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

BRIEF OF 184 MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES AND 34 MEMBERS OF THE U.S. SENATE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are 184 Members of the U.S. House of Representatives and 34 Members of the U.S. Senate. A complete list of amici is set forth in the Appendix. Among them are:

[1] Letters consenting to the filing of this brief are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made any monetary contribution to the preparation or submission of this brief.

U.S. House of Representatives:

- Nancy Pelosi, Democratic Leader
- Steny H. Hoyer, Democratic Whip
- James E. Clyburn, Assistant Democratic Leader
- Xavier Becerra, Democratic Caucus Chair
- Joseph Crowley, Democratic Caucus Vice-Chair
- John Conyers, Jr., Ranking Member, Committee on the Judiciary
- Zoe Lofgren, Ranking Member, Subcommittee on Immigration and Border Security of the Committee on the Judiciary

U.S. Senate:

- Harry Reid, Democratic Leader
- Richard J. Durbin, Democratic Whip
- Charles E. Schumer, Democratic Conference Committee Vice Chair and Policy Committee Chair, and Ranking Member, Subcommittee on Immigration and the National Interest, Committee on the Judiciary
- Patty Murray, Secretary, Democratic Conference
- Patrick J. Leahy, Ranking Member, Committee on the Judiciary
- Robert Menendez, Democratic Hispanic Task Force Chair

As Members of Congress responsible, under Article I of the Constitution, for enacting legislation that will then be enforced by the Executive Branch pursuant to its authority and responsibility under Article II, amici

have an obvious and distinct interest in ensuring that the Executive enforces the laws in a manner that is rational, effective, and faithful to Congress's intent.

Given their institutional responsibility, amici would not, of course, support Executive efforts to exercise unfettered discretion at odds with duly enacted federal statutes. But where Congress has chosen to vest in the Executive discretionary authority to determine how a law should be enforced, and the Executive has acted pursuant to that authority, amici have a strong interest in ensuring that federal courts honor Congress's deliberate choice by sustaining the Executive's action.

Those interests extend in full measure to the Executive's enforcement of the Nation's immigration laws. As representatives of diverse communities across the United States, amici have witnessed how an approach to enforcement of the immigration laws that does *not* focus on appropriate priorities, such as serious criminals and national security threats, undermines confidence in those laws, wastes resources, and needlessly divides families, thereby exacting a severe human toll. Amici regard the actions of the Executive invalidated by the court of appeals as appropriate measures to focus the Department of Homeland Security's limited enforcement resources on the removal of those unauthorized immigrants who pose threats to public safety.

Amici also regard those actions as squarely within the Executive's statutorily granted discretion to determine how best to enforce the immigration laws. Congress understands that the Executive is often better positioned to determine how to adjust quickly to changing circumstances in a complex field, particularly one, like immigration, involving law-enforcement and national-security concerns. Congress therefore regu-

larly gives the Executive broad discretion to determine how to enforce such statutes—and rarely has it done so more clearly than in the Nation's immigration laws.

Because amici regard the Executive's actions as a permissible exercise of the discretion that Congress has statutorily committed to it, they urge the Court to grant the petition for a writ of certiorari, reverse the decision of the court of appeals, and vacate the preliminary injunction entered by the district court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below represents an extraordinary substantive invalidation of an agency's judgment about how best to exercise the broad authority that Congress has expressly delegated to it. The court of appeals has overturned, as contrary to the Immigration and Nationality Act (INA), a practical judgment by the Secretary of Homeland Security about how to channel the government's limited immigration enforcement resources toward categories of individuals likely to pose a danger to the public interest rather than the millions of individuals who do not.

