SUPREME COURT OF THE UNITED STATES

No. 15–674

UNITED STATES, ET AL., PETITIONERS *v.* TEXAS, ET AL.

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

[June 23, 2016]

JUSTICE SCALIA, concurring.

Four years ago, "in light of Congress's failure to pass the Administration's proposed revision of the Immigration Act," the "Secretary of Homeland Security announced a program exempting from immigration enforcement some 1.4 million illegal immigrants under the age of 30." *Arizona v. United States*, 567 U.S. ___, ___ (slip op., at 20) (2012) (Scalia, J., dissenting). Today, the Court considers the legality of a "similar" executive action, known as DAPA, that would exempt from immigration enforcement nearly four million illegal immigrants who are the parents of citizens or lawful permanent residents.

Texas, along with 25 other states, challenged the legality of DAPA under the Administrative Procedure Act ("APA") and the Take Care Clause of the Constitution. I agree with the Court that Texas has standing. The state has demonstrated that it would incur "concrete" costs by issuing driver's licenses to DAPA beneficiaries. I stress, in response to the dissent, that this holding is wholly separate and apart from whether Texas has so-called "special solicitude" under *Massachusetts v. EPA*. 549 U.S. 497, 416 (2007).

The Court, however, does not go far enough. It holds only that the policy is procedurally deficient because it was not submitted to the notice-and-comment rulemaking process. DAPA

represents a fundamental transformation of immigration policy. It cannot be cured by asking the public what they think about the executive branch ignoring the law. JUSTICE ALITO's concurring opinion correctly concludes that DAPA should be set aside because it is "not in accordance with law." DAPA undoubtedly implicates "question[s] of deep 'economic and political significance' that [are] central to this statutory scheme; had Congress wished to assign that decision to an agency, it surely would have done so expressly." *King v. Burwell*, 576 U.S. ___, ___ (slip op., at 8) (2015) (quoting *Utility Air Regulatory Group v. EPA*, 573 U. S. ___, ___ (slip op., at 19) (2014). The generic and anodyne grants of authority the government relies on cannot be read to "alter the fundamental details" of immigration law. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). The government's purported source of statutory authority could not hide the elephant that is DAPA.

I write separately to address the "stark" constitutional questions that arise when the "Federal Government . . . does not want to enforce the immigration laws as written." *Arizona*, *supra*, at 12 (Scalia, J., dissenting). Historically, the Take Care Clause of the Constitution has been cited to bolster the executive's power to act. Here the problem is not one of a "vigorous" and "energetic Executive," The Federalist No. 70, pp. 421–22 (C. Rossiter ed. 1961, rprtg. 2003) (A. Hamilton), however, but of a passive one. Through DAPA, the Secretary of Homeland Security has suspended a law Congress refuses to change, in violation of the President's duty of faithful execution.

I

On November 20, 2014—two weeks after the midterm election—President Barack Obama announced a new executive action on immigration. That evening, Homeland Security Secretary Jeh Johnson released two related memoranda. The first set out a system of enforcement prioritization, indicating that aliens without criminal histories were the lowest priority for removal. The prioritization memorandum was never contested in court.

The second memo established a new program known as DAPA. At first, the acronym stood for Deferred Actions for Parental Accountability, but later the government settled on Deferred Action

for Parents of Americans and Lawful Permanent Residents. Deferred action, as its name suggests, refers to the deferral of the removal of an alien who is otherwise subject to removal. DAPA was designed to be "similar" to the two-year old Deferred Action for Childhood Arrivals ("DACA") policy. President Obama's 2012 executive action deferred the deportations of, and granted work authorization to, approximately 1.5 million "Dreamers"—certain aliens who entered the country as minors and graduated from high school.

The DAPA memo first expanded operation of DACA, removing the prior age ceiling (30 years of age under the 2012 memo), extending the authorized period of a DACA grant from two to three years, and moving the date-of-entry requirement forward from June 2007 to January 2010. Second, DAPA would defer the deportations of roughly four million alien parents of certain minor children who are U.S. citizens or lawful permanent residents. The memo stressed that "[d]eferred action does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specific period of time, an individual is permitted to be lawfully present in the United States." Memorandum from Jeh Johnson, Sec'y of Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship and Immigration Servs., 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), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

On December 3, 2014, Texas—joined by 17 other states—challenged the legality of the DAPA memorandum.[1] (I will refer to the plaintiffs collectively as "Texas" or the "states"). Texas sought to enjoin the policy, arguing that it was (1) procedurally unreasonable, (2) substantively unreasonable, and (3) violated the President's duty to take care that the laws are faithfully

[1] Ultimately, 26 states would join this litigation: Texas, Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Maine, Michigan, Mississippi, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin.

executed. On February 16, 2015, four days before DAPA would go into effect, the District Court for the Southern District of Texas issued a nationwide injunction, halting DAPA. First, the court found that Texas had standing to sue because of the added cost of providing DAPA beneficiaries with driver's licenses. *Texas v. United States*, 86 F. Supp. 3d 591, 604 (S.D. Tex. 2015). Judge Hanen determined that DAPA must first be submitted to the Administrative Procedure Act's notice-and-comment process, but did not reach the question of whether the policy was contrary to law or violated the Take Care Clause. *Id.*, at 666–76.

