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 OF BIPARTISAN FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are a bipartisan group of former members of the United States Senate and House of Representatives who served when key components of the nation's immigration laws, including provisions pertinent to this case, were drafted, debated, and passed. Based on their experience serving in Congress, *amici* understand that the nation's immigration laws, including the Immigration and Nationality Act ("INA"), delegate significant discretion to the executive branch to interpret and administer the law, including by setting enforcement priorities and providing guidance to field officials to facilitate the implementation of those priorities. *Amici* understand that Congress has conferred this discretion on the executive branch because immigration is a field in which flexibility in the implementation of the law is essential. Those who draft legislation on complicated topics like immigration, which touch on both international affairs and domestic concerns, can never fully foresee rapidly changing circumstances and the variety of issues that may arise in the process of implementing the law. Moreover, flexibility is particularly essential in the immigration context when, as is often the case, Congress has not provided sufficient resources for the executive branch to enforce the law against every individual the immigration laws make removable.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

*Amici* recognize that the directives at issue in this litigation implement enforcement priorities that have been embraced by previous Administrations and specifically endorsed by the immigration laws passed by Congress. They also recognize that the directives at issue in this litigation employ an administrative mechanism—case-by-case exercise of discretion to defer removal—that has been long employed by Administrations of both parties and repeatedly endorsed by Congress. Indeed, Congress has repeatedly endorsed deferred action programs with full recognition that deferred action recipients are eligible to receive work authorization pursuant to regulations promulgated during the Reagan Administration. *Amici* believe that the position adopted by the court below is not only at odds with well-established precedent, but would also dramatically undermine the ability of the executive branch to effectively enforce the nation's immigration laws in the manner that multiple congresses and Administrations, representing both political parties, have established.

*Amici* have an interest in ensuring that courts respect the executive branch's authority to exercise this discretion because the sound exercise of that discretion is often critical to the effective enforcement of the nation's immigration laws. While *amici* are aware that people may disagree about the wisdom of the policy choices the executive branch has made here, *amici* have no doubt that those policy choices are well within the range of legal options allowed the executive branch by the nation's immigration laws. By concluding otherwise, the court below did damage to the statutory scheme put in place by Congress, which depends upon the executive branch to make the sorts of discretionary choices at issue here.

A full listing of *amici* appears in the Appendix.

## INTRODUCTION AND SUMMARY OF ARGUMENT

On November 20, 2014, the Secretary of the Department of Homeland Security ("DHS") issued a series of directives to establish priorities for DHS officials' exercise of their discretion when enforcing federal immigration law. These directives clarified that the federal government's enforcement priorities "have been, and will continue to be national security, border security, and public safety."[2] They further directed that in light of those priorities, and given limited enforcement resources, federal officials should exercise their discretion, on a case-by-case basis, to defer removal of certain parents of U.S. citizens or lawful permanent residents.[3] Under other longstanding federal law, aliens with deferred action, like many other aliens who are temporarily allowed to remain in the country, become eligible for work authorization. 8 C.F.R. § 274a.12(a), (b), (b)(14).

*Amici* are former members of Congress who served when Congress enacted major components of the nation's immigration laws. They understand from personal experience that those laws confer substantial discretion on the executive branch to determine how best to enforce the nation's immigration laws, and that the effectiveness of the statutory

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[2] Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., for Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, et al. 2 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

[3] Memorandum from Jeh Charles Johnson, Sec'y, U.S Dep't of Homeland Sec., for León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., et al. (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [hereinafter DAPA Memo.].

scheme Congress put in place critically depends on the executive branch to exercise that discretion. They also recognize that the directives at issue in this litigation reflect priorities that were developed by Administrations representing both political parties and have been consistently endorsed by Congresses on a bipartisan basis. Likewise, these directives implement these policies through a long-established, well-defined, and circumscribed means of enforcement prioritization—deferred action on removal—that has been consistently employed by Administrations of both parties and repeatedly endorsed by Congress.

The State respondents nonetheless argue that these directives violate both the procedural and substantive components of the Administrative Procedure Act ("APA"), as well as the Constitution's Take Care Clause, which provides that the President shall "Take Care that the Laws be faithfully executed," on the ground that they represent a policy change at odds with the nation's immigration laws. As the State respondents put it, the "Executive claims the power to ignore [the nation's immigration laws]." Br. Opp'n at 1.

