DACA and the accompanying employment authorization is granted from two- to three-year increments. J.A. 96, 291-292, 340. The DAPA Memo "direct[ed] USCIS to establish a program, similar to DACA" for "individuals who have a son or daughter who is a U.S. citizen or lawful permanent resident" and who meet five additional eligibility requirements. Pet. App. 416a.

DAPA thus permits 4 million of the Nation's estimated 11.3 million undocumented immigrants "to be lawfully present in the United States." J.A. 289. It also allows them to seek legal status by "apply[ing] for work authorization for the renewable three-year period of deferred action," and to receive "social security, retirement benefits, social security disability benefits, or . . . Medicaid" as well as many state benefits. J.A. 289, 340.

Although it is impossible to know exact quantities, substantial numbers of undocumented immigrants have engaged in serious violent crimes, either in their home countries or since arriving in the United States. For example, more than half of all individuals removed by U.S. Immigration and Customs Enforcement (ICE) in fiscal year 2014 had criminal convictions. J.A. 151.

And seventy-six percent of those removed from the interior of the country (as opposed to being detained at the border) had "aggravated felony" convictions, two or more other felony convictions, or three or more misdemeanor convictions, J.A. 148-149. The year 2014 saw the removal of almost another 3,000 gang members. J.A. 141.

This is likely just the tip of the iceberg. Accordingly, whenever executive officials grant a DAPA application, there is a substantial likelihood that they are conferring legal status on a person who poses a risk of criminal activity—including violent crimes directed at citizens and residents of the United States.

3. A majority of States challenged DAPA as a violation of the Administrative Procedure Act (APA), 5 U.S.C. Sections 553, 706, and the Take Care Clause of the Constitution, art. II, section 3. J.A. 34-37. The district court granted the States' motion for a preliminary injunction enjoining DAPA's implementation. Pet. App. 244a-406a. The United States appealed to the Fifth Circuit and moved for a stay pending appeal, which the district court denied. *Texas* v. *United States*, No. 1:14-cv-00254, 2015 WL 1540022, at *8 (S.D. Tex. Apr. 7, 2015).

The Fifth Circuit also denied the stay and affirmed the preliminary injunction. Pet. App. 1a-90a, 156a-210a. On the merits, the Fifth Circuit held that DAPA violated the APA's notice-and-comment procedure and its substantive provisions by interfering with the operation of existing federal immigration statutes. Pet. App. 53a-86a. The United States has not sought a stay of the preliminary injunction in this Court.

SUMMARY OF ARGUMENT

The present system of immigration administration set up by Congress was designed in part to protect American citizens and other lawful residents from the risk of violent crimes committed by unauthorized immigrants. If allowed to take effect, DAPA would subvert this statutory scheme and thus create the very public safety problems that Congress tried to prevent. DAPA would therefore substantially increase the risk of more citizens and other lawful residents being murdered by unauthorized immigrants—victims like Joshua Wilkerson, Vanessa Pham, Rosool Harrell, Jusmar Gonzaga-Garcia, Mirjana Puhar, Jonathan Alvarado and Kathryn Steinle—whose untimely deaths are described below.

Section I discusses the inadequacy of DAPA's screening methods, which, on their face, do not sufficiently protect against the risk of violent crime. Moreover, based on the administration of DAPA's predecessor, DACA, even these meager protections will not be fully enforced. And, contrary to the Administration's contention that DAPA is necessary to comply with Congress' direction to focus enforcement resources against violent criminals, deferred action under DACA has coincided with a *decrease* in enforcement against dangerous criminal aliens.

Nor is there merit to the argument by *amici* supporting petitioners that DAPA will promote public safety by facilitating trust between unauthorized aliens and local law enforcement. There is little evidence that immigration enforcement discourages cooperation between unauthorized aliens and the police. But even if this were true in general, in this context

both federal and state laws protect unauthorized aliens who cooperate with the police. Moreover, the idea that immigration enforcement prevents community trust is the basis of various state and local "sanctuary" policies, which have led to disastrous public safety consequences—including multiple murders of innocent U.S. residents.

Section II addresses how and why DAPA contravenes Congress' statutory scheme to prevent alien crime. The Immigration and Nationality Act, for example, has long contained strong protections against criminal aliens. And the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 strengthened these measures, which made swift removal of criminal aliens central to federal immigration policy. DAPA's grant of deferred action to unauthorized aliens includes exemptions that directly violate these directives and contravene Congress' policy to reduce the risk of violent crime through vigorous enforcement.

For these additional reasons, and those articulated by respondents, the Fifth Circuit's decision should be affirmed.

ARGUMENT

Petitioners argue that DAPA is necessary, in part, because it will allow the Secretary "to focus its limited resources on border enforcement and removing serious criminals." Br. 74. In fact, DAPA both undermines public safety and contravenes Congress' statutory directions to further that important goal.