On May 26, 2015, a divided panel of the U.S. Court of Appeals for the Fifth Circuit denied the government's request for a stay. *Texas v. United States*, 787 F.3d 733 (2015). The majority agreed with the district court that Texas had standing and was likely to prevail on its procedural APA claim. The court went on to hold that DAPA was also substantively unreasonable. Judge Higginson dissented, finding that the case was not justiciable, that Texas lacked standing, and that DAPA was both procedurally and substantively reasonable. The United States did not seek a stay from this Court.

On November 9, 2015, a divided Fifth Circuit affirmed the district court's nationwide injunction. The majority once again found that Texas had standing and that DAPA was procedurally and substantively unreasonable. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015). Judge King dissented, along the same lines as Judge Higginson. Certiorari was granted on January 19.

II

The Constitution imposes on the President a duty to "take care that the laws be faithfully executed." U.S. Const. Art. II, §3. In several cases, mostly involving the removal power, the President has "invoked the Take Care Clause in defense as an affirmative source of authority." Reply Brief for the Petitioners in *U.S. v. Texas*, O.T. 2015, No. 15-674, p. 30. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010); *Morrison v. Olson*, 487 U.S. 654, 657 (1988); *Youngstown Sheet*

& Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring); *Myers v. United States*, 272 U.S. 52, 164 (1926); *U.S. v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915). However, this case presents a different perspective of the Take Care Clause. Rather than arguing that the Executive has done too much, Texas argues that the Executive has done too little.

Admittedly, the precedents are scant on when the President has violated his duty of faithful execution. This Court has addressed this issue only once, in dicta, nearly 180 years ago. *Kendall v. U.S. ex rel. Stokes*. 37 U.S. (12 Pet.) 524 (1838). During the administration of President John Quincy Adams, the firm of Stockton & Stokes received important carrier contracts to assist the Postal Service. Upon taking office in 1829, President Andrew Jackson refused any service from the firm because it supported his adversary Adams. Postmaster General Amos Kendall determined that Stockton & Stokes had been overpaid in credits by the Adams administration and sought to correct it by eliminating the credits. Kendall wrote in his autobiography that when he raised the issue with the President, Old Hickory "remitted the matter to [his] discretion." Amos Kendall, Autobiography of Amos Kendall 350 (1872). Kendall removed the credits from the ledgers.

Congress did not approve of the nonpayment and passed a law requiring the solicitor of the Treasury Department to review the accounts, settle the differences, and order the postmaster general to apply the credits. *Kendall*, *supra*, at 605. Upon receiving the solicitor's judgment, Kendall paid out most of the credits, but withheld some that he believed to be outside the congressional edict. This act of defiance was purportedly done "by President Jackson's order." 2 Charles Warren, The Supreme Court in United States History: 1836–1918, at 44 (1926).

Stockton & Stokes continued to press their claims after Martin Van Buren became president in 1837, and "called on the President, under his constitutional power to take care that the laws were faithfully executed, to require the postmaster general to execute this law, by giving them the further credit" to which they claimed entitlement. 37 U.S. at 538. The D.C. Circuit issued a writ of mandamus compelling the postmaster general to apply

the credits in full. This Court agreed, and held that the postmaster general must comply with positive congressional edicts, lest the duty to take care become a "dispensing power." *Id.*, at 608. The Court's analysis is worth quoting at length:

> It was urged at the bar, that the postmaster general was alone subject to the direction and control of the President . . . and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, *to take care that the laws be faithfully executed*. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which . . . would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice. To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.

Id., at 612–13 (emphasis added).

This discussion is dicta, because by the time the case was appealed, President Van Buren no longer forbade the postmaster from executing the law. Yet, this Court has reiterated *Kendall*'s reasoning, calling its principles "fundamental and essential," and noting that without them, "the administration of the government would be impracticable." *U.S. ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284, 304 (1854); *Midwest Oil*, *supra*, at 505 ("The Constitution does not confer upon [the President] any power to enact laws or to suspend or repeal such as the Congress enacts").

None of these cases, however, provide a sound jurisprudential footing for what could be called the *negative* Take Care Clause. That the courts have not had to deal with this issue reflects the fact that historically, Presidents used all of the powers Congress gave them, and then some. Today, a troubling trend has emerged, where the President simply disregards laws that obstruct his agenda. This is an appropriate case to recover the original understanding of the Take Care Clause.