*Amici* submit this brief to demonstrate that these directives do not "ignore" the nation's immigration laws; rather, they implement those laws—some of which have been on the books for years, others of which were enacted as recently as 2015—through the exercise of discretion specifically conferred on the executive branch by those very laws. As *amici* understand from their long experience serving in Congress, it is impossible to predict in advance every situation to which legislation must apply. That is especially true in the context of immigration because, as this Court has noted, "flexibility and the adaptation of the

congressional policy to infinitely variable conditions constitute the essence of the program." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (quoting *Lichter v. United States*, 334 U.S. 742, 785 (1948)).

By giving the executive the authority to establish "national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), and the power to "perform such other acts as he deems necessary for carrying out his authority" under the immigration laws, 8 U.S.C. § 1103(a)(3), Congress has ensured that the executive branch will have the discretion necessary to effectively implement the nation's immigration laws. As this Court has recognized, "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). Indeed, because Congress has made a substantial number of noncitizens deportable, but has nowhere mandated that every undocumented immigrant be removed (not to mention appropriated the funds that would make that possible), the executive branch necessarily must exercise this discretion. Congress has given the executive significant discretion to implement the nation's immigration laws in other ways, as well, including by giving the executive branch authority over which aliens are entitled to work in the United States. In short, the immigration scheme put in place by Congress critically depends upon the executive branch to exercise that discretion and to make decisions about where the nation should focus its limited enforcement resources.

Based on their experience in Congress, *amici* are familiar not only with the discretion that members of Congress of both parties have embedded in the nation's immigration laws, but also with the manner in

which presidents of both parties have exercised that discretion. *Amici* note that the practice of deferring removal of certain individuals, when doing so facilitates the nation's immigration enforcement priorities, is a long-standing manifestation of the executive branch's responsibility to enforce the nation's immigration laws that has been deployed by presidents of both parties. They also note that this practice has long been used by presidents of both parties with full knowledge that deferred action recipients may secure work authorization pursuant to long-standing regulations dating back to the Reagan Administration. Because actions of the type the executive branch engaged in here are not inconsistent with the nation's immigration laws—indeed, they are contemplated by those laws—they do not violate either the procedural or the substantive components of the Administrative Procedure Act. *See* Pet'rs' Br. 65-73.

Because these directives are consistent with the immigration laws, they are also plainly consistent with the Constitution's Take Care Clause, which provides that the President "shall take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3. When the Framers drafted our enduring Constitution, their design sharply departed from the precursor Articles of Confederation in its creation of a strong executive branch headed by a single President who would have sole responsibility for executing the nation's laws. To ensure that the President could effectively fulfill that responsibility, the Constitution conferred on him the power and the obligation to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3. As this Court has long recognized, this responsibility to "take Care that the Laws be faithfully executed" includes the power to exercise discretion to determine how the nation's laws should

be best enforced. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821 (1985).

Here, of course, Congress has specifically conferred substantial discretion on the executive branch to enforce the nation's immigration laws because it has recognized, as the Framers anticipated, that the executive would be best positioned to make the judgments necessary to enforce those laws. By setting enforcement priorities and providing guidance about how those priorities can be implemented in a manner consistent with the immigration laws passed by Congress, the President is ensuring that those laws are faithfully executed.

The directives are thus not at odds with the President's responsibility to "take Care that the Laws be faithfully executed," as State respondents would have it. Rather, they are an important means by which he fulfills that responsibility.

## ARGUMENT

## THE COURT SHOULD HOLD THAT THE DHS DIRECTIVES ARE A LAWFUL EXERCISE OF EXECUTIVE DISCRETION

### I. THE DIRECTIVES ARE CONSISTENT WITH THE NATION'S IMMIGRATION LAWS

#### A. Congress Has Long Conferred Significant Discretion on the Executive Branch.

As *amici* well know from their time serving in Congress, it is impossible for Congress to anticipate in advance every situation to which legislation must apply. That is particularly true in a context, like immigration, that touches on the nation's foreign af-

fairs and must adapt to frequently changing conditions on the ground. As the Supreme Court has noted, immigration law is a field in which "flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *Knauff*, 338 U.S. at 543 (quoting *Lichter*, 334 U.S. at 785). It is also a field that is "vitally and intricately interwoven with . . . the conduct of foreign relations." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952); *see INS v. Chadha*, 462 U.S. 919, 954 (1983); *Arizona*, 132 S. Ct. at 2498 (noting that the federal government's authority over immigration "rests, in part, on the National Government's . . . inherent power as sovereign to control and conduct relations with foreign nations" (internal citations omitted)); *cf. Medellin v. Texas*, 554 U.S. 759, 765 (2008) (noting the "President's responsibility for foreign affairs").