I. DAPA THREATENS PUBLIC SAFETY.

Contrary to petitioners' arguments, DAPA's protections against violent criminals receiving deferred action are inadequate. And even if DAPA's *articulated* standards were adequate, recent practice suggests the USCIS is unlikely to adhere to them anyway. Most troublingly, in combination with DACA, DAPA is likely to exacerbate violence by unauthorized immigrants, who have already committed thousands of murders and other violent crimes.[3]

A. Many violent criminals would likely be eligible to receive deferred action under DAPA's inadequate standards.

In theory, DAPA prohibits deferred action for those with criminal records that would make them a "priority" removal under the Administration's "Policies for

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[3] A 2011 GAO study estimated a total of 25,064 homicides committed by incarcerated criminal aliens, though it did not separate unauthorized from legal immigrants. US Gov't Accountability Office, *Criminal Alien Statistics, Information on Incarcerations, Arrests, and Costs*, GAO-11-187 at 12 (Mar. 2011), http://www.gao.gov/assets/320/316959.pdf. However, the same study estimated that in the states of New York, California, Texas, Arizona, and Florida alone, *unauthorized* immigrants were responsible for between 5,300-5,400 homicides. *Id.* at 28-34.

the Apprehension, Detention and Removal of Undocumented Immigrants" (the Prioritization Memo), which the Department issued to complement DAPA. J.A. 420a.

1. The Prioritization Memo, however, assigns high priority only to those *convicted* of felonies and certain "significant" misdemeanors such as for domestic violence and firearm offenses. *Ibid.* It follows that criminals who are otherwise eligible and have not been convicted of disqualifying crimes *will* receive deferred action. Thus, an alien who committed a felony, even a serious, violent felony, but who pleaded down to a less serious misdemeanor would not be barred from receiving deferred action. And therein lies the problem.

The risk that a truly violent, dangerous criminal will plead down from a serious felony to a less serious misdemeanor is not merely hypothetical. In *Padilla v. Kentucky*, which held that an alien criminal defendant has a Sixth Amendment right to know the deportation consequences of a criminal conviction, this Court observed that a competent defense attorney would "plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation." 130 S. Ct. 1473, 1486 (2010). *Padilla* thus mandated what was already common practice amongst most attorneys and by statute in many states.[4] These creative plea bargains would allow many criminal aliens who have committed serious, violent crimes to receive deferred action under DAPA.

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[4] Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117, 1146 (2011).

To be sure, because of the injunction in this case, USCIS has not yet detailed how it would implement DAPA. However, USCIS's administration of DAPA's predecessor, DACA, is instructive. While DACA applies to a different class of aliens, like DAPA it bars those who have "been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety." J.A. 103. This overlaps with many of the classes listed as high priority and ineligible for DAPA relief under the Prioritization Memo. But despite these provisions, in 2013 alone, USCIS revoked 282 DACA recipients' deferred action status because of gang ties it learned about *after* they had received deferred action.[5] There is no reason to believe ICE and USCIS will become *more* proficient at identifying threats to public safety before deferred action is granted under DAPA, if that policy goes into effect.

Moreover, many other violent criminals have had less serious criminal records and would therefore *not* be barred from receiving deferred action, even under DAPA's prohibitions. For example, in 2013, unauthorized alien Hermilo Vildo Moralez was convicted for the murder of Joshua Wilkerson. Mr. Moralez had previously been arrested for harassment, a misdemeanor, but had no other known criminal history.[6] Thus, he

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[5] Oversight of the Dep't of Homeland Security, hearing before S. Comm. on Judiciary. 104th Cong. (April. 29, 2015) (written responses to questions for the record, Jeh Johnson, Secretary, Dep't of Homeland Security) ("Johnson written responses").

[6] Oversight of the Administration's Misdirected Immigration Enforcement Policies: Examining the Impact in Public Safety and

would have been eligible for deferred action under DAPA.

Similarly, in 2013, Julio Miguel-Garcia Blanco was convicted of murdering Vanessa Pham. Before his arrest for murder, he had been charged with three misdemeanors, but had only one conviction.[7] Thus, he too would have been eligible for deferred action under DAPA.

Based on these events, there can be no doubt that implementation of DAPA would subject other citizens and lawful residents to the risk of murder or other violent acts at the hands of unauthorized aliens like Morales and Blanco.

2. In addition, USCIS will not even commit to categorically denying deferred action to those convicted of child pornography, child abuse, or abduction.[8] Surely

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honoring the victims, hearing before S. Comm. On Judiciary (July 21, 2015) (testimony of Laura Wilkerson).

[7] The three crimes were petty larceny, public intoxication, and price alteration, but he was only convicted of the price alteration charge. The petty larceny and price alteration arrests came in between his murder of Ms. Tram in 2010 and his arrest in 2013. Whitney Rhodes, Suspect in Pham Case to Face Second Degree Murder Charges, Fairfax City Patch (Dec 15, 2012), http://patch.com/virginia/fairfaxcity/suspect-in-pham-case-faces-second-degree-murder-charges.