As reflected in the DAPA Memorandum, Pet. App. 411a-419a,[2] the Secretary determined that those individuals whose situations do not present compelling cases for expending enforcement resources should be encouraged to identify themselves to authorities, so that immigration officers nationwide may know who they

[2] Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, to León Rodriguez, Director, U.S. Citizenship and Immigration Services, et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014).

are and confirm that they are not a removal priority. The Secretary further determined that, as long as those persons continued to meet certain qualifications, the Department of Homeland Security would refrain from removing them for a limited period—a discretionary determination that would be memorialized under the label of "deferred action," but would confer no legal rights and could be reversed at any time. Finally, the Secretary noted that, pursuant to pre-existing regulations promulgated under the Secretary's statutory authority, those immigrants with "deferred action" could apply for work authorization during the period of forbearance if they make a showing of economic need—a practical and sensible accommodation for such immigrants. Far from being invalid under the INA, the Secretary's actions represent exactly the kind of rational and measured approach to immigration enforcement that Congress expects—and explicitly empowered—the Executive to undertake.

The impact of the court of appeals' decision on the millions of individuals who might be eligible for deferred action under the Secretary's initiative—and their U.S. citizen and lawful permanent resident (LPR) children—would be reason enough for this Court to grant review of that decision. From amici's distinct perspective, however, what is especially troubling about the court of appeals' decision is that it appears to call into question fundamental premises about Congress's ability to grant the Executive the flexibility and discretion so often necessary to enforce the law effectively—including, but not limited to, immigration law. Millions of noncitizens are present in the United States; an estimated 11.3 million of them are present without authorization. Congress has long understood that the Executive, with the limited resources available, cannot

apply the immigration laws to all unauthorized immigrants. Moreover, the patterns of immigration are subject to swiftly changing circumstances, and the Executive is better situated to respond promptly to those changes and to redirect resources as necessary. On various occasions, Congress has therefore granted the Secretary broad discretion in determining how to carry out the immigration laws, and has explicitly *directed* the Secretary to establish policies and priorities for enforcement of those laws. These actions represent Congress's overarching judgment that the Executive should enforce immigration laws in a rational, tailored, and effective way.

The petitioners claim not to challenge—and the court of appeals did not question—the Secretary's discretionary authority to designate individuals who would be covered by DAPA and DACA as low priorities for removal.[3] In fact, however, the court of appeals' decision is not faithful to that congressional judgment and would in effect nullify those broad statutory grants of discretionary authority. The decision gives insufficient weight to 6 U.S.C. § 202(5), which charges the Secretary with "[e]stablishing national immigration enforcement policies and priorities," and to 8 U.S.C. § 1103(a)(3), which authorizes the Secretary to "establish such regulations; … issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the INA. Those two

[3] Those priorities were defined in a separate memorandum that accompanied the DAPA Memorandum. Pet. App. 420a-429a (Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, et al., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014)).

provisions unquestionably permit the Secretary to make the judgment that enforcement resources should be channeled in particular ways. In addition, in 8 U.S.C. § 1324a, Congress expressly authorized the Secretary, by broad delegation, to determine which noncitizens should be authorized to work while they remain in the United States in addition to those noncitizens who are otherwise specifically authorized by the INA to work. Those provisions, taken together, fully authorize the Secretary's judgment that the immigration laws will be better enforced if certain individuals who are not a priority for removal are encouraged to identify themselves and allowed to work lawfully during such time as the Secretary forbears from removing them.

Notwithstanding the express statutory authority to set enforcement policies, the court of appeals held that Congress had *precluded* the Secretary from implementing DAPA and DACA when it established separate mechanisms for obtaining immigration statuses that are markedly different from deferred action (such as LPR status) and when it explicitly allowed for lawful employment under certain circumstances.

That reasoning reflects a serious misreading of the INA. Deferred action is not a substitute for LPR status or an end-run around the stringent requirements for obtaining LPR status. An immigrant with LPR status enjoys numerous substantive and procedural guarantees reflecting his or her permanent position in the United States, including permanent residence, a path to citizenship, and the right to petition for the admission of close family members; an immigrant granted deferred action, in contrast, receives none of those guarantees. Deferred action is extended only as a matter of administrative convenience, can be terminated at any time and for any reason, and brings with it only

certain limited, temporary, and discretionary accommodations (such as eligibility to apply for work authorization on the basis of economic need).