III

One of the gravest abuses of the British monarchs in the 17th and 18th centuries was their assertion of a "suspension" power. Most prominently, the Stuart regents, King Charles II and King James II, issued declarations suspending penal religious laws. At a time when the French monarch had likewise suspended enforcement of the Edict of Nantes—ending toleration of Protestants and leading to their mass emigration—Protestant Britons had great reason to fear the use of a "suspension" power in the hands of the abusive and Catholic Stuart monarchy. Peter Ackroyd, Rebellion, at 455–59 (2014). Thus, in the wake of the Glorious Revolution, Parliament promulgated the English Bill of Rights of 1689, which repudiated "the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament." The Bill of Rights, 1 W. & M., c. 2 (1689).

Despite that protection, the crown continued to exercise lawmaking power in the Americas. King George III insisted that no law enacted by colonial legislatures was valid without his assent. See Leonard Woods Labaree, Royal Government in America: A Study of the British Colonial System Before 1783, at 218-19, 266-67 (1934). Through his governors, he often withheld assent from laws passed by colonial legislatures unless the laws included a suspension clause allowing the crown to halt their execution. *Id.*, at 224-27, 256-68. That insistence allowed the king not only to dispense with the implementation of statutes, but also to force changes to their content—a quintessentially legislative power. Ultimately, King George's executive overreach served as the basis for the first two grievances listed in the Declaration of Independence:

> He has refused his Assent to Laws, the most wholesome and _b4 necessary for the public good;
>
> He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

The Continental Congress was not merely concerned with the King abusing his royal prerogatives, but it objected to his

efforts to act as a lawmaker. See The Federalist No. 47, p. 298 (C. Rossiter ed. 1961, rprtg. 2003) (J. Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."). This cornerstone of the separation of powers was a guiding principle for the new state governments. The Virginia Declaration of Rights, authored by George Mason in June 1776, declared that "all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights and ought not to be exercised." Va. Decl. of Rights §7 (1776). The post-revolutionary constitutions of New York, Pennsylvania, and Vermont likewise imposed a duty of faithful execution. These provisions established the executive did not possess lawmaking powers. N.Y. Const. of 1777, art. XIX; Vt. Const. of 1777, ch. 2, §XVIII; Pa. Const. of 1776, §20. By 1787, six states "had constitutional clauses restricting the power [of the executive] to suspend or dispense with laws to the legislature." Calabresi et al., State Bills of Rights in 1787 and 1791, 85 S. Cal. L. Rev. 1451, 1534 (2012) (citing constitutions of Delaware, Maryland, Massachusetts, North Carolina, New Hampshire, and Virginia).

This principle extended to the Constitutional Convention. Blackman, The Constitutionality of DAPA Part II: Faithfully Executing the Law, 19 Tex. Rev. L. & Pol. 215, 226–30 (2015). Pierce Butler of South Carolina proposed "that the National Executive have a power to suspend any legislative act." 1 Records of the Federal Convention of 1787, at 103 (Max Farrand, ed., 1911). Elbridge Gerry of Massachusetts retorted that "a power of suspending might do all the mischief dreaded from the negative [veto] of useful laws; without answering the salutary purpose of checking unjust or unwise ones." *Id.*, at 104. On the question of "giving this suspending power," the delegates unanimously voted no. *Ibid.* The Framers instead modeled the newly created presidency on several of the state constitutions. The president was denied any legislative powers of suspension—other than a time-constrained veto that could be overridden—and was required to exercise his executive powers faithfully.

What ultimately became the Take Care Clause went through several revisions that highlight the importance the Framers

placed on faithfulness. An early version of the provision appeared in the Virginia Plan. It vested the "National Executive" with the "general authority to execute the National laws." *Id.*, at 21. The Convention adopted a revised version of the clause: The executive was "with power to carry into execution the national laws." *Id.*, at 63. There were no qualifications for faithfulness. A proposal to give the president the power "to carry into execution the nationl. [*sic*] laws" was unanimously agreed to. 2 *id.*, at 32.

This provision was then sent to the Committee of Detail, which considered two different formulations. First, "He shall take Care to the best of his Ability." *Id.*, at 137 n.6, 171. Second, John Rutledge of South Carolina suggested an alternate: "It shall be his duty to provide for the due & faithful exec[ution] of the Laws." *Ibid.* The final reported version hewed closer to Rutledge's proposal: "He shall take care that the laws of the United States be duly and faithfully executed." *Id.*, at 185. The Committee of Detail rejected the obligation that would have been linked to the "best of" the President's "ability," and instead focused on "due" and "faithful" execution.