Reflecting these considerations, Congress has long recognized that the executive branch must have discretion to determine how best to enforce the nation's immigration laws by "balancing . . . factors which are peculiarly within its expertise," *Chaney*, 470 U.S. at 831, including foreign relations, humanitarian considerations, and national security concerns. Accordingly, Congress has repeatedly conferred authority on executive branch officials to exercise discretion in enforcing the nation's immigration laws. For example, in the INA, Congress authorized the Secretary of Homeland Security to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the statute. 8 U.S.C. § 1103(a)(3). And in the Homeland Security Act of 2002, Congress directed the Secretary to establish "national immigration enforcement policies and prior-

ities." 6 U.S.C. § 202(5).[4] The consequence of these and other delegations in the immigration laws enacted by Congress is to "delegat[e] tremendous authority to the President to set immigration screening policy." Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 463 (2009); *see also* Ilya Somin, *Obama, Immigration, and the Rule of Law*, Wash. Post (Nov. 20, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/20/obama-immigration-and-the-rule-of-law/ (noting that in the immigration context, "Congress itself has delegated wide latitude to the president").

This delegation of discretion is, in fact, essential in the immigration context because Congress has made a substantial number of noncitizens deportable, but has nowhere mandated that every single undocumented immigrant be removed (or, perhaps more important, appropriated the funds that would be necessary to effectuate such a mass removal). Cox & Rodriguez, *supra*, at 463 (noting that the legislative branch has made a "huge fraction of noncitizens deportable at the option of the Executive"). As a result, the executive branch necessarily must exercise discretion in determining who should be removed consistent with the nation's "immigration enforcement policies and priorities." 6 U.S.C. § 202(5).

Indeed, this Court has repeatedly recognized the broad discretion that Congress has conferred on the executive branch in the immigration context. As re-

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[4] The court below points to a number of provisions of the INA which, it claims, prohibit the exercise of executive discretion at issue here. *See* Pet. App. 71a-76a. But, as the government demonstrates, *see* Pet'rs' Br. 60-64, those provisions say nothing about the ability of the executive branch to engage in the sort of limited exercise of discretion at issue here.

cently as 2012, the Court noted that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials," *Arizona*, 132 S. Ct. at 2499, and that "[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all," *id.* As the Court explained, the discretion enjoyed by the executive branch allows its officers to consider many factors in deciding when removal is appropriate, including both "immediate human concerns" and "foreign policy." *Id.*; *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005) ("Removal decisions . . . 'may implicate our relations with foreign powers' and require consideration of 'changing political and economic circumstances.'" (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976))).[5]

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[5] This discretion is, of course, not unlimited, and Congress remains free to "limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Chaney*, 470 U.S. at 833. As the Office of Legal Counsel noted in its memorandum on this issue, "[t]he history of immigration policy illustrates this principle: . . . . When Congress has been dissatisfied with Executive action, it has responded . . . by enacting legislation to limit the Executive's discretion in enforcing the immigration laws." Memorandum Opinion from Karl R. Thompson, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, for the Sec'y of Homeland Sec. and the Counsel to the President 6 (Nov. 19, 2014), https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf [hereinafter Office of Legal Counsel Op.]. It is worth noting that although some have suggested that the directives at issue are problematic because they make formal and explicit the exercise of discretion by DHS officials, the fact that they do so actually makes it easier for Congress to review executive action and respond if it deems appropriate. *Cf.* Letter from Rep. Henry J. Hyde et al. to Janet Reno, Att'y Gen., and Doris Meissner, Comm'r, Immigr. & Naturalization Serv. (Nov. 4, 1999),