[8] Oversight of U.S. Citizenship and Immigration Services: Ensuring Agency Priorities Comply with the Law Before the Subcomm. on Immigr. & the Nat'l Interest of S. Comm. on the Judiciary, 114th Cong. (2015) (responses to questions for the record, Tracy Renaud, Associate Director, USCIS), https://www.judiciary.senate.gov/download/moore-neufeld-renaud-responses-to-questions-for-the-record ("Renaud written responses").

anyone convicted of those crimes is likewise a threat to public safety, and should be removed.

It is simply unacceptable to subject American citizens and other lawful residents to the risk of such violent crimes. That is especially true when, as explained below in Section II, the policies that create those risks violate governing law.

B. Even where DAPA would preclude deferred action, USCIS does not have resources or procedures sufficient to ensure its own enforcement priorities are followed.

Even if the standards contained in DAPA were adequate—and they are not—USCIS does not have adequate resources or procedures to ensure that it does not approve applications from criminal aliens and other public safety threats that should be high enforcement priorities.

1. This is established by numerous instances in which USCIS has failed to prevent criminal aliens and known gang members, who should be barred under its own regulations, from receiving deferred action under DACA. For example, in 2015, after receiving deferred action under DACA, Emmanuel Jesus Rangel-Hernandez murdered four people—Rosool Jaleel Harrell, Jusmar Gonzaga-Garcia, Mirjana Puhar, and Jonathan Alvarado. Moreover, USCIS acknowledged he was approved for deferred action "notwithstanding a … record indicating he was a known gang member."[9]

In response to an inquiry from Senator Charles Grassley, USCIS also said it had found 49 *more* DACA

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[9] *Ibid.*

recipients who were in the federal gang member database[10]—but who received deferred action nonetheless. The fact that USCIS would grant deferred status to known gang members is yet more evidence that USCIS lacks the resources, ability or will to protect public safety.

Because USCIS admits it does not have the resources even to conduct a full accounting of the number of criminal aliens who received deferred action but did not meet the Administration's own standards, it is impossible to know how many DACA recipients have committed crimes.[11] However, as starkly illustrated by Rangel-Hernandez's victims, just one mistake can produce tragic and irreversible consequences.

2. *Amici* supporting petitioners nevertheless argue that DAPA will "advance homeland security and public safety" in part because "the government performs background checks" on the recipients. Former Fed. Immigr. & Homeland Security Officials Br. at 16. This echoes USCIS's repeated assurances that it has policies in place to screen DACA applicants under various federal criminal databases for gang membership

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[10] According to USCIS, it could not separate those flagged in the federal database for reasons other than gang membership—such as criminal history. *Ibid.*

[11] See, David North, *Are DACA Aliens Gang Members? USCIS Does Not Want to Know*, Cntr. for Immigr. Stud. (Oct. 16 2015) http://cis.org/north/are-daca-aliens-gang-members-uscis-does-not-want-know (noting a Freedom of Information Act response from USCIS noting it did not keep track of the number of self-identifying gang members applying for DACA); Letter from León Rodríguez, Director, U.S. Citizenship & Immigr. Serv., to Charles C. Grassley, U.S. Senator (Apr. 17, 2015) (Rodríguez letter).

and other indicators of danger to the public.[12] But the promise of such "background checks" is illusory.

First, USCIS acknowledges it does not carry out the kind of full background check on people seeking "status granting" benefits like deferred action as it does for naturalization.[13] USCIS requires *legal* immigrants to go through a vigorous vetting procedure when seeking naturalization. Almost all applicants must submit to a full criminal background investigation using the FBI's Name Check system, give biometric information, and undergo a probing interview with a USCIS officer.[14]

In contrast, USCIS does not typically submit DACA applicants through the FBI Name Check screening or require an interview, and has indicated it will not do so with DAPA applicants.[15] Besides the fundamental unfairness of holding legal immigrants to a higher vetting standard than unauthorized aliens, this contravenes Congress's statutory scheme, discussed in Section II, to ensure full vetting of aliens for public safety threats.

This incomplete vetting has allowed known criminals and gang members to receive relief under DACA. For example, in March 2015, Project Wildfire, a multi-

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[12] Rodríguez letter, *supra.*

[13] Renaud written responses, *supra*.

[14] 8 C.F.R. §§. 335.1-2; USCIS Policy Manual, Background & Security Checks, vol 12, ch 2, https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartB-Chapter2.html.

[15] Renaud written responses, *supra*.

agency operation targeting international gangs, arrested 199 alien gang members, of which five percent had already received or were applying for deferred action under DACA.[16]

Second, apparently, the government sometimes intentionally violates its own stated priorities. For example, a whistleblowing ICE attorney has alleged that her superiors told her to classify felony identity theft as a misdemeanor,[17] thereby reducing the likelihood that the affected felons would be subject to full scrutiny.