Although Congress has set forth detailed requirements for immigrants to attain LPR status, it does not follow that Congress intended to bar the Secretary from making the discretionary judgment that certain other noncitizens should, for different reasons and on different terms, be allowed to remain in the country for a limited time and be eligible to apply for authorized work during that time. The court of appeals' rationale—that by setting up one scheme extending benefits to specific classes of noncitizens, Congress must have meant to foreclose any other scheme applicable to other classes—which the court also applied with respect to work authorization, is out of place in administrative law. It is especially inapt with respect to the INA, which gives the Secretary extensive authority to make discretionary judgments on how best to enforce the Nation's immigration laws where Congress has not prescribed a specific action. The court of appeals' decision undermines Congress's ability to place critical responsibility in the hands of an agency with the necessary expertise and capabilities. The Court should therefore grant review and reverse.

ARGUMENT

I. THE DAPA MEMORANDUM IS A PERMISSIBLE EXERCISE OF CONGRESSIONALLY GRANTED DISCRETION

A. Congress Has Appropriately Vested The Secretary With Broad Discretion To Establish And Implement Immigration Policies And Priorities

1. Immigration is a complex and dynamic regulatory field. Demographic, social, and political changes abroad can cause abrupt and substantial changes in U.S. immigration patterns. Those changes in turn often generate unforeseeable and sometimes urgent challenges for domestic policy, criminal law enforcement, national security, and foreign relations. *See, e.g.*, *Arizona* v. *United States*, 132 S. Ct. 2492, 2498-2499 (2012) (stating that "[i]mmigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws," and noting that immigration enforcement decisions both "embrace[] immediate human concerns" and "involve policy choices that bear on this Nation's international relations"). Effective immigration policy demands that the government be able to move swiftly to meet high-priority challenges as they arise.

In addition, for decades the size of the unauthorized immigrant population in the United States has far exceeded the resources available to enforce the Nation's immigration laws. In any regulatory field, "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing," *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985)—hence the common need to set enforcement priorities. That is true in spades when it comes to the immigration laws. The

process of removal requires the dedication of extensive resources, as it typically involves investigation, charge, adjudication, and (if the person is found removable) the actual process of effecting the person's departure, and may also involve detention for certain categories of individuals. As the government explains, "DHS has not been able to remove more than four percent of the estimated removable population in any year." Pet. 4; *see also* Pet. App. 412a ("Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States."); *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (observing that "[a]t each stage" of removal, "the Executive has discretion to abandon the endeavor"). Given that resource gap, enforcement of the Nation's immigration laws will inevitably require the Executive to set priorities.

2. In the INA, Congress has empowered the Executive to define enforcement priorities, to do so in a rational, consistent, and measured way that focuses its limited resources on the highest-priority cases, and to establish practical means for implementing those priorities. Of course, "Congress legislates against a background assumption of prosecutorial discretion," *Abuelhawa* v. *United States*, 556 U.S. 816, 823 n.3 (2009); as this Court has "repeated time and again," an agency "has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities," *Massachusetts* v. *EPA*, 549 U.S. 497, 527 (2007). Thus, the authority to set removal priorities is an integral and unavoidable aspect of the Executive's discharge of its constitutional responsibility to faithfully execute the Nation's immigration laws. *See* U.S. Const. art. II, § 3.

In crafting the Nation's immigration laws, however, Congress has not relied solely on implicit executive authority. Rather, Congress has recognized that maintaining rational, secure, efficient, and humane immigration practices demands a degree of flexibility that the Executive is better equipped to provide. In view of the Executive's institutional advantages, Congress has explicitly granted the Executive broad discretionary authority to set removal policies and priorities to develop and implement appropriate means for carrying them out. *E.g.*, *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950) (identifying immigration law as "a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program" (quotation marks omitted)); *see also Mistretta* v. *United States*, 488 U.S. 361, 372 (1989) ("[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."); Rodríguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 Duke L.J. 1787, 1810 (2010) ("An administrative agency, as a structural matter, is better equipped than Congress to take into account factors that require expertise and speed to discern.").