It also bears emphasis that the discretion conferred on the executive branch by the immigration laws is not limited to decisions related to removal. *See, e.g.*, Jonathan H. Adler, *Not Everything the President Wants To Do Is Illegal*, Wash. Post (Aug. 8, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/08/not-everything-the-president-wants-to-do-is-illegal/ ("Immigration law is an area in which—for good or ill—Congress has given the executive wide latitude."). To the contrary, Congress has specifically given the executive branch significant authority over which aliens are entitled to work in the United States. *See* Pet'rs' Br. 50-51, 63. For example, section 1324(a)(h)(3) of title 8, which was enacted as part of the Immigration Reform and Control Act of 1986 (IRCA), defines an "unauthorized alien" not entitled to work in the United States as an alien who is neither a Lawful Permanent Resident nor "authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security]." 8 U.S.C. § 1324a(h)(3); *see also* Pub. L. No. 99-603, 100 Stat. 3359 (1986); *see generally* Office of Legal Counsel Op., *supra* note 5, at 21 (fact that deferred action recipients can apply for work authorization "depend[s] on independent and more specific statutory authority rooted in the text of the INA"). "Where the Attorney General is granted discretionary authority to grant relief by a statute that 'does not restrict the considerations which may be relied upon or the procedures by which the discretion should be exercised,' his discretion has been described by the Supreme Court as 'unfettered.'" *Perales v.*

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http://www.ice.gov/doclib/foia/prosecutorial-discretion/991104congress-letter.pdf (letter from bipartisan members of Congress urging INS to adopt "written guidelines . . . to ensure that [agency] decisions to initiate or terminate removal are not made in an inconsistent manner").

*Casillas*, 903 F.2d 1043, 1048-50 (5th Cir. 1990) (quoting *Jay v. Boyd*, 351 U.S. 345, 354 (1956)).

And, significantly, as some *amici* know from their experience serving in Congress when IRCA was enacted, § 1324 was enacted against the backdrop of existing regulations that "permitted certain categories of aliens who lacked lawful immigration status, including deferred action recipients, to apply for work authorization under certain circumstances." Office of Legal Counsel Op., *supra* note 5, at 21 n.11 (citing 8 C.F.R. § 109.1(b)(7) (1982)). In other words, Congress knew at the time it gave the executive branch that discretion that it would likely be used to permit certain categories of individuals who lacked lawful immigration status, including deferred action recipients, to apply for work authorization. *Cf.* 52 Fed. Reg. 46092, 46093 (1987) ("Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined 'unauthorized alien' in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute").

In short, executive discretion to determine how best to implement the laws passed by Congress is intentionally imbedded in the INA and the nation's other immigration laws.

### B. The DHS Directives Are a Valid Exercise of the Discretion Congress Has Conferred on the Executive Branch and Are Consistent with Previous Actions Taken by Presidents of Both Parties and Sanctioned Repeatedly by Congresses on a Bipartisan Basis.

Based on their experience in Congress, *amici* are familiar not only with the nation's immigration laws, but also with the manner in which presidents of both parties have exercised the discretion conferred on the executive branch in those laws. *Amici* thus recognize that these directives are a valid exercise of the discretion conferred on the executive branch. *See* Pet'rs' Br. 42-64.

To start, there is no question that the enforcement priorities established by the Administration are lawful and consistent with guidance provided by Congress. *See* Pet. App. 44a ("the states have not challenged the priority levels he has established"); *see also* Department of Homeland Security Appropriations Act, 2010, Pub. L. 111-83, 123 Stat. 2142, 2149 (2009) (directing DHS to prioritize "the identification and removal of aliens convicted of a crime by the severity of that crime"); H.R. Rep. No. 111-157, at 8 (2009) (instructing DHS not to "simply round[] up as many illegal immigrants as possible," but to ensure "that the government's huge investments in immigration enforcement are producing the maximum return in actually making our country safer").

Moreover, as *amici* well know, the practice of deferring removal of certain individuals in order to facilitate the nation's immigration enforcement priorities is a long-standing one and, significantly, one that has been deployed by presidents of both parties. *See, e.g.*, *Reno v. American-Arab Anti-Discrimination*

*Comm.*, 525 U.S. 471, 483-84 (1999) [hereinafter *AADC*] (the executive branch has long "engag[ed] in a regular practice (which ha[s] come to be known as 'deferred action') of exercising [its] discretion for humanitarian reasons or simply for its own convenience").

