NO. 15-40238

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF TEXAS, et al.,
Plaintiffs-Appellees,
v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS AT BROWNSVILLE

No. 1:14-cv-00254
The Honorable Andrew S. Hanen
United States District Court Judge

AMICI CURIAE BRIEF OF MEMBERS OF CONGRESS, THE AMERICAN CENTER FOR LAW & JUSTICE, AND THE COMMITTEE TO DEFEND THE SEPARATION OF POWERS IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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- *Jeh Charles Johnson, Secretary of Homeland Security*
- *R. Gil Kerlinkowske, Commissioner of U.S. Customs and Border Protection*
- *Ronald D. Vitiello, Deputy Chief of U.S. Border Patrol, U.S. Customs and Border of Protection*
- *Sarah R. Saldana, Director of U.S. Immigration and Customs Enforcement*
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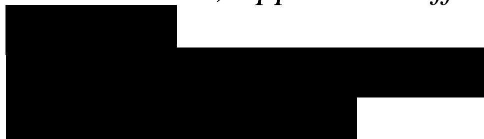

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- *State of Alabama*
- *State of Georgia*
- *State of Idaho*
- *State of Kansas*
- *State of Louisiana*
- *State of Montana*
- *State of Nebraska*
- *State of South Carolina*
- *State of South Dakota*
- *State of Utah*
- *State of West Virginia*
- *State of Wisconsin*
- *State of North Dakota*
- *State of Ohio*
- *State of Oklahoma*
- *State of Florida*
- *State of Arizona*
- *State of Arkansas*
- *State of Tennessee*
- *State of Nevada*
- *PAUL R. LEPAGE, Governor, State of Maine*
- *PATRICK L. MCCRORY, Governor, State of North Carolina*
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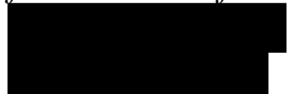

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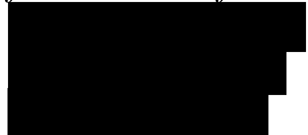

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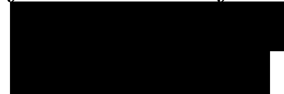

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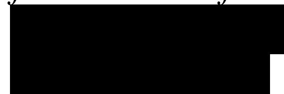

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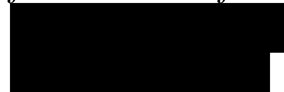

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American Center for Law and Justice[1]
The ACLJ's Committee to Defend the Separation of Powers[2]
Senator Ted Cruz
Senator John Cornyn
Representative Bob Goodlatte
Representative Lamar Smith

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[1] *The American Center for Law and Justice has no parent corporation, and no publicly held company owns 10% or more of its stock.*
[2] *The ACLJ's Committee to Defend the Separation of Powers is made up of individual Americans who stand in favor of this action and has no parent corporation, and no publicly held company owns 10% or more of its stock.*

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INTEREST OF *AMICI*[3]

Amici, United States Senators Ted Cruz and John Cornyn, and Representatives Bob Goodlatte and Lamar Smith, are currently serving in the 114th Congress. This brief is also filed on behalf of the American Center for Law & Justice (ACLJ) and its Committee to Defend the Separation of Powers, which consists of 183,128 Americans. *Amici* previously participated in the district court, *see* ACLJ Amici Curiae Brief, and are committed to the constitutional principle of separation of powers, which Appellants' unconstitutional and unprecedented directive on immigration violates.

SUMMARY OF ARGUMENT

This Court should maintain the status quo preserved by the preliminary injunction until a final decision is reached on the merits. Appellants will suffer no harm in the absence of a stay, while issuing the stay will substantially harm Appellees and runs counter to public interests. Furthermore, Appellants have not demonstrated a likelihood of success on the merits. A stay would also endanger fundamental constitutional principles at stake in this case. Therefore, to protect the rule of law and the separation of powers, as well as the status quo, this Court should deny Appellants' emergency motion for a stay pending appeal.