Again, if USCIS cannot or will not properly screen public safety threats from a much smaller class of aliens, it is unlikely to screen out such threats if DAPA is implemented.

C. Experience under DACA shows that DAPA would not lead the Department to focus on enforcement against criminal aliens.

In spite of this contrary evidence, petitioners nevertheless contend that "by deferring action for individuals who are not priorities for removal, the Guidance enables [the Department] to better focus on its removal priorities." Br. at 16. That assertion, however, is belied by the Administration's performance under DACA.

1. If deferred action enabled the Department to focus on high priority risks to public safety, it would have increased enforcement against criminal aliens since DACA's adoption. But that has not happened.

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[16] Johnson written responses, *supra*.

[17] Complaint at 41, *Vroom* v. *Johnson*, No. 2:14-cv-02463-DKD (D. Ariz., Nov. 6, 2014).

Rather, since 2012, enforcement against criminal aliens has plummeted, as shown in the following table:

Fiscal Year	Removal of Convicted Criminal Aliens (in thousands)[18]
2012	225
2013	217
2014	179
2015	139

As the table shows, under DACA, removal of criminal aliens declined from some 225,000 in 2012 to about sixty percent of that—139,000—in 2015.

Indeed, in 2014 alone, rather than remove them, ICE *released* over 30,000 criminal aliens. That number included 175 with homicide convictions and 373 with sexual assault convictions.[19]

The result has been tragic. ICE acknowledged that between FY 2010 and FY 2014, "there were 121 unique criminal aliens who had an active case at the time of release and were subsequently charged with homicide-related offenses."[20]

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[18] ICE Enforcement and Removal Operations Report: Fiscal Year 2015 (Dec. 22, 2015) at 2. https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf. (ICE removals)

[19] Oversight of the Administration's Criminal Alien Removal Policies, hearing before S. Comm. on Judiciary. 104th Cong. (Dec. 2, 2015) (Statement of Jessica M. Vaughan, Director of Policy Studies, Cntr. for Immigr. Stud.).

[20] Letter from Sarah R. Saldaña, Director, U.S. Immigration and Customs Enforcement, to Jeff Flake, U.S. Senator, & Charles

2. Nor has deferred action led to efficient tracking and removal of recipients who commit crimes. As of May 2015, ICE had only removed 89 of the 282 criminal alien DACA recipients who had had their deferred action status revoked; the agency even *released* 77 of these criminals from its own custody. Johnson written responses, *supra*.

Because of this weak enforcement, the criminal alien population continues to grow. As of October 4, 2015, there were 179,037 criminal aliens with outstanding removal orders, over 96% of whom ICE had previously released, and an additional 184,948 criminal aliens whom ICE released with pending deportation hearings. Vaughn statement, *supra.*

Meanwhile, the number of violent immigrant gang members also continues to grow. Although the Justice Department has called members of criminal street gangs the highest priority for removal, Pet. App. 420a-29a, in 2014 ICE arrested barely half the number of gang members it did in 2013, and the lowest number since 2015.[21] Obviously, deferred action has not helped the Administration protect the Nation from this clear and present danger.[22]

Grassley, U.S. Senator (May 28, 2015) http://www.grassley.senate.gov/sites/default/files/judiciary/upload/2015-05-28%20ICE%20to%20CEG%20and%20Flake%20%28Altimirano%29.pdf.

[21] *Ibid.*

[22] Additionally, the lack of expanded deferred action as adopted in DAPA has not led to the Administration's spending its resources deporting those it does not deem priorities. In fact, 93% of those deported are considered priority deportations. ICE removals, *supra* at 5. There is thus no need to assign some kind of "status" so that ICE officers can distinguish aliens who are deportable from those that are not.

Whether or not DACA is itself illegal, if the Court removes the injunction in this case and allows DAPA to proceed, the Administration will implement it within the context of the current enforcement regime. The Administration's failure to screen out dangerous criminal aliens in the much more limited DACA context suggests that DAPA will lead to the unnecessary victimization of many more American citizens and legal immigrants at the hands of unauthorized aliens.

D. Experience under DACA and an array of "sanctuary" policies shows that DAPA would not promote public safety through increased cooperation between immigrants and law enforcement.

Nor is there any merit to the argument by a group of law enforcement executives led by the Major Cities Chief Association (Major Cities Brief)— many of them from so-called "sanctuary cities"—that DAPA will enhance public safety "by removing the fear of detention and removal" and thus encouraging unauthorized aliens to cooperate with law enforcement. Major Cities Chief Ass'n Br. at 7. The evidence simply does not support these claims. And the belief that reducing immigration enforcement will increase cooperation has already undermined public safety through local sanctuary policies that have led directly to murder and other serious crimes.