Although there had never been any doubt about the breadth of the Executive's authority in this area, in 2002 Congress specifically charged the Secretary of Homeland Security with "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). That direction goes beyond the background assumption that executive agencies will set priorities for law enforcement; it expresses Congress's specific intent that immigration enforcement not be left to

chance, but rather be carried out in a way that furthers the Nation's immigration policies in an effective and efficient way.

In addition, since its enactment in 1952, the INA has authorized the Secretary (previously the Attorney General) to "establish such regulations; … issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" to execute the INA. 8 U.S.C. § 1103(a)(3); *see also, e.g.*, *Jean* v. *Nelson*, 727 F.2d 957, 965 (11th Cir. 1984) (en banc) (§ 1103(a) is "[t]he most important" of the INA's "broad grants of discretion" to the Secretary), *aff'd*, 472 U.S. 846 (1985).

Those broad congressional grants of discretionary authority plainly suffice to support the enforcement priorities established by the Secretary in a separate memorandum. *See* Pet. App. 423a (prioritizing "threats to national security, border security, and public safety"); *Arizona*, 132 S. Ct. at 2499 (stating that a "principal feature of the removal system is the broad discretion exercised by immigration officials," including as to "whether it makes sense to pursue removal at all"). They also support the particular policies adopted by the Department of Homeland of Security to accommodate low-priority unauthorized immigrants, such as using the deferred action mechanism to memorialize a decision to temporarily refrain from removal, and deeming deferred-action recipients eligible to apply for lawful employment during the period of forbearance (an accommodation adopted decades ago and separate from the DAPA Memorandum). For in instructing the Secretary to set and carry out national immigration enforcement "policies" (as well as "priorities"), Congress did not limit the Secretary to determining which individuals should be the focus of removal efforts or require

that the Secretary leave millions of people in perpetual limbo; it also necessarily granted the Secretary the authority to determine how to accommodate the many individuals who are determined *not* to be enforcement priorities.

The Secretary has determined that low-priority enforcement cases may receive "deferred action," along with (pursuant to a longstanding and unchallenged agency regulation known to Congress for decades) eligibility to apply for a time-limited authorization to work. That judgment easily qualifies as "national immigration enforcement polic[y]" under 6 U.S.C. § 202(5), as it enables the Executive to effectively focus its enforcement resources on the most pressing categories of cases. *See* Pet. App. 412a ("This memorandum is intended to reflect new policies for the use of deferred action.").

First, those accommodations create a mechanism—and an incentive—for low-priority noncitizens to identify themselves to the Department of Homeland Security and submit to a background check. *See* Pet. App. 415a (noting intent to encourage individuals "to come out of the shadows, submit to background checks, pay fees, apply for work authorization (which by separate authority [the Secretary] may grant), and be counted"). This self-identification process allows enforcement officials to focus their attention and resources on investigating and processing high-priority cases. *Id.* 418a-419a (instructing enforcement officials to "prevent the further expenditure of enforcement resources" with regard to individuals who may qualify under DAPA, including by seeking administrative closure of any pending removal proceedings). Moreover, it promotes public safety and national security, for it ensures that

millions of individuals in the country without authorization to remain can be identified and screened.

Second, by allowing individuals with deferred action to apply for authorization to work where they have an economic need, the Secretary helps ensure that his prioritization scheme is not self-defeating or otherwise contrary to the public interest. If individuals deemed to present low-priority cases for enforcement—and thus effectively permitted on a contingent basis to temporarily remain in the United States—were denied the ability to work lawfully, many would have no means of survival other than illegal activity. *Cf. Arizona*, 132 S. Ct. at 2504 (stating that immigration law's "framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives"). The Secretary could properly determine that such a situation would undermine the incentive for unauthorized immigrants to report themselves to the Department of Homeland Security, impair the government's ability to keep track of such individuals, and perpetuate a situation in which millions of individuals live "in the shadows."

