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Symposium: Don't judge a brief by its cover: DACA is a good policy that Congress has not authorized

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We recently filed an amicus brief "in support of DACA as a matter of policy but [the government] as a matter of law." The caption caused quite a kerfuffle on social media. "Is that a thing?" they tweeted. Yes, it is a thing. And the court would be well served to receive more briefs that expressly acknowledge the distinction between law and policy. Most Supreme Court amicus briefs are predictable. Groups that favor outcome A argue that the law supports outcome A. Groups that favor outcome B argue that the law supports outcome B. Occasionally, groups file cross-ideological briefs in which people of opposite political stripes unite to support a specific cause. But even these briefs fall into the same pattern: Regardless of ostensible ideological labels, all the groups on the brief support the policy outcome that the brief's legal theory advances.

In *Department of Homeland Security v. Regents of the University of California,* the Cato Institute and Professor Jeremy Rabkin took a different approach. We affirmatively support as a matter of policy normalizing the immigration status of individuals who were brought to this country as children and have no criminal records. (See Cato's immigration work if you have any doubts.) Moreover, as a matter of first principle, people shouldn't need government permission to work. But the president cannot unilaterally make such a fundamental change to our immigration policy — not even when Congress refuses to act. Indeed, our deep concerns about the separation of powers and abuse of executive power motivated us to file this brief. Presidents with different priorities come and go. The principle that Congress cannot delegate its legislative power to the president, such that he alone can fix the law, remains.

Through the Deferred Action for Childhood Arrivals program, known as DACA, the Obama administration took the position that the Immigration and Nationality Act authorized the secretary of homeland security to confer lawful presence and work authorization on roughly 1.5 million aliens. The Trump administration reversed course. Attorney General Jeff Sessions concluded that this reading of federal law had "constitutional defects." He reached this decision in light of the United States Court of Appeals for the 5th Circuit's injunction of the similar Deferred Action for Parents of Americans and

Lawful Permanent Residents program, which the Supreme Court affirmed by an equally divided vote in 2015.

Several lower courts blocked President Donald Trump from winding down DACA, however, holding that the executive branch had failed to justify the rescission. These rulings are wrong because DACA is not authorized by the INA. But even if the court declines to reach that holding, the attorney general offered reasonable constitutional objections to the policy. If the Obama administration's reading of the INA was correct, and DACA was within the scope of federal immigration law, then provisions of the INA violate the nondelegation doctrine. The attorney general prudently decided to wind down DACA to avoid enforcing an immigration scheme with such "constitutional defects."

DACA, which lacks "express statutory authorization" as defined in *Reno v. American-Arab Anti-Discrimination Committee*, cannot be supported by any "implicit" congressional acquiescence. Two general provisions within the INA cannot bear the weight of this foundational transformation of immigration policy. Moreover, it should not matter if Congress has stood idly by while previous presidents exercised materially different deferred-action policies. The president cannot acquire new powers simply because Congress acquiesced to similar accretions in the past.

In any event, DACA is not consonant with past practice. Each previous, broad deferred-action policy was sanctioned by Congress, and one of two qualifications existed: (1) the alien already 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, as one of us (Josh) put it in the Georgetown Law Journal Online, "deferred action acted as a *temporary bridge* from one status to another, where benefits were construed as arising immediately post-deferred action." The 5th Circuit adopted this limiting principle in *Texas v. United States*: "[M]any of the previous programs were bridges from one legal status to another, whereas DAPA awards lawful presence to persons who have never had a legal status and may never receive one."

These arguments are sufficient to confirm the attorney general's conclusion that DACA is unlawful. The Administrative Procedure Act cannot be read to force the executive branch to continue implementing a policy that is contrary to law, regardless of how it chooses to rescind the policy. But even if the court disagrees — or declines to reach that issue — the executive branch has still provided adequate grounds to justify the rescission of DACA.

The attorney general reasonably determined that DACA is inconsistent with the president's duty of faithful execution. Admittedly, the attorney general's letter justifying the rescission is not a model of clarity. But it need not be. This executive-branch communication provides, at a minimum, a reasonable constitutional objection to justify DACA rescission. Specifically, it invokes the "major questions" doctrine – outlined by Justice Neil Gorsuch in dissent in *Gundy v. United States* – which is used "in service of the constitutional rule" that Congress cannot delegate legislative power to the executive branch.

In other words, if federal law in fact supported DACA, then important provisions of the INA would run afoul of the nondelegation doctrine. The attorney general, as well as the 5th Circuit, rejected this reading of the INA. Here, the Supreme Court should accept the executive's determination of how to avoid a nondelegation problem: by winding down a discretionary policy. Indeed, if there were any doubt, Trump explained in his own words what the "constitutional defects" in DACA were. He declared that DACA was a "[t]otally illegal document which would actually give the President new powers." In other words, DACA relied on a reading of the INA that would delegate legislative powers to the executive that he lacks. Stripped of all legal formalities, the presidential tweet concisely explains why DACA was inconsistent with the president's duty of faithful execution. Candidly, it is far more descriptive than the attorney general's letter. And it comes right from the commander in chief. (For once, the president

tweeted something that helps his case!) The record amply provides enough ground to justify the rescission of DACA.

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Returning to our theme of the difference between law and policy, we often offer similar advice to law students: Ask your professors to give examples of policies they like but think are not constitutional, or those they don't like but think are. That question poses a real test of intellectual integrity. If your policy preferences and legal theories always align, you should reconsider the latter. Some policies we dislike are, regrettably, lawful – as the late Justice Antonin Scalia would say, "stupid, but constitutional." And other policies we favor are, regrettably, unlawful. DACA falls into the latter category.

The president simply can't make the requisite legal changes by himself to give this relief to the Dreamers. As one of us (Ilya) put it in the Washington Post, such unlawful executive actions both set back prospects for long-term reform and, more importantly for a Supreme Court case, weaken the rule of law. The justices should reverse the lower courts and restore the immigration debate to the political process — exactly where it belongs.

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