As the Office of Legal Counsel memo discusses in great detail, "[f]or decades, INS and later DHS have . . . implemented broader programs that make discretionary relief from removal available for particular classes of aliens." Office of Legal Counsel Op., *supra* note 5, at 14; *see id.* at 14-18. Perhaps most significantly, in 1990, INS implemented the "Family Fairness" program, which provided extended voluntary departure and work authorization to the spouses and children of aliens who had been granted legal status under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 ("IRCA"). *See id.*; *cf.* Memorandum from Andorra Bruno et al., Specialist in Immigration Policy, Cong. Research Serv. 10 (July 13, 2012), http://shusterman.com/pdf/crsdeferredactionmemo.pdf?3856b4 [hereinafter "CRS Report"] (noting that the program was adopted after "[l]egislation addressing this population was introduced throughout the 1980s, but not enacted"). Moreover, in addition to the 1990 Family Fairness program, there are numerous other examples of INS or DHS "ma[king] discretionary relief available to certain classes of aliens through the use of deferred action." Office of Legal Counsel Op., *supra* note 5, at 15; *see also* Pet'rs' Br. 48-50.[6]

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[6] According to the court below, this "[h]istorical practice" is too "far afield from the challenged program" to "shed[] . . . light on the Secretary's authority to implement DAPA" because those earlier programs were "interstitial," whereas this one is not. Pet. App. 84a. This is wrong. These directives, like earlier de-

Moreover, members of Congress of both parties have long "been aware of the practice of granting deferred action, including in its categorical variety . . . and [Congress] has never acted to disapprove or limit the practice." *Id.* at 18. To the contrary, Congress has repeatedly acknowledged the existence of such programs. *See, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (noting that Violence Against Women Act self-petitioners may be "eligible for deferred action"); *id.* § 1227(d)(2) (noting that denial of a stay request does not "preclude the alien from applying for . . . deferred action"); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c), (d), 117 Stat. 1392, 1694-95 (2003) (codified at 8 U.S.C. § 1151 note) (identifying individuals who are "eligible for deferred action"); *see also AADC*, 525 U.S. at 485 (concluding that Congress enacted 8 U.S.C. § 1252(g) "to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations"). Indeed, *amicus* Congressman Berman sponsored a piece of legislation that explicitly referenced a deferred action program for certain bona fide visa applicants and directed DHS to compile a report on how quickly a particular service center processed deferred action applications. Office of Legal Counsel Op., *su-*

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ferred action programs, establish guidelines for the exercise of case-by-case discretion that are consistent with established national priorities for immigration enforcement and are consistent with the authority Congress has conferred on the executive branch. Thus, while the population of immigrants covered by the nation's immigration laws has increased over time, the nature of the DAPA program is not novel. Moreover, the Family Fairness program "made a comparable fraction [approximately 1.5 million of the contemporary cohort of approximately 3.5 million] of undocumented aliens . . . potentially eligible for discretionary extended voluntary departure relief." Office of Legal Counsel Op., *supra* note 5, at 31; *see also* CRS Report, *supra*, at 10.

*pra* note 5, at 19. That bill was passed by both houses of Congress without objection.[7]

The court below nonetheless concluded that the directives were inconsistent with the immigration laws because, in significant part, they permit recipients of deferred action to apply for work authorization. Pet. App. 74a-76a; *see id.* at 76a (directives would "undermin[e] Congress's stated goal of closely guarding access to work authorization" by "dramatically increas[ing] the number of aliens eligible for work authorization"). But, significantly, the authority for deferred-action recipients to work derives not from the directives at issue in this litigation, but from pre-existing regulations that date back to the Reagan Administration. *See* 8 C.F.R. § 274a.12(c)(14). As discussed earlier, IRCA was enacted against the backdrop of regulations, promulgated in 1981 by the Immigration and Naturalization Service, that permitted deferred action recipients to apply for work authorization, *see supra* at 11-12, and shortly after IRCA was enacted, the INS denied a request that it repeal its employment authorization regulation, *see* Office of Legal Counsel Op., *supra* note 5, at 21 n.11. Also significantly, Congress has long known about those regulations, and it has never acted to limit the executive branch's authority to give work authorization to deferred action recipients, nor has it acted to limit the practice of deferred action more generally. *See supra* at 11-12.

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[7] *See Actions Overview: H.R. 7311—110th Congress (2007-2008)*, Congress.gov, https://www.congress.gov/bill/110th-congress/house-bill/7311/actions?q=%7B%22search%22%3A%5B%22%5C%22hr7311%5C%22%22%5D%7D&resultIndex=1 (last visited Nov. 23, 2015).