1. The Major Cities Brief contends that unauthorized immigrants "fear that interactions with local and state law enforcement could result in scrutiny of one's immigration status," citing a study purporting to show a significant number of Hispanics who claim they are less likely to report crimes to law enforcement because

of this concern.[23] However, the actual behavior of Hispanic crime victims does not reflect this hypothetical concern. Data from the Department of Justice's Bureau of Justice Statistics show that Hispanics are slightly *more* likely than the general population to report violent crimes.[24]

Moreover, according to surveys of immigrants who do not report crimes, language barriers (47%), cultural differences (22%), and failure to understand the U.S. justice system (15%) motivate their decisions to a far greater extent than any concerns about deportation.[25] In short, there simply is no solid factual foundation for the claim that immigration enforcement deters unauthorized aliens from cooperating with law enforcement.

To the extent any unauthorized aliens fear reporting crimes, moreover, DAPA is not necessary to address this concern. As the district court's injunction only applies to deferred action status, not to removal

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[23] Major Cities Chiefs Ass'n Br. at 8 (citing Nik Theodore, Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement, at 5-6, Univ. of Illinois Chicago (May 2013), available at http://www.academia.edu/4738588/Insecure_Communities_Latino_Perceptions_ of_ Police_ Involvement_ in_ Immigration_Enforcement.).

[24] Lynn Langton, *Victimizations Not Reported to the Police*, 2006-2010, Bureau of Justice Statistics, at 1, 16 (2012) http://www.bjs.gov/content/pub/pdf/vnrp0610.pdf 51% of Hispanic violent crime victims did not report their crime compared to 52% of the general population.

[25] Robert C. Davis, et. al., *Access to Justice for Immigrants Who are Victimized: The Perspectives of Police and Prosecutors*, 12 Crim. Justice Policy Rev. 183, 190 (2001).

priorities, any alien (other than a violent criminal) who might receive deferred action under DAPA faces very little threat of deportation in any event.

2. Furthermore, existing law provides ample protections for unauthorized aliens who report crimes. For example, federal law provides a special U-Visa for unauthorized alien crime victims who assist law enforcement in prosecuting crime.[26] Granting deferred action to large classes of unauthorized aliens would likely *weaken* this incentive for cooperating.

The Major Cities Brief, moreover, does not cite a single local jurisdiction that refers unauthorized alien victims and witnesses to federal immigration officials. Even the toughest local laws have policies against this. For example, Alabama's HB 56 was "hailed by advocates and critics alike as the most stringent [state level] anti-immigration legislation."[27] Yet it still explicitly exempts from reporting to federal officials any unauthorized alien who "is a critical witness in any prosecution, or is the child of a critical witness in any prosecution."[28]

In short, ample protections already exist for avoiding any disincentives that unauthorized aliens might otherwise have to report crimes. Implementation of

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[26] 8 U.S.C. § 1101(a)(15)(U). See also 8 U.S.C. § 1229(b)(2)(A) (granting Attorney General authority to cancel removal of unauthorized immigrants who are battered spouses and children).

[27] Joseph Darrow, *Developments in the Legislative Branch: Alabama Follows Arizona's Lead in Enacting Local Immigration Control Measures*, 26 Geo. Immigr. L.J. 195, 195 (2011).

[28] Ala. Code. § 31-13-20.

DAPA would provide no meaningful incremental encouragement to cooperate with law enforcement.

3. The sordid history of "sanctuary policies" in many states and localities, including the majority of those whose executives signed the Major Cities Brief, further undermines the idea that DAPA would reduce crime by leading to more cooperation with police. Such policies—to varying degrees—prohibit local law enforcement from cooperating with federal immigration officials.[29] And, similar to DAPA's public safety justification, "[t]he predominant reason local officials give for sanctuary policies has been the desire to encourage unauthorized aliens to report crimes to which they are victims or witnesses."[30]

Like DAPA, sanctuary policies attempt to enhance community-police relations by permitting illegal activity *en masse*, but with devastating effects. For example, in 2015, unauthorized alien Juan Francisco Lopez-Sanchez, who had been deported five times and had seven prior felony convictions, shot and killed Kathryn Steinle.[31] Less than three months before Steinle's murder, the City and County of San Francisco, whose Police Chief co-signed the Major Cities Brief here, re-

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[29] Bryan Griffith, et. al., *Map: Sanctuary Cities, Counties, and States, Map*, Cntr. for Immigr. Stud. (Jan. 2016).

[30] Orde F. Kittrie, *Federalism, Deportation, Deportation, and Crime Victims Afraid to Call the Police*, 91 Iowa L. Rev. 1449, 1475 (2006).