Finally, the Committee of Style and Arrangement, which included James Madison and Alexander Hamilton, received a draft requiring the president to see that the laws be "duly and faithfully executed." *Id.*, at 554, 574. The Committee eventually dropped the term "duly," so the final version read, "he shall take care that the laws be faithfully executed." *Id.*, at 589–603.[2] This account is confirmed by the Hamilton Plan, which, though "not formally before the Convention in any way," proved to be influential. 3 *id.*, at 617. Hamilton's plan eliminated "duly" and focused on "faithfully": "He shall take care that the laws be faithfully executed." *Id.*, at 624. A year later, the ten-dollar founding father

[2] Although there is no record as to why "duly" was dropped and the focus placed solely on "faithfully," it may have been an effort to avoid the ambiguity created by the use of "due" in "due process of law," a common term of art which was later added in the Fifth Amendment. See 2 E. Coke, Institutes *50. By eliminating "duly," the Framers directed attention to the President's faithfulness, rather than inviting dispute over what sorts of legal actions are "due," which is a question better suited for courts. Consistent with the Constitution's separation of powers, therefore, executive enforcement must be *faithful,* while judicial *process* of law must be *due.*

echoed that phrasing in Federalist No. 77, where he discussed the President "faithfully executing the laws." The Federalist No. 77, p. 462 (C. Rossiter ed. 1961, rprtg. 2003) (A. Hamilton).

IV

The text of the Take Care Clause, imposes a duty comprising four distinct but connected components. First, the President may not decline to execute the law, but "shall" execute it. Second, the president must act with "care" to discharge this duty: he may not act at whim, with favoritism, corruption, or arbitrariness. Third, the president must "execute" Congress's laws, not legislate. Fourth, the president must execute the laws in good faith. The plain text of the provision, consistent with its drafting history, stresses the significance the Framers placed on the president's faithful execution.

A

It bears emphasizing how strong the language of the Take Care Clause is. It is pitched at the highest register of constitutional obligation. The president *shall*—not may. He shall *take care*—not merely attempt. He shall take care that the laws be *executed*—not merely obeyed. And he shall take care that they are executed *faithfully*. No other constitutional provision mandates that any branch execute a power in a specific manner. Yet the Constitution mandates that the president execute the laws in a specific way: *faithfully*.

Most of the powers delegated by the Constitution are granted to the discretion of the officeholders. Congress, for example, has virtually *no* affirmative duties. "Congress shall have Power" to make certain laws, but need not do so. Likewise, Article II grants the President powers, but imposes few mandates. Even the duty to provide Congress with information on the state of the union is left to his discretion ("from time to time"). The Constitution imposes only two unambiguous duties: he *must* take the oath of office, U.S. Const. art. II, §1, and he "*shall* take Care that the Laws be faithfully executed." *Id.*, art. II, §3 (emphasis added).

These two provisions are closely parallel; the president's obligation and his authorization are commensurate. However "vast" his authority, *United States v. Curtiss-Wright Exp. Corp.*, 299

U.S. 304, 319 (1936), however much "force . . . speed," and "efficiency" he may muster, *Youngstown*, 343 U.S. at 629 (Douglas, J., concurring), however "broad" his "powers," *New York Times Co. v. United States*, 403 U.S. 713, 741 (1971) (Marshall, J., concurring), his obligation to execute the laws is equally vast, forceful, and broad.

Presidents have long understood the clause in just this way. In 1792, President Washington wrote to Alexander Hamilton concerning the enforcement of unpopular tax laws that it was his "duty to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to it." Letter to Alexander Hamilton (Sept. 7, 1792), in 10 Writings of George Washington 292 (1847). Abraham Lincoln invoked the clause as the basis of his obligation to put down the Confederate rebellion. Address to Congress, July 4, 1861, in 2 Abraham Lincoln: Speeches and Writings 252 (1989). Recently, the solicitor general acknowledged that invalidating certain recess appointments would violate a presidential "duty" imposed by the Take Care Clause. See Brief for the Petitioner in *NLRB v. Noel Canning*, O.T. 2013, No. 12-1281, p. 64 ("That result would directly undermine the President's duty to 'take Care that the Laws be faithfully executed' . . . .").

The *only* possible exception to this obligation is for cases in which the president finds a law to be unconstitutional. See, *e.g.*, Kavanaugh, Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution, 89 Notre Dame L. Rev. 1907, 1911 (2014); Prakash, The Executive's Duty to Disregard Unconstitutional Laws, 96 Geo. L.J. 1613 (2008); Presidential Authority to Decline to Execute Unconstitutional Statutes, Memorandum for the Honorable Abner J. Mikva, Counsel to the President (Nov. 2, 1994). The President's oath, which requires that he preserve, protect, and defend the Constitution—and the Constitution's specification that only laws made pursuant to it are the supreme law of the land—mandates that he refuse enforcement of unconstitutional laws. In all other cases, he must take care that the laws be executed faithfully.