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[3] No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its respective counsel made a monetary contribution to the preparation or submission of this brief. Amici file under the authority of Fed. R. App. P. 29(a).

ARGUMENT

Appellants fail to establish the threshold burdens to justify a stay. "A stay is not a matter of right, *even if* irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (emphasis added) (citation omitted). "It is instead 'an exercise of judicial discretion,' and '[t]he propriety of its issue is dependent upon the circumstances of the particular case.'" *Id.* (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672-73 (1926)). Because "[a] stay is an intrusion into the ordinary processes of administration and judicial review," *id.* at 427 (quotation marks omitted), "[t]he party requesting a stay bears the burden of showing that the circumstances justify [it]," *id.* at 433-34.

This Court considers four factors in evaluating a request for a stay: (1) whether the movant will suffer irreparable harm absent a stay; (2) whether a stay will substantially harm the other parties; (3) whether a stay serves the public interest; and (4) whether the movant has made a showing of likelihood of success on the merits. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013). Importantly, this Court has affirmed that "[l]ikelihood of success remains a prerequisite in the usual case," *Ruiz v. Estelle*, 666 F.2d 854, 857 (5th Cir. 1982), and held that "[o]nly 'if the balance of equities (i.e. consideration of the other three factors) is . . . *heavily tilted* in the movant's favor' will we issue a stay in its absence, and, even then, the issue must be one

with patent substantial merit," *id.* (emphasis added) (quotation marks omitted).

I. Appellants Will Suffer No Harm Absent a Stay.

Appellants argue that the Government will suffer irreparable harm absent a stay. *See* Appellants' Motion at 1, 17-18. But the district court already concluded that the Government is free to "continue to prosecute or not prosecute . . . illegally-present individuals, as current laws dictate." Order at 119. Thus, contrary to Appellants' contention, *see* Appellants' Motion at 17, the injunction in no way "interfere[es] with immigration enforcement." Appellants remain free to maintain border security, as well as to enforce every immigration law passed by Congress and signed by the President, and all immigration regulations, except the DHS Directive that created the DAPA and modified DACA programs ("DHS Directive"). That the injunction may pose an inconvenience for Appellants, *see id.* at 17 (arguing that "[d]eferred action helps immigration officials distinguish criminals and other high-priority aliens from aliens who are not priorities for removal"), or require them to halt "preparatory work necessary for implementation" of the DHS Directive, *id.* at 18, does not mean it results in *irreparable* harm.

II. A Stay Will Substantially Harm Appellees and Runs Counter to the Public Interest.

A stay of the preliminary injunction would substantially harm Appellees and the very people Appellants claim to want to help. In granting the preliminary

injunction, the district court aptly held, the "equities strongly favor an injunction to *preserve the status quo*."[4] Order at 121. It concluded that "there will be no effective way of putting the toothpaste back in the tube" if the DHS Directive was not enjoined until a final decision is reached on the merits. *Id.* at 116. As the district court recognized, "it is clear that the DHS Directive will . . . affect state programs" and, therefore, implementation of the DHS Directive will substantially harm Appellees. *Id.* at 24. Appellees have only two options when confronting the DHS Directive: "full compliance with a [legally] challenged action or a drastic restructure of a state program" that could be forcibly rolled back in the future once this litigation is resolved. *Id.* at 27.

The district court also recognized that preserving the status quo was the *only* way to protect the interests of over four million individuals whose lives will be negatively impacted should the Government proceed with granting substantive benefits under the programs only to later strip those benefits should the court ultimately hold the programs are unlawful or unconstitutional. *Id.* at 121. If Appellants were allowed to begin implementing the DHS Directive, which could be invalidated by subsequent court decisions on the merits, substantial harm would

[4] Indeed, the fact that the injunction was issued prior to implementation of the DHS Directive, thus maintaining the status quo between the parties, makes a stay wholly inappropriate, as the purpose of a stay pending appeal is "to maintain the status quo pending a final determination on the merits of the suit." *Ruiz*, 650 F.2d at 565. In other words, because the injunction here *maintains* the status quo, a stay of that injunction would necessarily serve to *alter* the status quo.

come to Appellees and the immigrant communities Appellants allege these programs help.