3. Further still, Congress has expressly given the Executive the discretion to accommodate unauthorized immigrants with deferred action and, separately, the discretion to authorize employment. Congress has long been aware of the Executive's practice of deferred action, and Congress has long recognized that the Executive has discretionarily extended work authorization to categories of individuals as a matter of immigration-enforcement priority, even outside the INA's separate and distinct regime for issuing visas or other forms of work authorization under certain circumstances.

a. Although the practice of deferred action began "without express statutory authorization," it long ago became a "regular practice." *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 484 (quotation marks omitted). Indeed, regulations recognizing deferred action and connecting deferred action to work authorization have been in force continuously since the 1980s. *See, e.g.*, 8 C.F.R. § 109.1 (1982) (providing that noncitizens with deferred action are eligible to apply for work authorization); *id.* § 274a.12(c)(14) (1988) (describing deferred action as "an act of administrative convenience to the government which gives some cases lower priority").

Congress, in turn, has approved of this practice and has enacted legislation incorporating the practice into regulatory schemes, including for certain victims of domestic violence, 8 U.S.C. § 1154(a)(1)(D)(i)(II) & (IV), and for certain relatives of certain individuals killed in the 9/11 terrorist attacks or in combat, Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361; National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694-1695 (2003). And for decades, the very congressional committees that are responsible for immigration have routinely asked the Executive to grant unauthorized immigrants deferred action or stays of removal while the committee considered private bills for relief from enforcement of the immigration laws.[4]

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[4] *See, e.g.*, Maguire, *Immigration: Public Legislation and Private Bills* 23-25, 253-255 (1997); Letter from Elliot Williams, Assistant Director, Immigrations and Customs Enforcement, to

b. In 1981, the Executive promulgated a regulation (after notice and comment) codifying decades of administrative practice permitting employers to hire noncitizens who are discretionarily authorized to work by the Executive. Employment Authorization to Aliens in the United States, 46 Fed. Reg. 25,079 (May 5, 1981); 8 C.F.R. § 109.1 (1982); U.S. Citizenship and Immigration Services, *Adjudicator's Field Manual*, ch. 38.2. Far from disapproving this regulation (or underlying practice), Congress in 1986 expressly granted the Executive the discretion to continue doing it by enacting 8 U.S.C. § 1324a(h)(3), which provides that an employer may hire a noncitizen if that person is "authorized to be … employed by this chapter *or by the Attorney General*"—now the Secretary (emphasis added). *See also Arizona Dream Act Coal.* v. *Brewer*, 757 F.3d 1053, 1062 (9th Cir. 2014) (recognizing that § 1324a(h)(3) vests in the Executive "broad discretion to determine when noncitizens may work in the United States").

Exercising that clear statutory authority, the Executive then promulgated (again, after notice and comment, Control of Employment of Aliens, 52 Fed. Reg.

Hon. Elton Gallegly, Chairman, Subcommittee on Immigration Policy and Enforcement, Committee on Judiciary, U.S. House of Representatives (Nov. 9, 2011) (stating that "[p]ursuant to the agreement between DHS and Congress, … [DHS] will temporarily grant deferred action to the beneficiary" of a private bill for the relief of an unauthorized immigrant, and noting that under 8 C.F.R. § 274a.12(c)(14), the beneficiary could "file for work authorization"); Subcommittee on Immigration and Border Security of the House Committee on the Judiciary, 114th Cong., Rules of Procedure and Statement of Policy for Private Immigration Bills, R. 5 ("In the past, the Department of Homeland Security has honored requests for departmental reports by staying deportation until final action is taken on the private bill.").