B

The Constitution does more than oblige the president to act. It prescribes the manner in which he must discharge his duty: the

president shall "take care." At the Framing, "take care" was a term of art employed in "power-conferring documents" in which officials assigned tasks to agents. Natelson, The Original Meaning of the Constitution's "Executive Vesting Clause," 31 Whitt. L. Rev. 1, 14 & n.59 (2009).

Today, "care" has a similar meaning to what it bore two centuries ago. Dr. Johnson's 1755 dictionary provides five definitions of "care," including "concern," "caution," "regard," "attention," and "object of care." 1 Samuel Johnson, A Dictionary of the English Language 328 (1755). Noah Webster similarly defined "care" to include "[c]aution; a looking to; regard; attention, or heed, with a view to safety or protection, as in the phrase, take care of yourself." 1 Noah Webster, American Dictionary of the English Language (1828). Webster, like Johnson, explained that the verb "care" could be prefaced by "to," as in "[t]o *take care*, to be careful; to be solicitous for" and "[t]o *take care* of, to superintend or oversee; to have the charge of keeping or securing." *Ibid.* (emphasis added). Read against this background, the clause is best understood to impose a presidential standard of care to supervise his subordinates, ensuring that they enforce the law with "caution" or "regard for the law."

C

Chief Justice Marshall provided one of the first explanations of the scope of the president's executive duty under the Take Care Clause in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). During the 1799 quasi-war with France, Congress enacted a statute that permitted the seizure on the high seas of any U.S. vessel bound *for* France or its dependencies. President Adams, in transmitting a copy of the act to his military officers, reinterpreted the statute to permit the seizure of U.S. vessels bound both "*to or from* French ports." *Id.*, at 178 (emphasis added). On that basis, a U.S. naval vessel seized a Danish ship, the *Flying Fish*, as it traveled to Danish St. Thomas *from* French Jérémie (in present-day Haiti). This Court affirmed the Circuit Court's finding that the seizure was not authorized by Congress, notwithstanding President Adams's "guidance."

While President Adams's statutory revision may have been motivated by the fact that "[i]t was so obvious that if only vessels

sailing to a French port could be seized on the high seas, that the law would be very often evaded," Chief Justice Marshall recognized that Congress was clear as to how the law ought to be executed. *Id.*, at 178. The Adams appointee explained that a president's "high duty . . . is to 'take care that the laws be faithfully executed,'" and Congress has "prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port." *Id.*, at 177–78. President Adams lacked the power to rewrite the law, for that would be a legislative act that violated the Take Care Clause.

It is axiomatic that Congress enacts the laws, and the president faithfully executes them. As the history of the British monarchy demonstrates, when the president crosses the line into lawmaking, he is no longer merely executing the law—even where the legislature purports to vest the president with such lawmaking authority.[3] This construction of the Take Care Clause provides a strong textual basis for what has become known as the non-delegation doctrine. The Court will uphold a statutory delegation so long as it provides an "intelligible principle to which . . . the [agency] is directed to conform." *Whitman v. American Trucking Association*, 531 U.S. 457, 472 (2001) (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U. S. 394, 409 (1928)).

If Congress purported to vest the President with the unfettered discretion to enforce a law, or not, without any guidance, the executive would be engaging in a legislative act. He *could not* "execute" such a law, faithfully, or otherwise. He would be legislating. *Id.*, at 488 (Thomas, J., concurring) ("there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative'"). For this reason, the solicitor general is incorrect in stating that the Take Care Clause "has no independent content," Reply Brief for the Petitioners in *U.S. v. Texas*, O.T. 2015, No. 15-674, p. 11 (cert. stage), and merely

[3] The President's *sole* involvement in the formal legislative process involves the veto power. *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) ("If there is to be a new procedure in which the President will play a different role in determining the final text of what may 'become a law,' such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution.").

"collapses" into the statutory argument, Brief for the Petitioners in *U.S. v. Texas*, O.T. 2015, No. 15-674, p. 73 (merits stage).

D

After imposing the duty to execute and assigning the appropriate standard of care, the Constitution defines *how* the president's duty should be executed: "faithfully." The clause's evolution during the Constitutional Convention speaks to the centrality of faithfulness to the Framers. As detailed above, the initial draft from the Virginia Plan imposed no qualifications. The president was simply to "execute the National laws." 1 Records of the Federal Convention of 1787, *supra*, at 21. The Committee of Detail considered proposals that restricted the duty to either (1) "the best of his Ability" or (2) "the due & faithful exec[ution] of the Laws." 2 *id.*, at 171. It chose the latter. Finally, the Committee of Style chose "faithfully." *Id.*, at 574.