[31] Ming H. Chen, *Trust in Immigration Enforcement: State Non-cooperation and Sanctuary Cities after Secure Communities*, 91 Chi.-Kent L. Rev. 13, 48-49 (2016).

fused to comply with an ICE detainer request and released Lopez-Sanchez following an imprisonment for a felony drug distribution conviction.[32] That action by a signatory of the Major Cities Brief cost Ms. Steinle her life.

Steinle's murder was not an isolated incident. In just the first nine months of 2014, sanctuary jurisdictions released 9,295 criminal aliens that ICE sought to detain, 2,320 of whom were arrested for committing other crimes *after* the sanctuaries released them.[33]

For reasons previously explained, DAPA will merely enhance the risk of unauthorized aliens committing violent crimes. DAPA's underlying idea that society should excuse the violation of its laws to encourage violators to be more cooperative with police has already produced disastrous results in the context of sanctuary city policies. Indeed, the argument's very premise undermines the foundations of the criminal justice system—as violators of any and every law could theoretically be hesitant to cooperate with law enforcement for fear of being apprehended for their own crimes. To believe that a new federal policy based on that same discredited idea will not result in even more crimes is madness.

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[32] *Ibid.*

[33] Jessica M. Vaughan, *Number of Sanctuaries and Criminal Releases Still Growing,* Cntr. for Immigr. Stud. (Oct. 2015), http://cis.org/sites/cis.org/files/vaughan-santuaries_3.pdf.

II. DAPA CONTRAVENES CONGRESS' EFFORTS TO PREVENT CRIME BY UNAUTHORIZED IMMIGRANTS.

As respondents demonstrate, DAPA violates not only the U.S. Constitution, but also federal laws specifically designed to protect the American public from crime by unauthorized immigrants. Resp. Br. 37. The risk of such crime has been a major concern since at least 1910, when the Senate Immigration Commission found that "present immigration law is not adequate to prevent the immigration of criminals, nor is it sufficiently effective as regards to the deportation of alien criminals."[34] As a result, the 1917 Immigration Act, the first major federal restriction on immigration, barred "persons who have been convicted . . . of a felony or other crime or misdemeanor involving moral turpitude."[35] Even as Congress enacted the Immigration and Naturalization Act (INA) in 1952 and liberalized immigration policies in 1965, it maintained strong protections against criminal aliens.[36]

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[34] Abstracts of Reports of the Immigration Commission, S. Doc. No. 61-747 at 27 (3d Sess. 1910).

[35] H.R. 10384; Pub. L. 301; 39 Stat. 874 § 3.

[36] Immigration and Nationality Act of 1952, Pub.L. 82–414, 66 Stat. 163, (1952) § 212(a)(9) (listing crimes of moral turpitude making alien "excluded from admission); *id. at* §241(a) (expanding definition of criminal "moral turpitude" as "classes of deportable aliens"). The 1965 Immigration Act, "a high-water mark for opponents of immigration restriction" Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. Rev. 273, 276 (1996), did not weaken any restrictions on exclusion or removal of criminal aliens. H.R. 2580; Pub. L. 89–236, 79 Stat. 911 (1965).

That trend continued in 1996 with enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[37] IIRIRA was enacted in response to public outcry that laws against removable and criminal aliens were not vigorously enforced—with resulting risks to (among other things) public safety. That law made "comprehensive amendments" to the INA to strengthen enforcement against unauthorized criminal aliens, *Immigr. & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 292 (2001), in part by limiting the Executive's discretion to grant relief to unauthorized aliens. Contrary to petitioners' assertion, IIRIRA did not grant discretion to issue blanket deferred action. Instead, it mandated more vigorous enforcement of existing laws against removable aliens, especially criminals.

A. IIRIRA strengthened the INA's enforcement mechanism in part to protect the Nation from criminal aliens.

IIRIRA was passed in part in response to concerns about alien crime caused by under-enforcement of existing immigration laws. In 1990, Congress had created the U.S. Commission on Immigration Reform,

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[37] In addition, Congress passed The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) prior to IIRIRA. AEDPA expanded the types of crimes leading to removal and limited habeas review of removal decisions. See generally John J. Dvorske, *Commencement of Deportation Proceedings Under the Antiterrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)*, 185 A.L.R. Fed. 221 (2003).

headed by former Congresswoman Barbara Jordan.[38] The Jordan Commission's preliminary recommendations in 1994 included reductions in legal immigration, strengthened employer sanctions, and a system to "ensure the prompt and effective removal of criminal aliens.[39] While IIRIRA did not enact the majority of the Jordan Commission's recommendations as to legal immigration or employer sanctions, it strengthened restrictions on criminal aliens "by reforming exclusion and deportation law and procedures."[40]

1. The "congressional architects" of IIRIRA "made amply clear their intention of targeting criminal aliens for expedited deportation from the United States."[41] One of the principal sponsors of the legislation, Rep. Lamar Smith, explained that one of the foundations of the law was "protecting American citizens from immigrants who commit crimes." Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reason*, 28 St. Mary's L.J. 883, 929 (1997) (Smith & Grant).