16,216 (May 1, 1987)) 8 C.F.R. § 274a.12(c)(14), which remains in force today and which permits unauthorized immigrants who are granted deferred action to apply for work authorization. It is that regulation, not the DAPA Memorandum challenged in this litigation, that makes recipients of deferred action pursuant to the DAPA Memorandum eligible to apply for lawful employment. And that regulation properly implements the Executive's delegated authority to determine, as a matter of discretion and judgment, which noncitizens may be allowed to remain in the country temporarily and work lawfully during that period, even if they have not been issued a formal status *entitling* them to do so as a matter of statutory right.

B. The Court of Appeals' Analysis Is Fundamentally Flawed

Despite the ample discretionary authority that Congress granted to the Secretary through the INA, the court of appeals ruled not only that the DAPA Memorandum was unauthorized by the Secretary's broad policymaking and priority-setting authorities, but also that it is "manifestly contrary to the INA" because the INA "directly" and "precise[ly]" *prohibited* the Secretary's actions. Pet. App. 70a-71a, 76a, 85a. The court's reasoning is wrong. It incorrectly equates deferred action and eligibility for work authorization with other forms of accommodation and formal immigration status set forth in the INA. More fundamentally, the court's reasoning is wrong because it presumes that, where Congress has not specifically authorized the Executive to take a particular action, Congress has barred that action, even in a regulatory field as complex as immigration. That reasoning stands to wreak havoc with immigration enforcement, and it could

gravely undermine Congress's fundamental objective that the Secretary implement the Nation's immigration laws in a rational and effective manner. Perhaps there might be some statutory schemes for which the court of appeals' interpretive approach—whether it be a clear-statement rule, the principle of *expressio unius*, or another canon—would be appropriate. But the INA is not one of them. The court's analysis reads the most important grants of authority out of the statute.

1. With respect to deferred action, the court of appeals pointed to provisions of the INA that specifically authorize immigrants to remain in the country under certain circumstances not relevant here. The court noted, for example, that "Congress has enacted an intricate process for illegal aliens to derive a lawful immigration classification [i.e., LPR] from their children's immigration status"; it then recited the various hurdles that must be cleared to obtain LPR status, but that are not required to obtain deferred action. Pet. App. 72a. And the court pointed out that the INA explicitly "identifie[s] narrow classes of aliens eligible for deferred action," but that the class of immigrants who would be eligible for deferred action under the DAPA Memorandum is not among them. *Id.* 71a-72a.

Deferred action, however, is not a substitute for LPR status or an end-run around the requirements for obtaining LPR status. The court commented that LPR status is "more substantial" than deferred action, Pet. App. 74a, but that was a considerable understatement. Among other differences, LPR designation is a permanent lawful status that confers the right to remain in the United States, apply for citizenship after five years, and petition for the admission of close family members. Neither the DAPA Memorandum nor the practice of deferred action generally confers "any form of legal

status" or any "substantive right, immigration status, or pathway to citizenship." *Id.* 413a, 419a. Nor does the DAPA Memorandum confer immunity from the immigration laws or any other kind of permanent status or legal right, as deferred action may be "terminated at any time at the agency's discretion." *Id.* 413a. In this way, although deferred action may mean that a person is "lawfully present" under certain narrow statutory provisions, lawful "presence" and lawful "status" "are distinct concepts" in the INA with substantially different implications. *Chaudhry* v. *Holder*, 705 F.3d 289, 292 (7th Cir. 2013).

More fundamentally, none of the statutory provisions relied on by the court of appeals in its analysis—indeed, no provision of the INA anywhere—explicitly bars the Executive from using deferred action to memorialize discretionary decisions to forbear from initiating removal proceedings. Although the court disclaimed reliance on the canon of *expressio unius*, Pet. App. 77a, its reasoning reflects a negative inference, drawn from the fact that the INA explicitly authorizes LPR status under certain circumstances and deferred action under certain circumstances but does not explicitly authorize deferred action as granted under the DAPA Memorandum. That kind of negative-inference reasoning, however, is perilous in the context of a sprawling and complex statute like the INA; it would seriously constrain Congress's ability to delegate to agencies the responsibility to respond to fast-moving or unanticipated events. It is also contrary to the text of the INA, which expressly grants the Secretary broad discretionary authority to set enforcement policies and priorities and to adopt appropriate means to carry out those priorities, as detailed above.