III. The Constitutional Infirmities of the DHS Directive Demonstrate that Appellants Are Not Likely to Succeed on the Merits.

As discussed *supra* in Parts I and II, not only is the balance of equities not "heavily tilted" in favor of Appellants, it is *clearly tilted* in favor of Appellees, thus requiring the usual showing of a likelihood of success on the merits—a showing Appellants have failed to make. Appellants wholly fail to address the constitutional arguments against the DHS Directive. *See* Appellants' Motion at 14-16. While the district court reserved ruling on these arguments, *see* Order at 122, they remain before the court and serve as clear impediments to Appellants' success in this case.

The DHS Directive creates a new class—the roughly 4 million parents of U.S. citizens (and lawful permanent residents) who are unlawfully in the United States—and grants members of the class deferred removal (among other benefits) if they meet the basic eligibility requirements. Am. Compl. at 20-21. Appellants' creation of a categorical, class-based program is neither moored in constitutional authority nor in authority delegated by a lawful statute passed by Congress.

A. The DHS Directive Fails the Constitutional Test in *Youngstown*.

By contradicting Congress's express and implied intent, the DHS Directive violates the test articulated in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). When the President acts within an area generally considered to be

under the constitutional authority of Congress, as he has done here, courts have applied Justice Jackson's three-tier framework articulated in *Youngstown Sheet & Tube Co. v. Sawyer*. 343 U.S. 579. According to *Youngstown*, when the President acts pursuant to an authorization from Congress, his power is "at its maximum." *Id.* at 635-36. When Congress is silent on the matter, "there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637. Yet, when the President acts in conflict with Congress's expressed or implied intent, his power is at its "lowest ebb, for then he can rely only upon his own constitutional power minus any constitutional powers of Congress over the matter." *Id.*

Tier one of the framework, which entails consent by Congress, is inapplicable to the present analysis by the President's own admission. He claims that he had to act because Congress failed to act. Am. Compl. at 19. Nor is the DHS Directive saved by the "zone of twilight." Critically, Congress's refusal to enact the President's preferred policy is not "silence"; it represents the constitutional system working as intended. Congress has enacted extensive immigration laws—they are simply not enacted in the manner the President prefers. Differing policy preferences do not provide license to, as President Obama said, "change the law." *Id.* at 3, 19.

Congress has created a comprehensive immigration scheme under the

Immigration and Naturalization Act ("INA"), which expresses its desired policy as to classes of aliens—but the class identified by the DHS Directive for categorical relief is unsupported by the scheme or policy. The Supreme Court, in unambiguous terms, has recognized Congress's "sole[] responsibility" for determining "[t]he condition of entry of every alien, the particular classes of aliens that shall be denied entry, the basis for determining such classification, [and] the right to terminate hospitality to aliens." *Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (quotation marks omitted). In this same vein, Congress also has exclusive authority to determine through legislation when hospitality should be extended to a broad class of aliens. But Congress has elected not to create an avenue of hospitable relief, such as deferred action, for the class defined in the DHS Directive.

Turning to the third tier, the creation of a new avenue for parents of a U.S. citizen or permanent resident to remain lawfully in this country conflicts with Congress's expressed and implied intent. Congress has not authorized deferred action for the class the DHS Directive targets. To the contrary, the Congress enacted burdensome requirements to allow these parents entry and the ability to stay in the United States. *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1182(a)(9)(B)(i)(ii), 1201(a), 1255. Finding themselves in conflict with Congress's intent, under the third tier of *Youngstown*, Appellants are left to rely exclusively on the powers vested in the Executive under Article II of the Constitution. Yet, the Supreme

Court has consistently stressed Congress's plenary power over immigration law and policy, except in rare cases of foreign affairs, which is not implicated here.