As *amici* are well aware, Congress's longstanding decision to permit deferred action programs and to permit work authorization to be given to deferred action recipients reflects Congress's repeated determinations that such programs can aid the executive branch in effectively enforcing the nation's immigration laws. Moreover, these multiple, bipartisan congressional actions underscore that these directives violate neither the procedural nor the substantive requirements of the APA, as the government's brief well demonstrates, *see* Pet'rs' Br. 65-73. Indeed, while State respondents may disagree with the manner in which the executive branch has exercised its discretion here, that sort of disagreement is a policy difference, not a legal one. By concluding otherwise, the court below did great damage to the statutory scheme put in place by Congress, a statutory scheme that depends upon the executive branch to make the sorts of discretionary choices at issue here to ensure that immigration enforcement best serves the national interest in public safety and national security.

## II. THE DIRECTIVES ARE CONSISTENT WITH THE CONSTITUTION'S TAKE CARE CLAUSE

Article II of the U.S. Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America," U.S. Const. art. II, § 1, cl. 1, and that that President "shall take Care that the Laws be faithfully executed," *id.* art. II, § 3. By exercising the discretion Congress has conferred on the executive branch in the nation's immigration laws, the executive branch is not acting at odds with the President's Take Care obligation; rather, the President is fulfilling that obligation by ensuring that the nation's immigration laws are "faithfully executed."

The Constitution's establishment of a single, independent President was a direct response to the infirmities of the precursor Articles of Confederation. The Articles of Confederation had vested executive authority in the Continental Congress, Articles of Confederation of 1781, art. IX, paras. 4, 5, thereby leaving the federal government unable to enforce the nation's laws, *see* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* 32-33 (2008). Because of these experiences under the Articles of Confederation, "the general antipathy toward executive power that dominated the post-1776 period immediately following independence had given way to a 1787 consensus in favor of an executive that was far more independent and energetic." *Id.* at 33; *see The Federalist No. 70* (Alexander Hamilton) ("all men of sense will agree in the necessity of an energetic Executive"); *see also, e.g.*, Saikrishna B. Prakash & Michael D. Ramsey, *The Goldilocks Executive*, 90 Tex. L. Rev. 973, 982 (2012) (reviewing Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (2010)) ("The Founders had experience with extraordinarily weak executives . . . and had judged them to be failures."). The Constitution thus vested "executive Power" in an independent President and gave that President the responsibility to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, in order to ensure that the nation's laws would be effectively enforced. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 Yale L.J. 541, 599-603 (1994) ("the Constitution's clauses relating to the President were drafted and ratified to energize the federal government's administration and to establish one individual accountable for the administration of federal law"); *cf.* Akhil Reed Amar, *America's Con-*

*stitution: A Biography* 131 (2005) ("The Constitution's 'President' . . . bore absolutely no resemblance to the 'president' under the Articles of Confederation.").

Inherent in this power to execute the laws is the power to determine how best those laws should be enforced within the statutory limits set by Congress. As this Court recognized in *Heckler v. Chaney*, agency decisions about how best to enforce the law "share[] to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict," and that is a decision that "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.'" *Chaney*, 470 U.S. at 832 (quoting U.S. Const. art. II, § 3). It is within the "special province of the Executive Branch" because it is a decision that requires the agency to "balanc[e] . . . a number of factors which are peculiarly within its expertise," such as "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, . . . whether the agency has enough resources to undertake the action at all." *Id.* at 832, 831. As the Court further explained in *Chaney*, the executive branch is particularly well-positioned to make such decisions because it "is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.* at 831-32.

Here, of course, Congress has recognized, as the Founders anticipated that it would in some contexts, that the executive would be best positioned to make the judgments necessary to enforce the immigration laws. *See supra* at 7-12. Thus, by setting enforcement priorities and providing guidance about how

those priorities can be implemented in a manner consistent with the immigration laws passed by Congress, the President is ensuring that those laws are faithfully executed. The directives are thus not at odds with the President's responsibility to "take Care that the Laws be faithfully executed," as State respondents would have it. Rather, they are a manifestation of that responsibility.

To be sure, the executive branch cannot, as a general matter, "'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. 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)). But the directives do not come anywhere close to that line, given that they are plainly an effort to determine how best to effectuate the Administration's statutory responsibilities, consistent with the limited enforcement resources that Congress has made available. *See supra* at 13-17; Pet'rs' Br. 42-64; *see also* Office of Legal Counsel Op., *supra* note 5, at 26 (justifications "for the program . . . appear[] consonant with congressional policy embodied in the INA").