The court of appeals dismissed those relevant grants of discretionary authority, asserting that they "cannot reasonably be construed as assigning decisions of vast economic and political significance … to an agency." Pet. App. 79a (quotation marks and footnote omitted). That is precisely what they are doing, and the court cited no ground for concluding otherwise. As this Court has acknowledged, "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868 (2013). Indeed it does—and here it has spoken in capacious terms to enlarge agency discretion in an area where discretion is critical. *See also Massachusetts*, 549 U.S. at 532 ("The broad language of § 202(a)(1) [of the Clean Air Act] reflects an intentional effort to confer the flexibility necessary to forestall … obsolescence.").

2. The court of appeals similarly went astray in concluding that the INA specifically forecloses the Secretary from allowing the immigrants covered by the DAPA Memorandum to apply for employment authorization. A longstanding regulation, 8 C.F.R. § 274a.12(c)(14), permits those unauthorized immigrants who are granted deferred action to apply for work authorization based on economic need. The court of appeals, however, concluded that that regulation is "beyond the scope of what the INA can reasonably be interpreted to authorize" because the INA "specifies classes of aliens eligible and ineligible for work authorization … with no mention of the class of persons whom [the DAPA Memorandum] would make eligible for work authorization." Pet. App. 49a, 74a-75a (footnote omitted).

It is far too late for the petitioners to seek to have this decades-old regulation set aside as *ultra vires*.[5] In any event, the court's negative inference here is also unwarranted, given the clear and broad grants of discretionary authority to carry out immigration enforcement policies and priorities. Section 1324a(h)(3) of Title 8 explicitly vests in the Executive the discretion to "authorize[]" employers to hire noncitizens. Nothing in that provision suggests that the Executive's authority to extend work authorization is limited to those categories of noncitizens already specifically identified by Congress. Rather, Congress has granted the right to apply for work authorization for certain classes of noncitizens, prohibited it for certain others, and given the Secretary discretion to determine whether to grant it to anyone else.

The court of appeals suggested that § 1324a(h)(3) would be "an exceedingly unlikely place" to find the requisite authority to extend work authorization to individuals granted deferred action because that provision "does not mention lawful presence or deferred action, and … is listed as a '[m]iscellaneous' definitional provision expressly limited to § 1324a, a section concerning the 'Unlawful employment of aliens.'" Pet. App. 78a-79a. That reasoning reflects a serious misunderstanding of § 1324a. Section 1324a, introduced by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3445, is the centerpiece of the INA's employment-authorization provisions, rendering it unlaw-

[5] 28 U.S.C. § 2401(a) (six-year limitations period); *P&V Enters.* v. *Army Corps of Eng'rs*, 516 F.3d 1021, 1023 (D.C. Cir. 2008) (dismissing claim that agency rule had "overstepped its authority" as untimely under § 2401(a)).

ful for employers to hire any "unauthorized alien." 8 U.S.C. § 1324a(a)(1)(A).

Although § 1324a(h) includes three "miscellaneous" provisions, including (in subsection (h)(3)) the definition of "unauthorized alien," there is nothing marginal about that definitional provision. That is where Congress defined the essential term "unauthorized alien," and thus that is also precisely where one would expect Congress to specify whether the Secretary may authorize the employment of noncitizens not otherwise authorized to be employed by statute. Nor is it surprising that the provision "does not mention lawful presence or deferred action," for Congress chose to speak more broadly, instead granting general authority to the Secretary to act in this area. *Arizona Dream Act Coal.*, 757 F.3d at 1062 (§ 1324a(h)(3) vests Executive with "broad discretion to determine when noncitizens may work in the United States").