Smith noted that the effect of IIRIRA "should be to maximize the number of criminal aliens who remain

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[38] U.S. Comm. on Immigr. Reform, Executive Summary (1994) *available at* http://www.utexas.edu/lbj/uscir/exesum94.pdf.

[39] *Id.* at 28.

[40] H. Rep. No. 104–828, at 199 (1996) (Conf. Rep.).

[41] Terry Coonan, *Dolphins Caught in Congressional Fishnets-Immigration Law's New Aggravated Felons*, 12 Geo. Immigr. L.J. 589, 590 (1998) (citing Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reason*, 28 St. Mary's L.J. 883, 929-930 (1997) (citing H.R. Rep. No. 104-469, pt. 1, at 118 (1996))).

in detention and to minimize the number who avoid removal through the granting of discretionary relief or through legal technicality." *Id.* at 933. Even the scholars cited by petitioners acknowledge that in IIRIRA, "Congress has made the system of deportation more categorical, eliminating many avenues of relief from removal that in earlier periods were available to noncitizens who engaged in deportable conduct."[42]

2. Petitioners nevertheless argue that, because Congress limited the number of removable criminal aliens while also limiting judicial review, the Executive must exercise discretion because others now cannot. Br. at 41-42. Yet this ignores the reality that IIRIRA itself also explicitly limited *Executive* discretion.

For example, IIRIRA amended INA 212(d)(5)(A) (8 U.S.C. 1182(d)(5)), which had previously granted the Attorney General authority to parole "for emergent reasons or for reasons deemed strictly in the public interest." IIRIRA expressly limited the Attorney General's authority under this provision to granting relief "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5). The reference to "public benefit" is incompatible with the Administration's view, reflected in DAPA, that it is acceptable to subject the American public to an increased risk of crime by unauthorized immigrants.

Even more to the point, IIRIRA restricted the attorney general's authority to grant voluntary departure when the alien commits an aggravated felony or

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[42] Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 517 (2009).

for a period of more than 120 days.[43] That too again demonstrates Congress's desire to reduce the risk to the American public from crimes committed by unauthorized aliens.

Finally, IIRIRA amended INA 240A(b)(1) to limit the definition of "exceptional and extremely unusual hardship" to emphasize that an alien seeking to prevent deportation "must provide evidence of harm to his spouse, parent, or child substantially *beyond* that which ordinarily would be expected to result from the alien's deportation." H. Rep. No. 104–828, at 213 (1996) (Conf. Rep.) (emphasis added). If enforced, that amendment would also help protect the American public from crimes by unauthorized aliens by making it more difficult them to avoid deportation.

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[43] 8 U.S.C. §1229c(a)(2)(A). Increased use of deferred action arose because "government has needed to find other ways to offer nonstatus to large groups of individuals" in light of these limitations. Geoffrey Heeren, *The Status of Nonstatus,* 64 Am. U. L. Rev, 1115, 1132 (2015). While IIRIRA's restrictions on voluntary departure or parole do not apply verbatim to deferred action, applying "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency" suggests Congress was not attempting to create a whack-a-mole system, whereby the Administration can simply evade explicit restrictions on one form of discretionary relief by radically expanding another. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (1999) (internal citations and quotations omitted).

B. DAPA's granting of deferred action to such a large class of immigrants not only violates the law, but also contravenes Congress's policy of reducing the risk of violent crime by unauthorized immigrants.

When opining on DAPA, the Office of Legal Counsel correctly acknowledged that "an agency's enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering." Pet. App. 417a-419a. But DAPA *is* directly "contrary to" one of the major "congressional polic[ies] underlying" the IIRIRA.

As explained above, IIRIRA reflected a clear congressional policy to ensure that immigration law is enforced uniformly and vigorously by reducing the discretion of both the Executive and Judicial branches to arbitrarily grant relief to, among others, criminal aliens. And again, that policy was designed to reduce the risk to all Americans of violent crime by such undocumented immigrants.

The Executive's decision to give less priority to reducing that risk is thus highly relevant to DAPA's lawfulness. "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). In at least three respects, DAPA is incompatible with Congress's "express [and] implied will.

First, in flat contravention of IIRIRA's amendment to Section 240A(b)(1), DAPA offers legal status to those who "are the parents of U.S. citizens or lawful

permanent residents"—but *without* any requirement of a hardship, much less an "exceptional and extremely unusual hardship." J.A. 411a. That aspect of DAPA effectively overrides the amendment to Section 240A(b)(1), even as it increases the risk of violent crime by those who escape deportation as a result.

Second, DAPA violates Congress's directive in IIRIRA that ICE officers ensure that certain unauthorized aliens—including many who pose a risk of violent crime—"shall be detained." Petitioners acknowledge that aliens with deferred action "are removable." Br. at 28. So DAPA effectively tells those same officers that these removable aliens—i.e., even those with serious criminal charges or convictions--"shall *not* be detained." That is an obvious affront to Congressional authority.