The term "faithfully" also appears in the Oath Clause. But there it is modified by "to the best of my ability," a phrase notably absent from the Take Care Clause. This decision emphasizes the strength of the Take Care Clause's mandate: the oath's requirement that the president "preserve, protect and defend the Constitution of the United States" is phrased in *less* mandatory language than the command to "take Care that the Laws be faithfully executed." This is a duty of the highest order.

V

DAPA is inconsistent with the text and history of the president's duty to take care that the laws be faithfully executed.[4] First, the circumstances that gave rise to DAPA show that it is

[4] The government's citation to *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1867), for the proposition that the president's actions are "not subject to judicial direction," is non-responsive to the question presented in this case. Brief for the Petitioners in *U.S. v. Texas*, O.T. 2015, No. 15-674, pp. 73–74. The *Johnson* Court, which approvingly cited *Kendall*, rightly noted that the courts could not issue orders directing the president's "exercise of judgment," 71 U.S. (4 Wall.) at 499. But the plaintiff states here do not seek such an order—or any injunction compelling the president to act in *any* way. They have sued the principal officers responsible for administering DAPA and have asked this Court to enjoin the policy. The executive branch's faithful execution is well within the Court's purview.

a blatant effort to undermine a law that the president tried and failed to repeal. Second, DAPA is not an execution of the law, but a legislative act. It is not consonant with congressional policy, nor has Congress acquiesced to this unprecedented executive action. Instead the executive branch has acted as a lawmaker, in violation of its duty under the Take Care Clause.

A

The executive would have this Court believe that on November 20, 2014—two weeks after the midterm election and four months after the House of Representatives rejected the president's preferred immigration reform bill—it suddenly unearthed the holy grail of prosecutorial discretion. Using this heretofore-unknown power, the government determined that it was not correctly prioritizing removals, and that it needed to shake things up with new policy guidance that exempted 40 percent of the illegal population from removal. This reasoning defies credulity.

Like the mythical phoenix, DAPA arose from the ashes of congressional defeat. On June 30, 2014, the Speaker of the House announced that he would not bring to a vote the comprehensive immigration bill that passed the Senate a year earlier. Steven Dennis, Immigration Bill Officially Dead, Roll Call (June 30, 2014), http://bit.ly/ZaKQvOy. Within hours of learning that the bill was dead, the president announced that he would act unilaterally and would "fix as much of our immigration system as I can on my own, without Congress." President Barack Obama, Remarks on Immigration (June 30, 2014). He explained that "I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing. . . . [I will] fix as much of our immigration system as I can on my own, without Congress." *Id.* Of course, Congress did not "do nothing"; its decision to reject the bill was an exercise of its constitutional authority.

A few days earlier—when it was already clear the bill was dead—the President cited congressional defeat as a reason why "[w]e can't afford to wait for Congress," and a justification for why he was "going ahead and moving ahead without them." Jeffrey Sparshott, Obama Blames Congress for Lack of Economic Progress, Wall St. J., (June 27, 2014), http://on.msj.com/ZaKRf68. He explained that "as long as they insist on [obstruction], I'll keep taking actions on

my own . . . . I'll do my job." President Barack Obama, Weekly Address: Focusing on the Economic Priorities for the Middle Class Nationwide (June 28, 2014). President Obama would later explain his "temptation to want to go ahead and get stuff done," because "there's a lot of gridlock." President Obama Takes over the Colbert Report (Dec. 9, 2014). In effect, the President argued that Congress's rejection of his agenda created *new* powers for him to rely on. Such a dangerous idea has never been sanctioned by this Court.

Press accounts suggest that the impetus for DAPA came from the top. The *New York Times* reported that the administration urged DHS to use its "legal authorities to the fullest extent." Michael D. Shear & Julia Preston, Obama Pushed 'Fullest Extent' of His Powers on Immigration Plan, N.Y. Times (Nov. 28, 2014), http://nyti.ms/1ytNwmw. Another account stated that the President told immigration advocacy groups that "I'm going to go as far as" his White House counsel "says I can." Charlie Savage, Power Wars 661 (2015).

But the President would move his own goalposts. When DHS presented the President with a preliminary policy, it was a disappointment because it "did not go far enough." *Ibid.* Scraping the bottom of the presidential barrel for more power, the President urged them to try again. And they did just that. Another press account reported that over the course of eight months, the White House reviewed "more than [sixty] iterations" of the executive action. Carrie Budoff Brown, Seung Min Kim & Anna Palmer, How Obama Got Here, Politico (Nov. 20, 2014), http://politi.co/ZaMXDfz. This is the veritable embodiment of what then-Professor Kagan referred to as "presidential administration," where we have "actual evidence of presidential involvement in a given administrative decision." Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245 (2001). And it is not a flattering portrait, as the President evinced a disregard for his own duty of faithful execution.