The comprehensive nature of the INA and Congress's pre-determination of limited avenues for hospitable relief leave no room for Appellants' creation of a categorical avenue of relief to those designated by law as unlawfully present. To find otherwise would allow executive action to disrupt the delicate balance of separation of powers, obliterate the Constitution's Presentment Clause, U.S. Const. art. I, § 7, cl. 2, and ignore the exclusive authority of Congress to set laws and policy on immigration matters. Thus, rather than the injunction "imping[ing] on core Executive functions," Appellants' Motion at 17, it is the DHS Directive that directly impinges on core *congressional* functions.

B. The DHS Directive Exceeds Statutory Delegated Authority.

The DHS Directive defies Congress's exclusive authority over immigration with the intention, as President Obama has admitted, of setting a new policy and creating new law. Appellants have mistakenly relied on authority generally granted to the Secretary of Homeland Security in section 103(a)(3) of the INA. 8 U.S.C. § 1103(a)(3). Section 103(a)(3) specifically limits the delegated authority of the Secretary for those actions that are "necessary for carrying out [its] authority under the provisions of this chapter." *Id.* The chapter in no way gives Appellants the authority to create out of whole cloth an extensive, categorical deferred action

program that grants affirmative legal benefits. Nor would such a program be *necessary* to carry out the authority delegated to the Secretary.

Similarly, while The Homeland Security Act does make the Secretary of DHS responsible for "[e]stablishing national immigration enforcement policies and priorities," 6 U.S.C. § 202(5) (2012), there is a substantial difference between priorities for enforcement, which allow the agencies tasked with carrying out the law to focus their limited resources, and creating enforcement-free zones for entire categories of unlawful aliens.[5]

The removal of unlawful aliens carries enormous importance to the overall statutory scheme, but the DHS Directive does not just articulate priorities for removal, it grants legal benefits on a categorical basis to current illegal aliens. By granting illegal aliens lawful presence (for purposes of 8 U.S.C. § 1182(a)(9)(C)(i)(I)) during the deferred period, Appellants violate the express and implied intent of Congress. Appellants' Motion, Attach. 5, at 13. Congress expressly limited Appellants' ability to grant waivers of grounds of admissibility for any unlawful alien who has been present in the United States for over a year and has been previously removed. *See id.* § 1182(a)(9)(C)(iii). Thus Appellants' blanket grant of "lawful presence" to aliens who would otherwise be inadmissible

[5] Neither Appellants' expressed enforcement priorities nor their authority to set these priorities has been challenged in this suit, and the district court expressly preserved the Appellants' authority to set enforcement priorities enjoining only the DAPA and modified DACA programs. Order at 119.

for the prescribed time exceeds executive authority and contravenes Congress's intent. Appellants subverted the very law that they were charged with enforcing.

CONCLUSION

Appellants have failed to show that any of the factors for granting a stay weigh in their favor. The absence of a stay poses no harm to Appellants, while issuing the stay will harm Appellees and the immigrant communities who may apply for DAPA and modified DACA. Moreover, Appellants have failed to demonstrate a likelihood of success on the merits, utterly ignoring significant constitutional arguments raised below that preclude such success. Our constitutional system enshrines the fundamental principles of separation of powers and checks and balances in order to preserve fairness and freedom for all Americans and all communities that make up the diverse fabric of our nation. To ensure these principles are preserved, this Court should deny Appellants' Emergency Motion to Stay the Preliminary Injunction Pending Appeal.

Respectfully Submitted,

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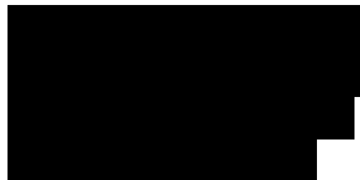

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CERTIFICATE OF SERVICE

In compliance with Fed. R. App. P. 25 and 5th Cir. I.O.P. 25, I hereby certify that on this 18th day of March, 2015, I electronically filed the foregoing Amici Brief with the Clerk of the Court by using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served via regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

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