Third, under DAPA, alien felons guilty only of a "state or local offense for which an essential element was the alien's immigration status" are expressly eligible for deferred action, thereby excusing many felony identity theft and document fraud charges.[44] Yet by its terms, IIRIRA itself classifies those guilty of felony forgery as aggravated felons who must be removed. 8 U.S.C. § 1101 (a)(43)(R).

Indeed, one of IIRIRA's architects, Rep. Smith, emphasized that the legislation treated "immigration-related crimes" like document fraud "with the degree of severity they deserve" because increasingly "these immigration-related crimes are carried out by sophisti-

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[44] Frequently Asked Questions Relation to Executive Action on Immigration, Immigr. & Customs Enforcement, https://www.ice.gov/immigrationAction/faqs.

cated criminal enterprises, which also are often involved in drug smuggling, prostitution, illegal labor practices, and other major crimes." Smith & Grant, *supra* at 935-936. As explained above in Section I.A., moreover, many violent criminals end up pleading down to less serious crimes.

Requiring federal immigration officials to ignore Congress's directives regarding removable aliens and to allow those guilty of what Congress described as an aggravated felony to receive deferred action is "so extreme" in its departure from Congress's instructions that it amounts "to an abdication of [the Executive's] statutory responsibilities." *Heckler* v. *Chaney*, 470 U.S. 821, 853 (1985). Such an abdication should not be tolerated by this Court, much less condoned in a decision upholding DAPA.

CONCLUSION

By enjoining the implementation of DAPA, the district court and the Fifth Circuit vindicated the Congressional policy of reducing the risk of violent crimes committed by unauthorized immigrants. In so doing, those courts reduced the risk that thousands more American citizens and lawful residents—like Joshua Wilkerson, Jonathan Alvarado and Kathryn Steinle—will be murdered or otherwise harmed by unauthorized immigrants. A decision reversing the district court's preliminary injunction would increase that risk even while endorsing a lawless departure from the Nation's duly enacted immigration laws.

For all of these reasons and those elaborated by respondents, the Fifth Circuit's decision should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A: Description of the *Amici*

The National Sheriffs' Association (NSA) Chartered in 1940, the NSA is a professional association representing thousands of sheriffs, deputies and other law enforcement, public safety professionals, and concerned citizens nationwide. The NSA has provided programs for sheriffs, their deputies, chiefs of police, and others in the field of criminal justice in order to enable them perform their jobs in the best possible manner and to better serve the people of their cities, counties, or jurisdictions. The NSA has worked to forge cooperative relationships with local, state and federal criminal justice professionals across the nation to network and share information about homeland security programs and projects. It has long held that Congress and the Administration should put its focus on funding programs to enhance border security, strengthen employment verification, and create a pathway for legal employment and status. The NSA's interest in this case is that DAPA makes it more difficult for Congress and the Administration to reach these goals and undermines the efforts of state and local law enforcement to keep their communities safe.

The Remembrance Project is a Texas-based nonprofit organization that works to support the families of illegal alien homicide victims, and to educate Americans about the importance upholding current laws and following the Constitution. From this mission has emerged a national quilt of remembrance, The Stolen Lives Quilt. The Quilt, now in over 25 states, is a growing, visual reminder of the true cost of an uncontrolled border, measured in lives stolen and forever lost to families, communities and to America's future.

The Remembrance Project's interest in this case is to ensure enforcement of our nation's laws, and to emphasize the human costs of a lawless immigration policy. While other amici have pointed to the individual stories of illegal aliens who benefited from deferred action, see United We Dream Amicus Br. at 18-32, The Remembrance Project reminds the Court of the victims of criminal aliens—men and women like men and women like Jesse Benavides, Spencer Golvach, Sgt. Brandon Mendoza, Dominic Durden, Dustin Inman, Dr. Mario J. Gonzalez, Felicia Ruiz, Joshua Wilkerson, Ranger Kris Eggle, Robert Krentz, Ruben Morfin, Eric Haydu Zepeda, Dustin Inman, Matthew Denise, Richard Grossi, Louise Sollowin, Sarah Root, Tessa Tranchant —whose survivors work with the Project to prevent tragedies like the murders of their loved ones and thousands of other Americans.

American Unity Legal Defense Fund (AULDF) is a national non-profit educational organization dedicated to maintaining American national unity into the twenty-first century. AULDF has filed amicus briefs in other recent cases, including *Arizona* v. *Intertribal Tribal Council of Arizona*, 133 S. Ct. 2247 (2013); *Arizona* v. *United States*, 132 S. Ct. 2492 (2012); and *Horne v. Flores*, 557 U.S. 433, 461 n. 10 (2009) (citing AULDF's amici brief).