Beyond the compelling political narrative, this history resonates on a deeper constitutional plane. From 2012 to 2014, while Congress considered the legislation, the President consistently maintained that he lacked the power to defer deportations of the parents of U.S. citizens. He asserted that he had already

pushed the boundaries of his discretion to the limit with the 2012 DACA policy. His comments ranged from broad statements about executive power to a very specific description of what would become DAPA. Blackman, *supra*, at 267–80.

To quote one example, the president stated on March 5, 2014, that "until Congress passes a new law, then I am constrained in terms of what I am able to do." Univision News Transcript: Interview with President Barack Obama, available at goo.gl/Nr2JJa. Specifically, he conceded that the government could not halt the deportation of non-citizen parents with citizen-children. Citing congressional power to distribute funding, he reiterated, "I cannot ignore those laws any[]more than I could ignore, you know, any of the other laws that are on the books." *Ibid.* Yet this was precisely what DAPA accomplished.

The president's public statements, while not dispositive of his constitutional obligations, are relevant to the Take Care Clause calculus. Critically, these statements-against-interest are not "self-serving press statements." *Youngstown*, 343 U.S. at 647 (Jackson, J., concurring); cf. *Hamdan v. Rumsfeld*, 548 U.S. 557, 623 n.52 (2006) (refusing the invitation to "defer[] to comments made by [Executive] officials to the media"). These remarks signaled to Congress that if it rejected the immigration bill, the president would comply with existing law (and not defer the deportations of those who would benefit from the bill). But rather than vindicating that expectation, the president suddenly "discovered" authority to take pre-actions Congress had refused to approve. In the face of legislative defeat, the president decided to evade the congressional commitment based on his own policy differences. Cf. *Youngstown, supra*, at 583. At the very least, this episode rebuts the presumption that the president's defense of DAPA was in good faith.

B

DAPA would have granted "lawful presence" to four million illegal aliens who are not lawfully present in the United States. That radical change in the status quo amounts to a legislative act because it flouts congressional immigration policy, embodied in the Immigration and Nationality Act (INA). Congress has singled out the potential beneficiaries of DAPA—parents

of citizens and lawful permanent residents—and imposed formidable obstacles for them to achieve legal status. Blackman, The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action, 103 Geo. L.J. Online 96, 102–10 (2015). Congress inserted these provisions into the INA specifically to allow the government to remove unlawful entrants with post-entry U.S.-citizen children. See *Faustino v. INS*, 302 F. Supp. 212, 215–16 (S.D.N.Y. 1969). Congress has provided only limited avenues for visa availability and relief—and, for the most part, the classes of alien contemplated by DAPA fall outside the bounds of those pathways. DAPA was designed to effectively nullify the statutory provisions the Executive disagrees with, thereby rewriting the law in a way that better comports with this administration's policy preferences.

Contrary to the government's assertion, Congress has not acquiesced to such an unprecedented usage of deferred action. The government has identified four prior exercises of deferred action for certain classes of aliens that Congress had supported: deferred action for (1) self-petitioners under the Violence Against Women Act, (2) T and U visa applicants, (3) foreign students affected by Hurricane Katrina, and (4) widows and widowers of U.S. citizens. Blackman, The Constitutionality of DAPA Part I, *supra* at 112–21. But those past practices do not support DAPA's legality.

The scope of Congress's acquiescence in past deferred action programs is far more constrained than the government suggests. Each instance was sanctioned by Congress—and in each case, one of two qualifications existed: (1) the alien had an *existing* lawful presence in the U.S., or (2) the alien had the *immediate prospect* of lawful residence or presence in the U.S. In either case, deferred action served as a temporary bridge from one status to another, with benefits construed as arising after deferred action. These conditions brought the deferred action within the scope of congressional policy.

Neither limiting principle exists for DAPA. While deferred action historically served as a temporary *bridge* from one status to another—and benefits arose within a reasonable period afterwards—DAPA acts as a *tunnel* to dig under and

through the INA. Unlike previous uses of deferred action, DAPA beneficiaries have no prospect of a formal adjustment of status unless they become eligible for some other statutory grant of relief.

For a fifth precedent, the government has placed increasing weight throughout this litigation on the 1990 Family Fairness Program.[5] However, the OLC Opinion released contemporaneously with the announcement of DAPA demonstrated—perhaps unwittingly—that Family Fairness fits within the "bridge" construct. That opinion noted that Family Fairness "authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens *who had been granted legal status under the Immigration Reform and Control Act of 1986 [IRCA].*" See 38 Opinion of Office of Legal Counsel (Op. OLC) ___, at 14 (2012) (emphasis added), available at https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf.

Precisely! The temporary relief afforded by Family Fairness was "ancillary to *Congress's* grant of legal status to millions of undocumented persons in IRCA." Margulies, The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law, 64 Am. U. L. Rev. 1183, 1217 (2015) (emphasis added). But there is no ancillary statutory relief awaiting beneficiaries of DAPA after the three-year grant of deferred action.