Put differently, if this Court concludes, as it should, that the directives are consistent with the nation's immigration laws, that conclusion should end the Take Care inquiry. The President cannot violate his obligation to "take Care that the Laws be faithfully executed" by executing those laws in a manner consistent with the guidance provided by Congress.[8]

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[8] Moreover, even if the directives were inconsistent with the statutory guidance provided by Congress (which they are not), they still would not present a violation of the Take Care Clause. As this Court has recognized, "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims." *Dalton v. Specter*, 511 U.S. 462, 473 (1994); *see*

As *amici* well know based on their experience in Congress, the directives at issue here are consistent with that guidance and should be upheld.

## CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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*id.* at 474 n.6 ("in cases in which the President concedes, either implicitly or explicitly, that the only source of his authority is statutory, no 'constitutional question whatever' is raised. . . . Rather, 'the cases concern only issues of statutory interpretation.'" (quoting Jesse H. Choper, *Judicial Review and the National Political Process* 316 (1980))).

# APPENDIX

## APPENDIX:

## LIST OF *AMICI*

Barnes, Michael
Former Representative of Maryland (1979-1987); Chair of the Western Hemisphere Subcommittee of the House Committee on Foreign Affairs

Berman, Howard
Former Representative of California (1983-2013); Chair of the House Committee on Foreign Affairs; Member of the Committee on the Judiciary

Fazio, Victor H.
Former Representative of California (1979-1993); Chair of the House Democratic Caucus

Gonzalez, Charles
Former Representative of Texas (1999-2013); Chair of the Hispanic Caucus

Harkin, Tom
Former Senator of Iowa (1985-2015) and former Representative of Iowa (1975-1985); Chair of the Senate Committee on Health, Education, Labor, and Pensions; Chair of the Senate Committee on Agriculture, Nutrition, and Forestry; Member of the Senate Appropriations Subcommittee on State, Foreign Operations, and Related Programs

Hart, Gary
Former Senator of Colorado (1975-1987); Member of the Senate Committee on Armed Services; Member of the Senate Select Committee on Intelligence

Holtzman, Elizabeth
Former Representative of New York (1973-1981); Member of the Committee on the Judiciary; Chair of the Subcommittee on Immigration

LaHood, Raymond H. ("Ray")
Former Representative of Illinois (1995-2009); Member of the House Permanent Select Intelligence Committee, and the Republican Mainstream Partnership; Former United States Secretary of Transportation (2009-13)

Leach, James A.
Former Representative of Iowa (1977-2007); Chair of the House Committee on Financial Services; Member of the Committee on International Relations; Chair of the Subcommittee on Asian-Pacific Affairs; Chair of the National Endowment of the Humanities (2009-13)

Levin, Carl
Former Senator of Michigan (1979-2015); Chair of the Committee on Armed Services; Member of the Committee on Homeland Security and Governmental Affairs; Chair of the Permanent Subcommittee on Investigations

Lugar, Richard
Former Senator of Indiana (1977-2013); Chair of the Senate Committee on Foreign Relations; Chair of the Committee on Agriculture, Nutrition, and Forestry

Miller, George
Former Representative of California (1975-2015); Chair of the House Committee on Education and Labor

Porter, John E.
Former Representative of Illinois (1980-2001); Member of the House Committee on Appropriations; Chair of the Subcommittee on Labor, Health & Human Services, and Education

Reyes, Silvestre
Former Representative of Texas (1997-2013); Chair of the Permanent Select Committee on Intelligence; Member of the Committee on Armed Services; U.S. Border Patrol (1969-95); Sector Chief, Chief Patrol Agent, El Paso Sector, U.S. Border Patrol

Skaggs, David
Former Representative of Colorado (1987-1999); Member of the House Appropriations Subcommittee on Commerce, Justice, State, and the Judiciary; Chair of the Democratic Study Group

Udall, Mark

Former Senator of Colorado (2009-2015) and former Representative of Colorado (1999-2009); Member of the Senate Committee on Armed Services; Member of the Senate Select Committee on Intelligence

Waxman, Henry A.

Former Representative of California (1975-2015); Chair of the House Committee on Oversight and Government Reform, and the Committee on Energy and Commerce

Wirth, Tim

Former Senator of Colorado (1987-1993) and former Representative of Colorado (1975-1987); Chair of the House Subcommittee on Telecommunications; Member of the Senate Committee on Foreign Relations; Undersecretary of State for Global Affairs (1993-1997)