II. THE DECISION BELOW RAISES IMPORTANT ISSUES ABOUT THE PROPER ENFORCEMENT OF FEDERAL LAW THAT WARRANT THIS COURT'S REVIEW

The significance of this case to Congress's ability to ensure rational, effective, and efficient enforcement of federal law by executive agencies cannot be overstated. Other participants in this case have articulated, and presumably will again articulate, important interests impaired by the decision below. We focus on two.

A. The court of appeals' approach to statutory interpretation would curtail Congress's ability to delegate broad discretionary authority to the Executive and force Congress to specifically prescribe every priority and power with detailed enforcement instructions. In the immigration context, as in many other complicated regulatory contexts, Congress has rarely seen fit

to cabin the Executive's enforcement discretion or to instruct the Executive specifically on what classes of immigrants to prioritize or what means to adopt to implement those priorities. The vast majority of prioritization and implementation decisions are not addressed specifically by the INA. This is entirely appropriate, indeed essential; given the circumstances that characterize the field of immigration, as discussed above, Congress has recognized the Executive's substantial institutional advantages and recognizes that it is not well situated to micromanage Executive enforcement actions. Congress must have the ability to vest broad discretionary authority in the Executive, and the language used in the INA to accomplish that objective is as clear as such language could be. If the INA's language does not suffice, it is difficult to imagine what language Congress could use in the future to accomplish that objective.

B. The court of appeals' ruling, if allowed to stand, will have adverse consequences for immigration enforcement far beyond DAPA. It would damage the INA significantly, throwing well established and important immigration practices into disarray and harming millions of individuals and families around the country.

The court's reasoning seems to leave little room for deferred action or work-authorization eligibility (whether provided on a case-by-case basis or categorically), except under the few circumstances expressly provided for by statute. But for decades now—long before the DAPA Memorandum—Administrations of both major political parties have extended deferred action (and other forms of forbearance), as well as eligibility for work authorization and other accommodations, to numerous individuals through the discretionary exer-

cise of the Executive's delegated authority, often on a class-wide basis. *E.g.*, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 38 Op. O.L.C. __, 14-18 (Nov. 19, 2014) (documenting "more than two dozen instances dating to 1956").

The erroneous decision below instantly casts a substantial cloud over the lives of these individuals, including the hundreds of thousands who have already received deferred action under DACA. The potentially devastating consequences for these individuals, their families, and their communities *alone* make this case appropriate for this Court's review.

The potential harm of the decision below is compounded by the court's rulings on standing and the nationwide scope of the injunction. Plaintiffs seeking to expand the scope of the decision below to encompass other situations in which deferred action or work authorization are used may well be able to sue in the Fifth Circuit and similarly secure nationwide injunctions. There is thus no prospect that any of the issues presented would benefit from percolation among the various courts of appeals. Given the decision's sweeping scope, States dissatisfied with other aspects of the Executive's implementation of the INA will have every incentive to file suit in the Fifth Circuit to overturn those administrative actions, and that court's decisions would then become the law of the land (absent this Court's review, of course). That prospect, which would seriously interfere with the rational administration of the immigration laws, emphasizes the need for this Court's prompt review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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DECEMBER 2015

APPENDIX

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Xavier Becerra
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Sanford D. Bishop, Jr.
Earl Blumenauer
Suzanne Bonamici
Madeleine Z. Bordallo
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Corrine Brown
Julia Brownley
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G.K. Butterfield
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Michael E. Capuano
Tony Cárdenas
John C. Carney, Jr.
André Carson
Matt Cartwright

Kathy Castor
Joaquin Castro
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Yvette D. Clarke
Wm. Lacy Clay
Emanual Cleaver
James E. Clyburn
Steve Cohen
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John Conyers, Jr.
Jim Costa
Joe Courtney
Joseph Crowley
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Susan A. Davis
Peter A. DeFazio
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Sam Farr
Chaka Fattah
Bill Foster
Lois Frankel
Marcia L. Fudge
Tulsi Gabbard
Ruben Gallego
John Garamendi
Alan Grayson
Al Green
Gene Green
Raúl M. Grijalva
Luis V. Gutiérrez
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