[5] Repeating the 1.5 million figure, the solicitor general notes that the "INS could only estimate how many people were potentially eligible and how many would actually come forward." Brief for the Petitioners in *U.S. v. Texas*, O.T. 2015, No. 15-674, p. 56. The actual estimate was closer to 100,000. See Glenn Kessler, Obama's Claim That George H.W. Bush Gave Relief to '40 Percent' of Undocumented Immigrants, Wash. Post (Nov. 24, 2014), http://wapo.st/ZaMjSGh. The origin of the 1.5-million estimate seems to be an error in congressional testimony. INS Commissioner Gene McNary himself told the *Post*, "I was surprised it was 1.5 million when I read that. I would take issue with that. I don't think that's factual." *Ibid.* Ultimately, INS had received only 46,821 applications by October 1, 1990. *Ibid*. The next month, President Bush signed the Immigration Act of 1990, ending the temporary Family Fairness program.

Further, unlike the Family Fairness plan, which could be viewed as consistent with congressional policy in 1990,[6] DAPA has been expressly repudiated. After the president announced the program, the House of Representatives resolved that the executive action was "without any constitutional or statutory basis." Preventing Executive Overreach on Immigration Act of 2014, H.R. 5759, 113rd Cong. (2016). It is true enough that a one-house vote is not sufficient for purposes of bicameralism and presentment, but the Court has employed a far more functional approach to ascertaining congressional disapprobation. See *Youngstown*, 343 U.S. at 583 (noting that "Congress has taken no action" after President Truman's communications); *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981) ("We are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority" after the suspension of the claims); *Noel Canning*, 573 U.S. ___, ___ (slip op., at 14) ("[N]either the Senate considered as a body nor its committees, despite opportunities to express opposition to the practice of intra-session recess appointments, has done so").

In light of this clear disjunction between the executive and legislative branches, without any clear statutory authority, DAPA operates in what Justice Jackson referred to as the president's "lowest ebb" of authority, which "must be scrutinized with caution" by the courts. *Youngstown*, *supra*, at 637–38 (Jackson, J., concurring). Such scrutiny reveals that while deferred action has been authorized by Congress in the abstract, here the president has employed the practice to bypass Congress. DAPA is not a humdrum exercise of prosecutorial discretion, based on modest new guidance so DHS can prioritize resources. Instead, it is an executive effort to bypass Congress, and to enact a policy the legislature rejected.

[6] Regardless of what Congress may have acquiesced to in 1990, in 1996 Congress repudiated that prior position through subsequent legislation, which had the effect of eliminating the practice known as "extended voluntary departure" for unlawfully present aliens that the government had not yet removed. 8 U.S.C. §1229c(a)(2)(A). See Brief for the Respondents in *U.S. v. Texas*, O.T. 2015, No. 15-674, pp. 49–51 (merits stage).

We should not lose sight of the threat posed by this aggrandizement of power. Justice Frankfurter's warning in *Youngstown* is evergreen: "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Id.*, at 594. Returning this "major question" to the legislature—which should have resolved the issue in the first instance—plays an essential role in avoiding this accretion or even avulsion of power. The penultimate paragraph of this Court's decision in *King v. Burwell* speaks to this rationale. "In a democracy, the power to make the law rests with those chosen by the people." 576 U.S. ____, ____ (slip op., at 21) (2015). In other words, with Congress.

On matters of great social consequence, the Court's deference is to the legislature, whatever the merits of its decision, not to the executive branch. Under our system of government, there is only one way to decide major questions, as difficult as it may be. In the absence of consensus, the status quo remains. *INS v. Chadha*, 462 U.S. 919, 959 (1983) ("The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked."); *Noel Canning*, *supra*, at 11–12 (Scalia, J., concurring) (quoting *Free Enterprise Fund*, 561 U.S. at 499) ("'Convenience and efficiency,' we have repeatedly recognized, 'are not the primary objectives' of our constitutional framework.").

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During the height of the Korean War, this Court rejected the president's efforts to bypass Congress and engage in executive lawmaking. Not even asserting national-security interests could save the steel seizures. The Constitution provides that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown*, 343

U.S. at 587. Justice Jackson closed his iconic opinion with timeless wisdom for the courts:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. *But it is the duty of the Court to be last, not first, to give them up.*

Id., at 655 (Jackson, J., concurring) (emphasis added).

This Court must be the "last, not first" to give up. The Chief Justice is correct to halt DAPA, but his rationale does not go far enough. This policy should be declared unconstitutional before the next president can rely on it as a precedent for constitutional evasions "presently unimagined, [which] will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers." Noel Canning, *supra,* at 49 (Scalia, J., concurring). I concur.

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